COMMENTARY
SUBTITLE II. OFFENSES AGAINST PERSONS

RCC § 22E-1101. Murder.

Explanatory Note. *This section establishes the first degree and second degree murder offenses for the Revised Criminal Code (RCC).*

The revised first degree murder offense criminalizes purposely, with premeditation and deliberation, causing the death of another person. The RCC's murder statute replaces the current first degree and second degree murder statutes,[1] *the special form of first degree murder by obstruction of a railroad, D.C. Code § 22-2102, and the special form of first degree murder of a law enforcement officer, D.C. Code § 22-2106. The revised first degree murder statute also replaces penalty enhancements authorized under §§ 22-2104.01 and 24-403.01(b-2). An actor who knowingly causes the death of another under aggravating circumstances is subject to the enhanced penalty provision under subsection (c). In addition, insofar as they are applicable to current first degree murder offense, the revised first degree murder statute also partly replaces the protection of District public officials statute*[2] *and six penalty enhancements: the enhancement for committing an offense while armed;*[3] *the enhancement for senior citizens;*[4] *the enhancement for citizen patrols;*[5] *the enhancement for minors;*[6] *the enhancement for taxicab drivers;*[7] *and the enhancement for transit operators and Metrorail station managers.*[8]

The revised second degree murder offense specifically criminalizes two forms of murder: 1) recklessly, under circumstances manifesting extreme indifference to human life, causing the death of another person (commonly known as "depraved heart murder"), or 2) negligently causing the death of another person in the course of, and in furtherance of, certain[9] *serious crimes (commonly known as "felony murder"). The RCC's second degree murder statute replaces several types of murder criminalized under*

[1] Under current law, first degree murder criminalizes three types of murder: (1) purposely causing the death of another with premeditation and deliberation; (2) purposely causing the death of another while committing or attempting to commit any felony; or (3) causing the death of another, with or without purpose, while committing or attempting to commit first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, kidnaping, burglary while armed with or using a dangerous weapon, or any felony involving a controlled substance. Currently, second degree murder criminalizes three different versions of murder: (1) knowingly causing the death of another without premeditation and deliberation; (2) causing the death of another with intent to cause serious bodily injury; and (3) causing the death of another with extreme recklessness, also known as acting with a "depraved heart." The RCC first degree murder offense replaces: purposely causing the death of another with premeditation and deliberation form of murder.

[2] D.C. Code § 22-851.

[3] D.C. Code § 22-4502.

[4] D.C. Code § 22-3601.

[5] D.C. Code § 22-3602.

[6] D.C. Code § 22-3611.

[7] D.C. Code §§ 22-3751; 22-3752.

[8] D.C. Code §§ 22-3751.01; 22-3752.

[9] The specified felonies are: first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, kidnaping, burglary while armed with or using a dangerous weapon, or any felony involving a controlled substance

the current first degree and second degree murder statutes.[10] *In addition, the revised second degree murder statute replaces penalties authorized under §§ 22-2104.01 and 24-403.01(b-2). An actor who commits second degree murder under aggravating circumstances is subject to the enhanced penalty provision under subsection (c). In addition, insofar as they are applicable to the current second degree murder statute, the revised second degree murder statute also partly replaces the protection of District public officials statute*[11] *and six penalty enhancements: the enhancement for committing an offense while armed;*[12] *the enhancement for senior citizens;*[13] *the enhancement for citizen patrols;*[14] *the enhancement for minors;*[15] *the enhancement for taxicab drivers;*[16] *and the enhancement for transit operators and Metrorail station managers.*[17]

This re-organization of murder offenses clarifies and improves the consistency and penalty proportionality of the revised offenses.

Paragraph (a)(1) specifies that a person commits first degree murder if he or she purposely, with premeditation and deliberation, causes the death of another person. The paragraph specifies that a "purposely" culpable mental state applies, which requires that the actor consciously desired to cause the death of another person. The means of causation, whether by obstruction of a railway[18] or otherwise, are irrelevant. In addition, paragraph (a)(1) requires that the person acted with premeditation and deliberation, terminology that is incorporated in the revised offense and is defined by current D.C. Court of Appeals (DCCA) case law. Premeditation requires "giv[ing] thought before acting to the idea of taking a human life and [reaching] a definite decision to kill[.]"[19] Such premeditation "may be instantaneous, as quick as thought itself"[20] and only requires that the accused formed the intent prior to committing the act. Deliberation requires that

[10] Under current law, first degree murder criminalizes three types of murder: (1) causing the death of another with premeditation and deliberation; (2) purposely causing the death of another while committing or attempting to commit any felony; or (3) causing the death of another, with or without purpose, while committing or attempting to commit one of eight specified felonies. Currently, second degree murder criminalizes three different versions of murder: (1) knowingly causing the death of another without premeditation and deliberation; (2) causing the death of another with intent to cause serious bodily injury; and (3) causing the death of another with extreme recklessness, also known as acting with a "depraved heart." The RCC second degree murder statute replaces: (1) causing the death of another, with or without purpose, while committing or attempting to commit a specified felony; (2) causing the death of another with intent to cause serious bodily injury; and (3) causing the death of another with extreme recklessness, also known as acting with a "depraved heart."

[11] D.C. Code § 22-851.

[12] D.C. Code § 22-4502.

[13] D.C. Code § 22-3601.

[14] D.C. Code § 22-3602.

[15] D.C. Code § 22-3611.

[16] D.C. Code §§ 22-3751; 22-3752.

[17] D.C. Code §§ 22-3751.01; 22-3752.

[18] D.C. Code § 22-2102.

[19] *Thacker v. United States*, 599 A.2d 52, 56-57 (D.C. 1991)); *see, e.g., Watson v. United States*, 501 A.2d 791, 793 (D.C. 1985).

[20] *Bates v. United States*, 834 A.2d 85, 93 (D.C. 2003) (upholding jury instruction that defined premeditation as "the formation of a design to kill, [may be] instantaneous [ ] as quick as thought itself."; D.C. Crim. Jur. Instr. § 4-201.

the accused acted with "consideration and reflection upon the preconceived design to kill, turning it over in the mind, giving it a second thought."[21]

Paragraph (b)(1) specifies that a person commits second degree murder if he or she recklessly, with extreme indifference to human life, causes the death of another person. This paragraph requires a "reckless" culpable mental state, a term defined at RCC § 22E-206, which here means that the accused consciously disregards a substantial risk of causing death of another, and the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, recklessness alone is insufficient. The accused must also act "with extreme indifference to human life." This language is intended to codify current D.C. Court of Appeals (DCCA) case law defining what is commonly known as "depraved heart murder."[22] In contrast to the "substantial" risks required for ordinary recklessness, depraved heart murder requires that the accused consciously disregarded an "*extreme* risk of causing death or serious bodily injury."[23] For example, the DCCA has recognized there to be an extreme indifference to human life when a person caused the death of another by: driving at speeds in excess of 90 miles per hour, and turning onto a crowded onramp in an effort to escape police[24]; firing ten bullets towards an area where people were gathered[25]; and providing a weapon to another person, knowing that person would use it to injure a third person.[26] Although it is not possible to specifically define the degree and nature of risk that is "extreme," it need not be that it is more likely than not that death or serious bodily injury would occur.[27] The "extreme indifference" language in paragraph (b)(1) codifies DCCA case law that recognizes those types of unintentional homicides that warrant criminalization as second degree murder.

Although consciously disregarding an extreme risk of death or serious bodily injury is necessary for depraved heart murder liability, it is not necessarily sufficient. There may be some instances in which a person causes the death of another person by consciously disregarding an extreme risk of death or serious bodily injury that do not constitute extreme indifference to human life. Whether an actor engages in conduct with

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[21] *Porter*, 826 A.2d at 405.

[22] *See Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (en banc) (noting that examples of depraved heart murder include firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into . . . a moving automobile, necessarily occupied by human beings . . . .; playing a game of 'Russian roulette' with another person [.]"); *Jennings v. United States*, 993 A.2d 1077, 1078 (D.C. 2010) (depraved heart murder when defendant fired a gun at across a street towards a group of people, hitting and killing one of them); *Powell v. United States*, 485 A.2d 596 (D.C. 1984) (defendant guilty of depraved heart murder when he led police on a high speed chase, drove at speeds of up to 90 miles per hour, turned onto a congested ramp and caused a fatal car crash).

[23] *Comber*, 584 A.2d at 39 (emphasis added).

[24] *Powell v. United States*, 485 A.2d 596, 598 (D.C. 1984).

[25] *Jennings v. United States*, 993 A.2d 1077, 1081 (D.C. 2010).

[26] *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (note that the defendant was guilty of second degree murder on an accomplice theory).

[27] For example, if an actor kills another person by playing Russian roulette, this may constitute an extreme risk of death or serious bodily injury, even though there was a 1 in 6 chance of causing death or serious bodily injury.

extreme indifference to human life depends not only on the degree and nature of the risk consciously disregarded, but also on other factors that relate to the actor's culpability.

Specifically, the same factors that determine whether an actor's conscious disregard of a substantial risk is "clearly blameworthy" as required for ordinary recklessness[28] also bear on the determination of whether an actor's conscious disregard of an extreme risk of death or serious bodily injury manifests extreme indifference to human life. These factors are: (1) the extent to which the actor's disregard of the risk was intended to further any legitimate social objectives[29]; and (2) any individual or situational factors beyond the actor's control[30] that precluded his or her ability to exercise a reasonable level of concern for legally protected interests. In cases where these factors negate a finding that the actor exhibited extreme indifference to human life, a fact finder may nonetheless find that the actor behaved recklessly, provided that the actor's conduct was clearly blameworthy.

Under the hierarchical relationship of culpable mental states defined in RCC § 22E-206, a person who purposely or knowingly causes the death of another satisfies the culpable mental state required in paragraph (b)(1).[31]

Paragraph (b)(2) specifies that a person commits second degree murder if he or she negligently causes the death of another person, other than an accomplice,[32] while committing or attempting to commit one of the enumerated felonies. The statute specifies that a culpable mental state of "negligently" applies, a term defined at RCC § 22E-206 that here means that the actor should have been aware of a substantial risk that death would result from his or her conduct, and the risk is of such a nature and degree, that, considering the purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive the risk is clearly blameworthy.[33] The negligently culpable mental state does not, however, apply to the enumerated felonies in paragraph (b)(2), which must have their own culpable mental state requirements which must be proven. Also, it is not sufficient that a death happened to occur during the commission or attempted commission of the felony. The "mere coincidence in time" between the underlying felony and death is insufficient for felony murder liability.[34] There also must

[28] See Commentary to RCC § 22E-206.

[29] For example, consider a person who causes a fatal car crash by driving at extremely high speeds as he rushes his child, who has suffered a painful compound fracture, to a hospital. The actor's intent to seek medical care and to alleviate his child's pain may weigh against finding that he acted with extreme indifference to human life.

[30] For example, consider a person who is habitually abused by her husband, who drives at extremely high speeds under threat of further abuse (insufficient to afford a duress defense) from her husband if she slows down. If that person then causes a fatal car crash, her emotional state and external coercion from her husband may weigh against finding that she acted with extreme indifference to human life.

[31] RCC § 22E-206 specifies that "When the law requires recklessness as to a result element or circumstance element, the requirement is also satisfied by proof of intent, knowledge, or purpose." Moreover, absent any applicable defense, any time a person purposely or knowingly causes the death of another, that person manifests extreme indifference to human life.

[32] For example, if in the course of an armed robbery, the accused accidentally fires his gun, striking and killing his accomplice who was acting as a lookout, there would be no felony murder liability.

[33] RCC 22E-206(e).

[34] *Head v. United States*, 451 A.2d 615, 625 (D.C. 1982).

be "some causal connection between the homicide and the underlying felony."[35] The death must have been caused by an act "in furtherance" of the underlying felony.[36] The revised statute codifies this case law by requiring that the death be "in the course of and in furtherance of committing, or attempting to commit" an enumerated offense.[37] In addition, the lethal act must have been committed by the accused.[38] A person may not be convicted under paragraph (b)(2) for lethal acts committed by another person.[39]

Subsection (c) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[40] However, as discussed above, extreme indifference to human life in paragraph (b)(1) of the RCC murder statute requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been

[35] *Johnson v. United States*, 671 A.2d 428 (D.C. 1995).

[36] It is not required that the death itself facilitated commission or attempted commission of the predicate felony. Rather the lethal act must have facilitated commission or attempted commission of the predicate felony. For example, if during a robbery a defendant fires a gun in order to frighten the robbery victim, and accidentally hits and kills a bystander, felony murder liability is appropriate so long as the *act of firing the gun* facilitated the robbery.

[37] Causing death of another is in furtherance of the predicate felony if it facilitated commission or attempted commission of the felony, or avoiding apprehension or detection of the felony. *E.g.*, *Lovette v. State*, 636 So. 2d 1304, 1307 (Fla. 1994) ("These killings lessened the immediate detection of the robbery and apprehension of the perpetrators and, thus, furthered that robbery.").

[38] For example, if during a robbery, police arrive at the scene and in an ensuing shootout the police fatally shoot a bystander, there would be no felony murder liability. However, this rule does not limit liability under any other form of homicide. If the person committing the robbery cause the death of the bystander in a manner that constituted recklessness with extreme indifference to human life, he may still be convicted of murder under a depraved heart theory, as specified in paragraph (b)(1).

[39] The requirement that the actor commit the lethal act should not be construed to include causing another person to commit the lethal act. The D.C. Court of Appeals (DCCA) has held that when a person has intent to kill and engages in a gun battle which causes a third party to fire a fatal shot, the person may be found guilty of second degree murder even though he did not fire the fatal shot. *Fleming v. United States*, 2020 WL 488651, (D.C. 2020) (*en banc*). The DCCA held "that a defendant can be viewed as having personally caused death if (1) the defendant, acting with an intent to kill, shoots at another person or takes other actions such as bringing an armed group in search of another person or brandishing a gun at another person, (2) the defendant's acts foreseeably cause the intended target or another person to fire shots in response; and (3) the latter shots fatally wound a victim." *Id.* at 7. Although *Fleming* involved an intent-to-kill form of second degree murder, its holding may be interpreted more broadly to define requirements of proximate causation. If a robber shoots and kills a person during the course of a robbery, and a getaway driver's conduct was a but-for cause of the shooting, and the shooting was reasonably foreseeable, under *Fleming*, the getaway driver arguably "caused" the death. However, the "lethal act" requirement under the revised second degree murder statute would bar the getaway driver from being convicted of felony murder.

[40] Imputation of recklessness under RCC § 22E-209 also requires that the person was negligent as to the result or circumstance.

sober. The terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.[41]

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and weighs against finding that the person acted with extreme indifference to human life.[42] In these cases, although the awareness of risk may be imputed, the person could still be acquitted of second degree murder. However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for involuntary manslaughter[43], provided that his or her conduct was clearly blameworthy.

Subsection (d) establishes the penalties for first and second degree murder. Paragraph (d)(1) specifies that first degree murder is a [Class X offense…RESERVED]. Paragraph (d)(2) specifies that second degree murder is a [Class X offense . . . RESERVED.]

Paragraph (d)(3) provides enhanced penalties for both first and second degree murder. If the government proves the presence of at least one aggravating factor listed under paragraph (d)(3), the penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class. These penalty enhancements may be applied in addition to any penalty enhancements authorized by RCC Chapter 8.

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[41] For further discussion of these terms, see Commentary to RCC § 22E-209.

[42] This is perhaps clearest where a person's self-induced intoxication is pathological—i.e., "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." Model Penal Code § 2.08(5)(c). The following hypothetical is illustrative. X consumes a single alcoholic beverage at an office holiday party, and immediately thereafter departs to the metro. While waiting for the train, X begins to experience an extremely high level of intoxication—unbeknownst to X, the drink has interacted with an allergy medication she is taking, thereby producing a level of intoxication ten times greater than what X normally experiences from that amount of alcohol. As a result, X has a difficult time standing straight, and ends up stumbling into another train-goer, V, who falls onto the tracks just as the train is approaching. If X is subsequently charged with depraved heart murder on these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances— may weigh against finding that she manifested extreme indifference to human life. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for depraved heart murder under the RCC if X's conduct manifested an extreme indifference to human life.

It is also possible, under narrow circumstances, for a person's self-induced intoxication to negate his or her blameworthiness even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death. If X is charged with depraved heart murder, under current law evidence of her voluntary intoxication could *not* be presented to negate the culpable mental state required for second degree murder. *Wheeler v. United States, 832 A.2d 1271, 1273 (D.C. 2003) (quoting Bishop v. United States, 71 App. D.C. 132, 107 F.2d 297 (D.C. Cir. 1939)).* In the RCC, however, evidence of the actor's voluntary intoxication could be present in the case and considered by the jury to presume awareness of the risk but also to negate finding that she acted with extreme indifference to human life.

[43] RCC § 22E-1102.

Subparagraph (d)(3)(A) specifies that recklessness as to whether the decedent is a protected person is an aggravating circumstance. Recklessness is defined at RCC § 22E-206, and requires that the actor was aware of a substantial risk that the deceased was a protected person, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. The term "protected person" is defined in RCC § 22E-701.[44]

Subparagraph (d)(3)(B) specifies that causing the death of another "with the purpose" of harming the decedent because of his or her status as a law enforcement officer, public safety employee, or district official is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[45] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[46] "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" 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. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Subparagraph (d)(3)(C) specifies that murder committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose" a term defined at RCC § 22E-206, which means that the actor must consciously desire to avoid or prevent a lawful arrest, or to escape from custody.

Subparagraph (d)(3)(D) specifies that murder committed for hire is an aggravating circumstance. This aggravating circumstance is satisfied if the actor received anything of pecuniary value from another person in exchange for causing the death. This subsection also specifies that the culpable mental state required for this aggravating circumstance is

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[44] RCC § 22E-701 "Protected person" means a person who is:

(A) Under 18 years of age old, when, in fact, the actor is 18 years of age or older and at least 4 years older than the complainant;

(B) 65 years old or older, when, in fact, the actor is under the age of 65 years and at least 10 years younger than the complainant;

(C) A vulnerable adult;

(D)A law enforcement officer, while in the course of official duties;

(E) A public safety employee while in the course of official duties;

(F) A transportation worker, while in the course of official duties; or

(G)A District official, while in the course of official duties.

[45] For example, a defendant who murders an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing murder with the purpose of harming the decedent due to his status as a law enforcement officer.

[46] For example, if a person fires several shots above a police officer's head with the purpose of frightening the officer, and accidentally hits and kills the officer, the aggravating factor under (c)(3)(B) may apply, even if the person did not have the purpose of causing bodily injury.

"knowingly," a term defined under RCC § 22E-206 to mean that the actor must have been practically certain that he or she would receive anything of value in exchange for causing the death of another.

Subparagraph (d)(3)(E) specifies that the infliction of extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death is an aggravating circumstance.[47] This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must have been practically certain that his or her conduct would cause extreme physical pain or mental suffering for a prolonged period of time prior to the decedent's death.

Subparagraph (d)(3)(F) specifies that mutilating or desecrating the decedent's body is an aggravating circumstance.[48] This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must be practically certain that he or she mutilated or desecrated the body after death.

Subparagraph (d)(3)(G) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The term "substantial planning" is intended to have the same meaning as under current law.[49] Although substantial planning does not require an intricate plot, the accused must have formed the intent to kill a substantial amount of time before committing the murder.[50] This subparagraph uses the term "in fact," which specifies that no culpable mental state applies to this aggravating circumstance.

Subparagraph (d)(3)(H) specifies that committing a murder by a drive-by or random shooting is an aggravating circumstance. The term "drive-by shooting" is intended to cover murders committed by firing shots from a motor vehicle while it is being operated. Random shootings are intended to include murders in which the actor did not have a target in mind, or in which the shooting was committed in a manner that indiscriminately endangered bystanders.

Subparagraph (d)(3)(I) specifies that committing a murder with the purpose of harming the decedent because he was or had been a witness in any criminal investigation or judicial proceeding, or the decedent was capable of providing or had provided assistance in any criminal investigation or judicial proceeding is an aggravating circumstance.

Subsection (e) provides for a bifurcated proceeding when a person is charged with penalty enhancements under subparagraphs (c)(3)(E) or (c)(3)(F). In the first stage of the proceeding, the fact finder shall only consider evidence relevant to determining whether the accused committed either first or second degree murder. Evidence that is relevant to

[47] For example, murders preceded by keeping the victim tied up for a prolonged period of time, knowing that his or her death was forthcoming or starving the person to death, may satisfy this aggravating circumstance.

[48] For example, a defendant who cuts off body parts, disfigures body parts, or who uses the deceased's body for sexual gratification may satisfy this aggravating circumstance.

[49] D.C. Code §§ 22-2104.01, 22-2403.01(b-2).

[50] For example, if days before a murder, the defendant plans out how he will ambush the victim, and chooses a weapon for the purpose of carrying out the murder, the substantial planning circumstance would be satisfied.

determining whether aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F) are not admissible at this stage, unless it is relevant to determining whether the accused committed either first or second degree murder. In the second stage of the proceeding, the fact finder may consider evidence relevant to determining whether aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F). This bifurcated procedure limits the admissibility of unfairly prejudicial evidence during the first stage. This subsection also specifies that the same jury or fact finder will serve at both stages of the proceeding.

Paragraph (f)(1) provides that in addition to any other defenses otherwise applicable to the accused's conduct, the presence of mitigating circumstances is a defense to prosecution for first degree murder, or second degree depraved heart murder. This paragraph provides a non-exhaustive definition of mitigating circumstances.[51]

Subparagraph (f)(1)(A) first defines mitigating circumstances as acting under the influence of extreme emotional disturbance for which there was a reasonable cause. "Extreme emotional disturbance" refers to emotions such as "rage," "fear or any violent and intense emotion sufficient to dethrone reason."[52] Subparagraph (e)(1)(A) further specifies that the reasonableness of the cause of the disturbance shall be determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be. The "actor's situation" includes some of the actor's personal traits, such as physical disabilities[53], or temporary emotional states,[54] which should be taken into account in determining reasonableness. However, the actor's idiosyncratic values or moral judgments are irrelevant.[55] Subparagraph (e)(1)(A) also specifies that reasonableness shall be determined from the accused's situation "as the actor believed them to be." This language clarifies that the actor's *factual* beliefs, even if inaccurate, must be taken into account in determining whether the cause of the extreme emotional disturbance was reasonable.[56] The fact finder must determine in each case whether the provoking circumstance was a reasonable cause of the extreme emotional disturbance, such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[57]

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[51] Other circumstances that are not explicitly listed in paragraph (e)(1) may constitute mitigating circumstances. However, subparagraph (e)(1)(C) is drafted broadly to include nearly any circumstance that would constitute a mitigating circumstance.

[52] *See* Commentary to MPC § 210.3 at 60.

[53] For example, circumstances that may reasonably cause extreme emotional disturbance for a blind or paralyzed person may not be reasonable for an able-bodied person.

[54] For example, circumstances that may reasonably cause extreme emotional disturbance for a person suffering from extreme grief may not be reasonable for a person under a neutral emotional state.

[55] For example, if a defendant reacts to a minor verbal insult with homicidal rage and kills a person who insulted him, whether the minor insult was a reasonable cause for the extreme emotional disturbance depends on the community's values, not the defendant's individual values as to the proper response to minor insults. However, if the insults were of such a severe nature that the community's values would deem them a reasonable cause of the extreme emotional disturbance, mitigation would be satisfied.

[56] For example, a classic heat of passion fact pattern involves a person discovering his or her spouse having sexual relations with another person. An actor who genuinely, but falsely, believes that his or her spouse is having an affair may still be deemed to have acted under an extreme emotional disturbance for which there was a reasonable cause.

[57] *See* Commentary to MPC § 210.3 at 63.

Subparagraph (f)(1)(B) defines mitigating circumstances to include acting under an unreasonable belief that the use of deadly force was necessary to prevent imminent death or serious bodily injury under the circumstances. This form of mitigation may arise in the context of imperfect self-defense or the defense of others.[58] A person is justified in using deadly force if he reasonably believes he, or another person, is in imminent danger of serious bodily harm or death, and that the use of deadly force was necessary to prevent the infliction of that harm.[59] Use of deadly force with such a reasonable belief is a complete defense to liability.[60] If the actor genuinely believes these circumstances exist, but that belief in either circumstance is unreasonable, subparagraph (e)(1)(B) clarifies that the actor is not guilty of murder, but is guilty of voluntary manslaughter.[61]

Subparagraph (f)(1)(C) further defines mitigating circumstances to broadly include any other legally-recognized partial defense to murder. For example, an unreasonable belief in any circumstance that would provide a legal justification for the use of lethal force, apart from self-defense or defense of others, may constitute a mitigating circumstance.[62]

Paragraph (f)(2) specifies the burden of proof for the mitigation defense. If any evidence of mitigating circumstances is presented at trial by either the government or the accused, the government bears the burden of proving the absence of mitigating circumstances beyond a reasonable doubt. This paragraph is intended to codify current District law, which specifies the government's burden of proof.[63]

Paragraph (f)(3) specifies the effect of the mitigation defense in a murder prosecution. If evidence of mitigation has been presented at trial and the government fails to meet its burden of proving that mitigating circumstance were absent, but proves

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[58] *Comber v. United States*, 584 A.2d 26, 41 (D.C. 1990) ("mitigation may also be found in other circumstances, such as "when excessive force is used in self-defense or in defense of another and '[a] killing [is] committed in the mistaken belief that one may be in mortal danger.'").

[59] *Bassil v. United States*, 147 A.3d 303, 307 (D.C. 2016).

[60] See RCC § 22E-4XX [forthcoming] Defense of Person.

[61] If an actor uses lethal force reasonably believing that the decedent was threatening an imminent use of deadly force, but the belief that use of lethal force was necessary to repel the attack was unreasonable because it was obvious that the person could have easily retreated with no risk to his safety, an imperfect self-defense claim would be available to mitigate the offense from murder to manslaughter. In addition, belief that the use of lethal force was necessary may be unreasonable if the actor used excessive force. For example, if the actor genuinely believed that the decedent was threatening an imminent use of deadly force, but *non-lethal* force would have been sufficient to repel the attack, an imperfect self-defense claim would be available to mitigate the offense from murder to manslaughter. *See*, *Dorsey v. United States*, 935 A.2d 288, 293 (D.C. 2007).

[62] For example, a court may find that the use of deadly force is justified to defend against an attempted sexual assault, even absent the fear of serious bodily injury or death. *See, Evans v. United States*, 277 F.2d 354, 356 (D.C. Cir. 1960) (reversing conviction for second degree murder when trial court did not allow evidence of decedent's intoxication when defendant claimed she was "defending herself from a sexual assault.").

[63] *Comber*, 584 A.2d at 41 (D.C. 1990) ("The absence of justification, excuse, or mitigation is thus an essential component of malice, and in turn of second-degree murder, on which the government bears the ultimate burden of persuasion."). *See also*, *Davis v. United States*, 724 A.2d 1163, 1170 (D.C. 1998) (noting that if there is any evidence, however weak, of mitigating circumstances, if requested the trial court must provide a voluntary manslaughter instruction in a murder prosecution). *But see*, *Edwards v. United States*, 721 A.2d 938, 942 (D.C. 1998) (defendant not entitled to a self-defense instruction when as a matter of law, the forced used was excessive).

all other elements of murder, then the accused is not guilty of murder but is guilty of voluntary manslaughter.[64]

Subsection (g) provides that a person cannot be held liable as an accomplice to felony murder, as defined in paragraph (b)(2).[65] This subsection does not limit application of any other form of homicide liability.[66]

Subsection (h) [RESERVED For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), murder in the first degree, and murder in the second degree are Class A felonies.]

Subsection (i) cross references definitions found elsewhere in the revised criminal code.

Relation to Current District Law. *The revised murder statute changes current District law for first and second degree murder in nineteen main ways.*

First, under the revised murder statute, felony murder is graded as second degree murder. Under the current first degree murder statute, a person may be convicted if he or she unintentionally causes the death of another while committing or attempting to commit a specified felony.[67] Such an unintentional felony murder is currently punished more severely than an intentional, but non-premeditated killing (which currently constitutes second degree murder), subjecting the defendant to a life sentence if the government can prove that at least one aggravating circumstance was present.[68] Moreover, one of the possible aggravating circumstances that enhances penalties for first degree felony murder is that the killing occurred while the accused was committing or attempting to commit "kidnapping,"[69] "robbery, arson, rape, or a sexual offense,"[70] and the DCCA has held that the predicate felony for felony murder can also serve as an aggravating circumstance.[71] Consequently, under current law, an unintentional murder that occurs during a robbery, arson, sexual offense, or kidnapping is subject to a more severe maximum sentence than even a premeditated, intentional killing (which currently constitutes first degree murder absent aggravating circumstances). By contrast, under the RCC, unintentionally causing

[64] The mitigation provision is also not intended to change current DCCA case law which states that if evidence of mitigation is presented in a murder trial, the defendant is entitled to a jury instruction as to voluntary manslaughter. *Price v. United States*, 602 A.2d 641, 645 (D.C. 1992).

[65] For example, if A is a getaway driver for B who robs a store, and during the course of the robbery B negligently kills the store clerk, A cannot be held liable as an accomplice to the felony murder committed by B.

[66] For example, if A is a getaway driver for B, who robs a store and intentionally kills the store clerk, A could be liable as an accomplice to B's intentional murder, provided the requirements of accomplice liability are satisfied.

[67] These specified felonies are: first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, kidnapping, first degree burglary while armed, or a felony involving a controlled substance. D.C. Code § 22-2101.

[68] Absent any aggravating circumstances, a non-premeditated intentional murder is subject to a maximum sentence of 40 years, whereas felony murder is subject to a 60 year maximum sentence and a 30 year mandatory minimum. D.C. Code § 22-2104.

[69] There is only one grade of kidnapping under current law. [CCRC staff has not yet reviewed the kidnapping offense, but may eventually recommend that the offense be divided into multiple penalty gradations.]

[70] D.C. Code § 22-2104.01 (b)(8).

[71] *Page v. United States*, 715 A.2d 890, 891 (D.C. 1998).

the death of another while committing an enumerated felony constitutes second degree murder. This change improves the proportionality of penalties under the RCC by treating killings committed with a lower culpable mental state less severely.

Second, the revised murder statute eliminates as a distinct form of first degree murder purposely causing the death of another while "perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary."[72] The DCCA has held that an "offense punishable by imprisonment in the penitentiary refers to any felony.[73] Under the RCC, the grading with respect to general felony conduct is simplified, such that purposely causing the death of another person with premeditation and deliberation is first degree murder, while purposeful killing without premeditation or deliberation will still be covered by the second degree murder offense. This change improves the clarity and proportionality of the revised criminal code.

Third, the revised first degree murder statute eliminates as a distinct form of murder D.C. Code § 22-2102, which requires that the accused "maliciously places an obstruction upon a railroad or street railroad . . . and thereby occasions the death of another."[74] In contrast, the RCC treats killings caused by obstructing railroads the same as any other killings, with charges dependent on the accused's culpable mental state, and the presence of aggravating or mitigating circumstances. The fact that a killing occurs by means of obstructing a railroad no longer, by itself, renders the killing first degree murder. This change improves the proportionality of the revised homicide statutes by ensuring that the accused's culpable mental state remains the primary grading factor, instead of the specific means of placing obstructions upon a railroad or street railroad.

Fourth, the revised second degree murder statute changes the specified felonies that may serve as a predicate offense for "felony murder" in five ways.[75] The current felony murder predicates include: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[76] (4) mayhem; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[77] By contrast, the RCC clarifies, and in several respects reduces, the

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[72] D.C. Code § 22-2101.

[73] *Lee v. United States*, 112 F.2d 46, 49 (D.C. Cir. 1940) (noting that the phrase "punishable by imprisonment in the penitentiary" was a codification of a "common law concept of felony" and that "offenses punishable by imprisonment in a penitentiary" are those offenses with a possible sentence greater than one year).

[74] D.C. Code § 22-2101. The statute also includes displacing or injuring "anything appertaining" to a railroad or street railroad, or "any other act with intent to endanger the passage of any locomotive or car[.]"

[75] In addition to felony murder under the revised second degree murder statute, the revised aggravated arson statute provides an alternate means of criminalizing certain homicides. The revised aggravated arson offense criminalizes committing arson when the defendant knows the building is a dwelling, with recklessness as to the dwelling being occupied, and in fact, death or serious bodily injury results.

[76] D.C. Code §22-2101.

[77] Under current law, burglary is divided into two grades, both of which appear to be included in the felony murder statutory reference to "housebreaking." The original 1901 Code codified the offense now known as burglary, but called it "housebreaking." The original "housebreaking" offense only had one grade, and criminalized entry of *any building* with intent to commit a crime therein. In 1940, Congress amended the first degree murder statute and included an enumerated list of felonies, which included housebreaking, for felony murder. See H.R. Rep. Doc. No. 76-1821, at 1 (1940) (Conf. Rep). In 1967, Congress relabeled "housebreaking" as "second degree burglary," and created first degree burglary, which required that the

conduct that is a predicate for felony murder. First, the revised statute states that first degree, second degree, third degree, and fourth degree robbery are predicates for felony murder, but does not include the RCC's fifth degree robbery as a predicate offense, or pickpocketing-type conduct that is treated as theft from a person[78] in the RCC. Eliminating such conduct as predicates for felony murder improves the statute's proportionality because such conduct does not involve infliction of significant bodily injury or the use of a weapon, and lacks the inherent dangerousness of first degree, second degree, third degree, and fourth degree robbery.[79] Second, the revised second degree murder offense does not include the current D.C. Code first degree child cruelty, and instead includes the RCC's first and second degree criminal abuse of a minor, but not third degree criminal abuse of a minor. Omitting third degree criminal abuse of a minor changes current law as at least some conduct that constitutes the RCC's third degree criminal abuse of a minor offense would satisfy the elements of the current first degree child cruelty statute.[80] Omitting third degree criminal abuse of a minor as a predicate for felony murder improves the proportionality of the statute, as the RCC third degree criminal abuse of a minor and the current first degree child cruelty statute cover conduct that is not sufficiently dangerous or harmful to warrant felony murder liability.[81] Third, the revised second degree murder offense does not include felonies involving a controlled substance as predicates for felony murder. Omitting controlled substance offenses from the enumerated offenses improves the proportionality of the felony murder rule, as controlled substance offenses do not present the same inherent, direct risk of physical harm to others as compared to the other enumerated felonies.[82] Fourth, the revised second degree murder offense no longer includes "mayhem" as a predicate for felony murder. Mayhem is a common law offense that is replaced under the RCC by the revised

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burglar entered an occupied dwelling. However, the DCCA has held that only the current first degree burglary offense may serve as a predicate to non-purposeful felony murder. *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014).

[78] Under the RCC, pick pocketing or sudden snatching of property that does not involve threats or physical force, when the property is not taken from the other person's hands or arms, are not criminalized under the robbery statute, but instead are treated as theft from a person, RCC §§ 22E-1201, 22E-2101.

[79] Third degree robbery requires that the defendant took property from the immediate actual possession of another by means of either: 1) using physical force that overpowers another person present; 2) causing bodily injury to any one present; or 3) committing conduct constituting second degree menace.

[80] The RCC's third degree child abuse offense includes recklessly causing bodily injury to a child, which would also satisfy the elements of the current D.C. Code first degree child cruelty. The RCC's third degree child abuse also includes recklessly using physical force that overpowers a child, which would not satisfy the elements of the current D.C. Code first degree child cruelty.

[81] A person commits the current first degree child cruelty offense by recklessly creating "a grave risk of bodily injury to a child, and thereby causes bodily injury." D.C. Code § 22-1101. Recklessly causing any degree of bodily injury may suffice for first degree child cruelty. If a parent leaves a child unsupervised on playground equipment, and the child falls and suffers a minor cut, it appears that the parent could be found guilty under the current first degree child cruelty statute. If that cut becomes infected and ultimately proves fatal, the parent could be liable for felony murder. Such conduct is not sufficiently dangerous or harmful to serve as a predicate for felony murder liability. See Commentary to RCC § 22E-1501 for more explanation of the revised child abuse statutes.

[82] If in the course of committing a controlled substance offense, a defendant intentionally causes the death of another, or intentionally causes serious bodily injury that causes death of another, he or she may still be convicted of first or second degree murder.

first degree and second degree assault offenses.[83] The revised statute does not include these offenses as enumerated predicate offenses as unnecessary. In most cases, a person who causes the death of another while committing or attempting to commit first or second degree assault can be convicted of second degree murder under a depraved heart theory.[84] Omitting these offenses from the enumerated predicate offenses improves the clarity of the code. Lastly, the revised second degree murder offense replaces the phrase "any housebreaking while possessing a dangerous weapon" with "first degree burglary while possessing a dangerous weapon on his or her person." Under current law, only first degree burglary while armed may serve as a predicate offense,[85] and the current first degree burglary offense requires that the accused entered an occupied dwelling. This largely corresponds to the RCC's first degree burglary offense, with only minor changes to current law.[86]

Fifth, the revised second degree murder offense requires that, for felony murder, the accused must have caused the death of another while acting "in furtherance" of the predicate felony. The current statute does not specify that the accused cause the death of another "in furtherance" of the underlying felony, and the DCCA has held that "[t]here is no requirement in the law . . . that the government prove the killing was done in furtherance of the felony in order to convict the actual killer of felony murder."[87]

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[83] See Commentary to RCC §§ 22E-1202, 1201. In any case in which a person commits aggravated assault and causes the death of the victim of the aggravated assault, depraved heart murder liability would apply. However, if while committing aggravated assault, the person negligently causes the death of another person, depending on the specific facts, depraved heart liability may not apply

[84] At common law mayhem required that the defendant cause a "permanent disabling injury to another" and "did so willfully and maliciously." *Edwards v. United States*, 583 A.2d at 668 & n.12 ("The elements of mayhem are: (1) that the defendant caused permanent disabling injury to another; (2) that he had the general intent to do the injurious act; and (3) that he did so willfully and maliciously.") (citing *Wynn v. United States*, 538 A.2d 1139, 1145 (D.C. 1988)). Any case in which a person caused the death of another while committing mayhem would also satisfy the elements of second degree murder under paragraph (b)(1). The DCCA has held that the "maliciously" mental state can be satisfied either intentionally causing a specified result, or by disregarding a risk of causing the specified result, under circumstances manifesting extreme indifference to causing that result. *Comber v. United States*, 584 A.2d 26, 38 (D.C. 1990) (*en banc*). A person can commit mayhem by either intentionally causing a permanent disabling injury, or by recklessly causing a permanent disabling injury under circumstances manifesting extreme indifference. If a defendant causes death while committing mayhem, the defendant would also have either intentionally caused a serious bodily injury, or recklessly caused the death of another under circumstances manifesting extreme indifference to human life, either of which culpable mental states would satisfy the requirement for second degree murder per paragraph (b)(2).

[85] *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014) (Because robbery is one of the felonies enumerated in the felony murder statute, D.C. Code § 22–2101 (2012 Repl.), and second-degree burglary is not, the government is required to prove an intent to kill in order to convict a defendant of felony murder with the underlying felony of second-degree burglary, but is not required to prove that intent for robbery.).

[86] The RCC's first degree burglary statute differs from the current first degree burglary offense in three main ways. The RCC's first degree burglary statute requires that the defendant enter a dwelling: (1) knowing that he or she lacked the effective consent of the owner; (2) knowing the building was a dwelling, and (3) the dwelling was, in fact, occupied by someone who is not a participant in the crime. The current first degree burglary statute does not specifically require that the defendant knew the building was a dwelling, that the defendant lacked effective consent to enter, or that the occupant be a non-participant in the crime.

[87] *Butler v. United States*, 614 A.2d 875, 887 (D.C. 1992).

However, while there is no "in furtherance" requirement under current law,[88] the DCCA has held that "[m]ere temporal and locational coincidence"[89] between the underlying felony and the death are not enough. There must have been an "actual legal relation between the killing and the crime . . . [such] that the killing can be said to have occurred *as a part of the perpetration of the crime*."[90] By contrast, the revised statute, through use of the "in furtherance" phrase, requires that the accused's conduct that caused the death of another in some way facilitated the commission or attempted commission of the offense, including avoiding apprehension or detection of the offense or attempted offense.[91] Practically, this change in law may have little impact, as most cases in which the accused causes the death of another as "part of perpetration of the crime," he or she would also have been acting in furtherance of the crime. However, this change improves the proportionality of the offense insofar as a person whose risk-creating behavior is not in furtherance of the felony is not as culpable as a person who otherwise negligently kills someone in the course of committing a specified felony.[92]

Sixth, applying the general culpability principles for self-induced intoxication in RCC § 22E-209 allows a defendant to claim that due to intoxication, he or she did not form the awareness of risk required to act "recklessly, with extreme indifference to human life." However, subsection (c) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. Although self-induced intoxication is generally culpable, and weighs in favor of finding that the person acted

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[88] However, the DCCA has clearly held that when one party to the underlying felony causes the death of another, an aider and abettor to the underlying felony may only be convicted of felony murder if the "killing takes place in furtherance of the underlying felony." *Butler v. United States*, 614 A.2d 875 (D.C. 1992).

[89] *Johnson v. United States*, 671 A.2d 428, 433 (D.C. 1995).

[90] *Id.* 433 (emphasis original).

[91] Courts in other states have disagreed about the meaning of "in furtherance" language that is common in felony murder statutes. Some courts have held that "in furtherance" requires that the act that caused the death must have advanced or facilitated commission of the underlying crime. *E.g.*, *State v. Arias*, 641 P.2d 1285, 1287 (Ariz. 1982); *Auman v. People*, 109 P.3d 647, 656 (Colo. 2005) (the death must occur either "in the course of" or "in furtherance of" immediate flight, so that a defendant commits felony murder only if a death is caused during a participant's immediate flight or while a person is acting to promote immediate flight from the predicate"). However, other states have interpreted "in furtherance" to require only a "logical nexus" between the underlying crime and death, to "exclude those deaths which are so far outside the ambit of the plan of the felony and its execution as to be unrelated to them." *State v. Young*, 469 A.2d 1189, 1192–93 (Conn. 1983); *see also*, *Noble v. State*, 516 S.W.3d 727, 731 (Ark. 2017) (rejecting appellant's argument that "in furtherance" requires that lethal act facilitated the underlying crime, but noting that a burglary committed with intent to kill cannot serve as a predicate offense to felony murder when the defendant completes the murder, because the murder was not committed in furtherance of the burglary); *People v. Henderson*, 35 N.E.3d 840, 845 (N.Y. 2015) ("[Appellant] asserts that the statutory language "in furtherance of" requires that the death be caused in order to advance or promote the underlying felony. We have not interpreted "in furtherance of" so narrowly."). The RCC tracks the former approach, requiring the death to have advanced or facilitated the commission of the underlying crime.

[92] For example, if in the course of committing a kidnapping, the defendant binds and gags the victim to prevent him from escaping, and the defendant suffocates as a result, felony murder liability would be appropriate. If however, the defendant leaves the kidnapping victim to go on an unrelated errand, and while doing so causes the death of another by driving negligently, felony murder liability would not be appropriate.

with extreme indifference to human life, it is possible, however unlikely, that self-induced intoxication reduces the blameworthiness, and negates finding that the person acted with extreme indifference to human life.[93]

The current murder statutes are silent as to the effect of voluntary intoxication, but the DCCA has held that, although evidence of self-induced intoxication may negate a finding that the defendant acted with premeditation as required for first degree murder, it "may not reduce murder to voluntary manslaughter, nor permit an acquittal of [second degree] murder."[94] The DCCA further clarified that evidence of voluntary intoxication "is not admissible to disprove [the element of] malice' integral to the crime of murder."[95] By contrast, although subsection (c) allows for imputation of the awareness of risk, in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for second degree murder. This change improves the proportionality of the revised offense.

In addition, to the extent that the voluntary intoxication provision changes current law with respect to any of the predicate offenses for felony murder, the provision also changes current law as to felony murder.[96] If voluntary intoxication negates the requisite culpable mental state required for a predicate offense, there can be no felony murder liability based on that offense.[97] These changes improve the clarity, completeness, and proportionality of the revised offense.

Seventh, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the murder was committed in the course of kidnapping or abduction, or attempt to kidnap or abduct. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed in the course of a kidnapping, abduction, or attempted kidnapping or abduction.[98] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. In any case in which a person recklessly, with extreme indifference to human life, kills another while committing or attempting to commit kidnapping, the person may be convicted and separately sentenced for kidnapping or attempted kidnapping, which substantially increases the maximum allowable punishment beyond a murder not committed in the course of a kidnapping or attempted kidnapping. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses[99], and improves

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[93] *Infra*, at 41.

[94] *Wheeler v. United States*, 832 A.2d 1271, 1273 (D.C. 2003) (quoting *Bishop v. United States*, 71 App.D.C. 132, 107 F.2d 297 (D.C. Cir. 1939)).

[95] *Id*. (citing *Bishop v. United States*, 107 F.2d 297, 302 (1939)).

[96] For example, the revised arson statute changes current law by allowing evidence of the defendant's voluntary intoxication to be introduced to negate the culpable mental state required for first or second degree arson. See Commentary to RCC § 22E-2501.

[97] For example, if a defendant is charged with felony murder predicated on first or second degree arson, evidence of voluntary intoxication may be introduced to negate the requisite culpable mental state for first or second degree arson. If the defendant failed to form the requisite mental state for arson, then by extension the defendant cannot be found guilty of felony murder predicated on arson.

[98] D.C. Code § 22-2104.1(b)(1).

[99] It is unclear whether under current District law, a defendant may be sentenced under the kidnapping aggravating circumstance and be separately convicted and sentenced for the kidnapping itself. It is possible that when kidnapping is used as an aggravating circumstance to enhance the maximum penalty for murder,

the clarity and proportionality of the revised statute by preventing both an enhanced penalty for the murder and a separate conviction and sentence for the kidnapping offense.

Eighth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the murder was committed while committing or attempting to commit a robbery, arson, rape, or sexual offense. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed "while committing or attempting to commit a robbery, arson, rape, or sexual offense."[100] The terms "rape" and "sexual offense" are undefined by the current statute, and there is no case law on point.[101] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. Even with the omission of this aggravating circumstance, the accused may still be separately convicted and sentenced for the robbery, arson, rape, or other sexual offense, which substantially increases the maximum allowable punishment beyond a murder not committed in the course of robbery, arson, rape, or another sexual offense. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[102] and improves the clarity and proportionality of the revised statute by preventing both an enhanced penalty for the murder and a separate conviction and sentence for the other felony offense.

Ninth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that there was more than one first degree murder arising out of one incident. The current first degree murder statute is subject to a penalty enhancement when there was more than one offense of murder in the first degree arising out of one "incident."[103] The term "incident" is not defined by the statute, and there is no case law on point. By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. In any case in which the accused commits more than one murder, that person may be convicted and sentenced for multiple counts of murder, which allows for punishment proportionate to the conduct.[104] Eliminating this

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the conviction for kidnaping merges with the murder conviction. If so, there is no overlap issue. No case law exists on point.

[100] D.C. Code § 22-2104.01(b)(8).

[101] Arguably, "rape, or sexual offense" at least includes first, second, and third degree sexual abuse, child sexual abuse, and some other offenses currently described in Chapter 30 of Title 22 of the D.C. Code. However, many other offenses are included in the definition of a "registration offense" for purposes of the District's sex offender registry. D.C. Code § 22-4001(8). It is unclear whether these constitute a "sexual offense" for purposes of the current first degree murder aggravating circumstance. District case law has not established the scope of this language.

[102] It is unclear whether under current District law, a defendant may be sentenced under this aggravating circumstance and be separately convicted and sentenced for robbery, arson, rape, or other sexual offense. It is possible that when robbery, arson, rape, or other sexual offense is used as an aggravating circumstance to enhance the maximum penalty for murder, the conviction for robbery, arson, rape, or other sexual offense merges with the murder conviction. If so, there is no overlap issue. No case law exists on point.

[103] D.C. Code § 22-2104.1(b)(6).

[104] Other jurisdictions began enumerating aggravating circumstances to murder to authorize the death penalty in accordance with the Supreme Court's holding in *Furman v. Georgia*, 408 U.S. 238 (1972). The circumstances were necessary to distinguish between cases that warranted imposition of the death penalty as opposed to life imprisonment. However, the District does not impose the death penalty and there is no need for an aggravating circumstance when the defendant can already receive a proportionate term of imprisonment.

aggravating circumstance reduces unnecessary overlap between offenses,[105] and improves the clarity and proportionality of the revised statute by preventing both enhanced penalty for each murder and a separate conviction and sentence for the additional murders.

Tenth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the murder was a drive-by or random shooting. The current first degree murder statute is subject to a penalty enhancement when the murder "involved a drive-by or random shooting."[106] There is no District case law on the meaning of "random." By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance because the circumstance is vague and drive-by or random shootings are not sufficiently distinguishable from other murders to justify a more severe sentence. It is unclear both what connection would suffice to establish that a murder "involved" a drive-by or random shooting, and what the meaning of "random" is in this context[107]. In addition, murders committing by random or drive-by shootings do not categorically inflict greater suffering on the victim, nor are they significantly more culpable than murders committed by other means.[108] Eliminating this aggravating circumstance improves the clarity and proportionality of the revised statute by preventing enhanced penalties for murders that are not categorically more heinous or culpable than other types of murder.

Eleventh, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the murder was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression. The current first degree murder statute is subject to a penalty enhancement when the murder was "committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression[.]"[109] A separate bias-related crime penalty enhancement in current D.C. Code § 22-3703 increases the maximum punishment for any murder by one and a half times when the murder "demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, …sexual

[105] It is unclear whether under current District law, a defendant may be sentenced under this aggravating circumstance and be separately convicted and sentenced for any other first degree murders that arise out of the same incident. It is possible that when another first degree murder is used as an aggravating circumstance to enhance the maximum penalty, the murder convictions merge. If so, there is no overlap issue. No case law exists on point.

[106] D.C. Code §§ 22-2104.1(b)(5), 24-403.01 (b-2)(2)(E).

[107] For example, it is unclear whether the aggravator for "random" killing would include any shooting of a firearm in the general direction of an unknown person (assuming the unknown identity of the victim is the critical aspect for determining randomness), whether the lack of a specific motive or reason for shooting a firearm in the general direction of an unknown person is required (assuming the lack of a clear victim-selection mechanism is the critical aspect of randomness), or whether a non-purposeful, unintentional, culpable mental state as to the victim is required (assuming that lack of knowing or purposeful action is the critical aspect of randomness).

[108] One possible rationale for punishing murders committed by drive-by or random shootings more severely is that these types of murders are less likely to result in apprehension and conviction. Therefore, to achieve sufficient deterrent effect, more severe punishment is needed. However, there are any number of factors that could make it significantly more difficulty to apprehend and convict a perpetrator that are not included as aggravating circumstances.

[109] D.C. Code §§ 22-2104.1(b)(7), 24-403.01 (b-2)(2)(A).

orientation, gender identity or expression…."[110] By contrast, the penalty enhancements under subsection (d) omit this aggravating circumstance as unnecessary because bias motivated murders will be subject to a general penalty enhancement under RCC § 22E-607. Omitting this aggravating circumstance reduces unnecessary overlap between statutes[111] and improves the proportionality of the offense by precluding bias motivations from enhancing penalties twice, both as an aggravating circumstance and under the separate bias enhancement.

Twelfth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding. The current first and second degree murder statutes are subject to a penalty enhancement when the murder ".was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding."[112] By contrast, the penalty enhancements under subsection (d) omit this aggravating circumstance as unnecessary because murders committed for these purposes are subject to separate criminal liability under the obstructing justice statute.[113]

Thirteenth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the accused had previously been convicted of murder, manslaughter, or other enumerated violent offenses. The current first degree murder statute is subject to a penalty enhancement when the accused had previously been convicted of certain violent offenses.[114] Separate repeat offender penalty enhancements in current D.C. Code §§ 22-1804 and 22-1804a potentially increases the maximum punishment for any murder committed by a person with one or two prior convictions for certain offenses (including those currently as aggravating circumstances for first degree murder.)[115] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. The general penalty enhancement for recidivist conduct under RCC § 22E-606 provides for enhanced penalties. Omitting this aggravating circumstance reduces unnecessary overlap between criminal statutes[116] and improves the proportionality of the

[110] D.C. Code §§ 22-3701, 22-3703.

[111] It is unclear whether under current District law, a defendant may be sentenced under both the current bias-related crime statute D.C. Code § 22-3703, and the bias motivated aggravating circumstance. It is possible that only one statute may apply to a particular murder, and there is no overlap issue. No case law exists on point.

[112] D.C. Code § 24-403.01 (b-2)(2)(B).

[113] See RCC § 22E-XXXX [pending revision of the obstructing justice statute].

[114] D.C. Code § 22-2104.01(b)(12) (these offenses are: "murder, (B) manslaughter, (C) any attempt, solicitation, or conspiracy to commit murder, (D) assault with intent to kill, (E) assault with intent to murder, or (F) at least twice, for any offense or offenses, described in § 22-4501(f) [now § 22-1331(4)] whether committed in the District of Columbia or any other state, or the United States.").

[115] D.C. Code §§ 22-1804 and 22-1804a.

[116] It is unclear whether under current District law, a defendant may be sentenced under both the general recidivist enhancement, and this aggravating circumstance based on the same prior conviction. It is possible that only one statute may apply to a particular murder, and if so there is no overlap issue. No case law exists on point.

offense by precluding prior convictions from enhancing penalties twice, both as an aggravating circumstance and under the separate recidivist enhancement.

Fourteenth, the penalty enhancements under subsection (d) include as an aggravating circumstance that the murder was committed for the purpose of harming the victim because of the victim's status as a law enforcement officer or public safety employee, or District official. Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[117] Under current law, an accused who knowingly causes the death of a law enforcement officer or public safety employee, with knowledge or reason to know that the victim was an on-duty law enforcement officer or public safety employee, or "on account of performance"[118] of the officer's or employee's official duties is guilty of a separate murder of a law enforcement officer offense. A separate penalty enhancement in current D.C. Code § 22-3602 increases the maximum punishment for any murder by one and a half times when the murder is of "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol."[119] A separate offense criminalizes harming District officials or employees and their family members.[120] By contrast, penalty enhancements under subsection (d) include as an aggravating circumstance that the murder was committed with the purpose of harming the victim because of the victim's status as a law enforcement officer, public safety employee, or District official. Inclusion of this this aggravating circumstance replaces the murder of a law enforcement officer offense that exists under current law.[121] Use of the RCC's "law enforcement officer" definition also changes current law by including certain types of officers that are not included under the current murder of a law enforcement officer statute.[122] This aggravating circumstance covers only a subset of District employees—District officials—and does not include citizen patrol members, consistent with other provisions in the RCC.[123] Including this aggravating circumstance, and eliminating the separate murder of a law enforcement officer, reduces unnecessary overlap between criminal statutes and improves the clarity and consistency of the revised code.

Fifteenth, the penalty enhancements under subsection (d) include as an aggravating circumstance that the accused was reckless as to the victim's status as a "protected person," a term defined under RCC § 22E-701, which includes "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of

[117] For example, if a person fires several shots above a District official's head with the purpose of frightening the official, and accidentally hits and kills the official, the aggravating factor under (c)(3)(B) may apply, even if the person did not have the purpose of causing bodily injury.
[118] D.C. Code § 22-2106.
[119] D.C. Code § 22-3602(b).
[120] D.C. Code §22-851.
[121] D.C. Code § 22-2106.
[122] The RCC's "law enforcement officer" definition includes; "any…reserve officer, or designated civilian employee of the Metropolitan Police Department;" "any licensed special police officer"; and "any officer or employee…of the Social Services Division of the Superior Court…charged with intake, assessment, or community supervision." These types of officers are not included in the definition of "law enforcement officer" in the current murder of a law enforcement officer statute.
[123] For more information on the RCC definition of "District official," see commentary to RCC § 22E-701.

official duties," or a "District official, while in the course of official duties." Under current law, the aggravating circumstances that authorize a life sentence for murder do not include the victim's status as an on duty law enforcement officer, public safety employee, transportation worker, District official or employee, or citizen patrol member. However, separate statutes authorize enhanced penalties based on the victim's status as a specified transportation worker,[124] or status as a citizen patrol member.[125] Separate statutes also criminalize murder of a law enforcement officer engaged in official duties,[126] and harming District officials or employees and their family members as separate offenses.[127] By contrast, the penalty enhancements under subsection (d) include as an aggravating circumstance that the victim was a "protected person."[128] This term is defined to include persons vulnerable due to youth or old age, a specified transportation worker, or a law enforcement officer engaged in official duties, and replaces the current D.C. Code's separate penalty enhancements, and the murder of a law enforcement officer offense. Under the revised term, a victim's status as a member of a "citizen patrol" no longer is sufficient for an enhanced murder penalty. Including recklessness as to victim being a protected person as an aggravating circumstance, and eliminating the separate penalty enhancements, and the separate murder of a law enforcement officer improves the clarity and consistency of the revised code.

Sixteenth, the penalty enhancements under subsection (d), through use of the term "protected person," change the range of victims' ages that qualify as an aggravating circumstance. Under current law, three separate statutory provisions authorize heightened penalties for murder based on the age of the victim. Both first and second degree murder are punishable by a lifetime sentence if the victim was less than 12 years old or more than 60 years old.[129] Separate statutes allow for penalty enhancements of one and one half times the maximum authorized punishment for murder if the victim was 65 years of age or older[130], or less than 18 years of age if the perpetrator was at least 18 years of age and at least two years older than the victim.[131] By contrast, the penalty enhancements under subsection (d), through use of the term "protected person," include as aggravating circumstances that the victim was less than 18 years old—if the actor is at least 18 years old and at least 4 years older than the complainant—or the victim was 65 years or older—when the actor is under the age of 65 and at least 10 years younger than the complainant.[132] This aggravating circumstance replaces both the age based aggravating circumstances under current law, and the separate statutory penalty

[124] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22- 3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).
[125] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).
[126] The current murder of a law enforcement officer offense criminalizes causing the death of an on-duty law enforcement officer or public safety employee "with knowledge or reason to know the victim is a law enforcement officer or public safety employee." D.C Code § 22-2106.
[127] D.C. Code §22-851.
[128] For more information on the RCC definition of "protected person," see commentary to RCC § 22E-701.
[129] D.C. Code § 24-403.01 (b-2)(2)(G).
[130] D.C. Code §22-3601.
[131] D.C. Code § 22-3611.
[132] RCC § 22E-701.

enhancements based on the victim's age, insofar as they apply to murder. This change in law improves the consistency of the current and revised code.[133]

Seventeenth, the revised murder statute does not provide enhanced penalties for committing murder while armed with a dangerous weapon. Under current law, murder is subject to heightened penalties if the accused committed the offense "while armed" or "having readily available" a dangerous weapon.[134] In contrast, under the revised statute, committing murder while armed does not increase the severity of penalties. As a practical matter, nearly all murders involve a dangerous weapon, and raising the gradation of murder in all instances using a dangerous weapon would increase liability significantly compared to the current murder statute. Moreover, as a practical matter, it is unclear whether the current code's separate weapon enhancement significantly affect sentences for murder. This change improves the proportionality of the revised code, as murder while armed does not inflict greater harm than unarmed murder, and therefore does not warrant heightened penalty.

Eighteenth, the penalty enhancements under subsection (d) do not require separate written notice and a separate hearing as is required under D.C. Code § 22-2104.01(a), or a separate written notice prior as is required under § 22-403.01(b-2)(A). Under current law, § 22-2104(a) requires that the government notify the accused in writing at least 30 days prior to trial if intends to seek a sentence of life imprisonment without release.[135] When the government alleges that aggravating circumstances enumerated under § 22-2104.01 were present, a separate sentencing proceeding must be held "as soon as practicable after the trial has been completed to determine whether to impose a sentence of more than 60 years[.]"[136] Following the hearing, if the sentencing court wishes to impose a sentence greater than 60 years, a finding in writing must state whether, beyond a reasonable doubt, one or more aggravating circumstances exist.[137] In addition, if the government intends to rely on the aggravating circumstances listed under § 24-403.01(b-2) it must file an indictment or information at least thirty days prior to trial or a guilty plea that states in "writing one or more aggravating circumstances to be relied upon."[138] D.C. Code §24-403.01(b-2) does not specify whether a separate sentencing hearing must be held. By contrast, the revised murder statute eliminates the special requirements under D.C. Code § 22-2104.01(a), (c) and § 24-403.01(b-2)(A) that relate to sentences for murder.[139] Under the revised murder statute, proof of at least one aggravating circumstance is still an element which must be alleged in the indictment[140] and proven

[133] This aggravating circumstance may also change current law in another way. It is unclear whether under current law, a felony murder predicated on first degree child cruelty is subject to penalty enhancement due to the victim's status as a minor. Under the revised second degree murder offense, first degree child abuse and second degree child abuse are predicate offenses for felony murder. Under the RCC, a second degree felony murder predicated on child abuse is, in addition, subject to a penalty enhancement based on the victim's status as a minor.
[134] D.C. Code § 22-4502.
[135] D.C. Code § 22-2104.
[136] D.C. Code § 22-2104.01.
[137] D.C. Code § 22-2104.01(c).
[138] D.C. Code § 22-403.01 (b-2)(1)(A).
[139] D.C. Code § 24.403.01 includes sentencing procedures for other offenses. The statutory language of § 24.403.01 will only change insofar as it is relevant to sentencing for murder.
[140] D.C. Super. Ct. R. Crim. P. 7.

beyond a reasonable doubt at trial.[141] The factfinder is not required to separately produce a written finding that at least one aggravating circumstance was proven beyond a reasonable doubt, however, nor is the hearing described in current law required.[142] However, eliminating the statutory notice and hearing requirements applicable to the current District murder statutes does not change applicable Sixth Amendment law which, since the District adopted its statutory notice requirements, has expanded to require proof beyond a reasonable doubt of facts that subject a person to a higher statutory penalty.[143] This change improves the clarity of the criminal code.

The revised murder statute does not specifically address the effect of an appellate determination that the burden of proof was not met with respect to an aggravating circumstance that was the basis for the conviction. Current D.C. Code § 22-2104.01(d) provides that if a trial court is reversed on appeal due to "an error only in the separate sentencing procedure, any new proceeding before the trial court shall only pertain to the issue of sentencing."[144] However, this provision is unnecessary as the revised murder statute does not require any separate sentencing proceeding. If a conviction for murder with a sentencing enhancement is reversed on appeal on grounds that only relate to one of the aggravating circumstances, the appellate court may order entry of judgment as to first degree or second degree murder.[145]

Nineteenth, the revised murder statute bars accomplice liability for felony murder.[146] Under current District case law, "[a]ccomplices also are liable for felony

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[141] *In re Winship*, 397 U.S. 358 (1970).

[142] However, as set forth in subsection (e), a separate proceeding will be used to determine if aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F) were present.

[143] *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment requires a jury to find at least one aggravating circumstance that authorizes imposition of the death penalty); *Long v. United States*, 83 A.3d 369, 379 (D.C. 2013), *as amended* (Jan. 23, 2014) (holding that it was plain error for a judge to make factual findings to determine a defendant's eligibility for an enhanced sentence of life without the parole).

[144] D.C. Code § 22-2104.01 (d).

[145] Under the RCC, first and second degree murder are lesser included offenses of those respective degrees of murder that are subject to a sentencing enhancement under the elements test set forth in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (en banc). The sentencing enhancement can only apply if the elements of first or second degree murder have been proven. The revised murder statute does not change current District law that allows an appellate court to order entry of judgment as to a lesser included offense if conviction of a greater offense is reversed on grounds that only pertain to elements unique to the greater offense. *Gathy v. United States*, 754 A.2d 912, 919 (D.C. 2000).

[146] At least one state bars application of felony murder when the defendant did not commit the lethal act. E.g., Cal. Penal Code § 189 (e) ("A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: (1) The person was the actual killer. (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."). Other states provide affirmative defenses in cases where the defendant did not commit the lethal act. E.g. Wash. Rev. Code Ann. § 9A.32.030 ("Except that in any prosecution under [for felony murder] in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant: (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or

murder if the killing . . . [is] a natural and probable consequence of acts done in the perpetration of the felony."[147] In contrast, under the revised murder statute, a person may not be convicted as an accomplice to felony murder as defined in paragraph (b)(2). This change improves the proportionality of the revised offense by matching the actor's liability to his or her true degree of culpability.

Beyond these nineteen changes to current District law, ten other aspects of the revised murder statute may constitute substantive changes in law.

First, the revised murder statute recognizes that acting under an "extreme emotional disturbance for which there is a reasonable cause" constitutes a mitigating circumstance, and serves as a partial defense to murder. Although current District murder statutes make no mention of mitigating circumstances, the DCCA has held that a person commits voluntary manslaughter when he or she causes the death of another with a mental state that would constitute murder, except for the presence of mitigating circumstances.[148] The DCCA has not clearly defined what constitutes a "mitigating circumstance," but has held that mitigating circumstances include an accused "act[ing] in the heat of passion caused by adequate provocation."[149] Under common law, cases interpreting what constituted adequate provocation came to recognize "fixed categories of conduct"[150] that "the law recognized as sufficiently provocative to mitigate"[151] murder to the lesser offense of manslaughter.[152]

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serious physical injury; and (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.").

California's murder statute includes two exceptions to the rule that felony murder requires that the defendant was the "actual killer." Felony murder liability may apply if the defendant either 1) had intent to kill, aided and abetted the actual killer in the commission of the murder; or 2) was a "major participant in the underlying felony and acted with reckless indifference to human life." The revised murder statute does not include these exceptions to the general rule that felony murder requires that the accused must commit the lethal act. However, a defendant in either of these cases could still be liable for murder under alternate theories. If a defendant acts with intent to kill, and aids and abets another person in committing the lethal act, the defendant may still be liable for murder as an accomplice under the rules set forth in RCC § 22E-210. Alternatively, if a defendant who acts with extreme indifference to human life may still be liable for second degree murder under a depraved heart theory.

[147] *In re D.N.*, 65 A.3d 88, 94 (D.C. 2013).

[148] *Comber v. United States*, 584 A.2d 26, 41 (D.C. 1990). Furthermore, in a murder prosecution, if evidence of mitigating circumstances is presented at trial, the government must prove beyond a reasonable doubt that mitigating circumstances were not present. If the government fails to meet this burden, but proves all other elements of murder, the defendant may only be found guilty of voluntary manslaughter. *See Harris v. United States*, 373 A.2d 590, 592-93 (D.C. 1977) ("The defendant is entitled to a manslaughter instruction if there is 'some evidence' to show adequate provocation or lack of malice aforethought.")

[149] *E.g.*, *High v. United States*, 972 A.2d 829, 833 (D.C. 2009).

[150] *Brown v. United States*, 584 A.2d 537, 540 (D.C. 1990).

[151] *Id.* at 540. See also Commentary to MPC § 210.3 at 57 ("Traditionally, the courts have also limited the circumstances of adequate provocation by casting generalizations about reasonable human behavior into rules of law that structured and confined the operation of the doctrine.").

[152] *See*, Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 Wm. & Mary L. Rev. 1027, 1036 (2011) ("The law came to recognize four distinct-and exhaustive-categories of provocative conduct considered "sufficiently grave to warrant the reduction from

In contrast, the RCC's murder statute states that acting under "extreme emotional disturbance" is a mitigating circumstance, thereby adopting the modern approach to provocation, which is more flexible in determining which circumstances are sufficient to mitigate murder to manslaughter.[153] This modern approach "does not provide specific categories of acceptable or unacceptable provocatory conduct."[154] Instead of being limited to the "fixed categories" that have been previously recognized by courts, the modern approach more generally inquires whether the "provocation is that which would cause . . . a reasonable man . . . to become so aroused as to kill another"[155] such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[156] Consistent with this modern approach, under subsection (f) of the revised murder statute, it is possible to mitigate homicides from murder to manslaughter even under circumstances that have not been traditionally recognized at common law.[157]

One notable change from the common law of provocation is that an "extreme emotional disturbance" need not have been caused wholly or in part by the decedent in order to be adequate.[158] For example, consider a case in which the accused discovers that his neighbor has killed the accused's spouse, and in a fit of rage, the accused kills a third person who attempted to protect the neighbor. Under the traditional common law approach, since the third party was not responsible for provoking the accused, mitigation would be unavailable. Under the "extreme emotional disturbance" rule however, it is at least possible that the homicide could be mitigated downwards to manslaughter. Despite its differences, the modern approach in many ways is similar to the common law approach. Under both approaches, the accused must have acted with an emotional state that would cause a person to become so "aroused as to kill another"[159] or that would "naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection."[160] Further, under both approaches, the reasonableness of the accused's reaction to the provoking circumstance is determined from the accused's view of the facts.[161]

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murder to manslaughter of a hot-blooded intentional killing." The categories were: (1) a grossly insultive assault; (2) witnessing an attack upon a friend or relative; (3) seeing an Englishman unlawfully deprived of his liberty; and (4) witnessing one's wife in the act of adultery."); Lafave, Wayne. 2 Subst. Crim. L. § 15.2 (3d ed.) ("There has been a tendency for the law to jell concerning what conduct does or does not constitute a reasonable provocation for purposes of voluntary manslaughter.").

[153] Commentary to MPC § 210.3 at 49.

[154] *Brown v. United States*, 584 A.2d 537, 542 (D.C. 1990).

[155] *Id*. at 542.

[156] Commentary to MPC § 210.3 at 63.

[157] For example, at common law, and under current DCCA case law, mere words alone are inadequate provocation. *See Brown*, 584 A.2d at 540 (D.C. 1990); D.C. Crim. Jur. Instr. § 4-202; Lafave, Wayne. 2 Subst. Crim. L. § 15.2 (3d ed.). However, under the "extreme emotional disturbance" formulation, it is at least possible that mere words, if sufficiently provocative, could constitute a reasonable cause for an extreme emotional disturbance.

[158] Commentary to MPC § 210.3 at 49.

[159] *High v. United States*, 972 A.2d 829, 833-34 (D.C. 2009).

[160] *Brown*, 584 A.2d at 543 n. 17.

[161] *See, High*, 972 A.2d at 834 (stating that instruction on voluntary manslaughter mitigation would be appropriate if "a reasonable man would have been induced to lose self-control . . . because he *believed* that his friend engaged in sexual relations with his adult step-sister" with on regard to whether this belief was factually accurate).

It is unclear whether adopting the modern "extreme emotional disturbance" approach changes current District law.[162] Although the DCCA has long used the traditional "adequate provocation" formulation[163], the Court has also noted that while under the common law, "there grew up a process of pigeon-holing provocative conduct . . . [o]ur own law of provocation in the District of Columbia began with a general formulation similar to the modern view[.]"[164] Instead of being bound by common law precedent defining specific fact patterns that constitute adequate provocation, the District may already embrace the more flexible modern approach that "does not provide specific categories of acceptable or unacceptable provocatory conduct."[165] Ultimately the DCCA has not fully reconciled its "recognition (or non-recognition) of the Model Penal Code"[166] approach to provocation, and so it is unclear how adopting the modern approach changes current law.[167]

The RCC revised murder statute's adoption of the "extreme emotional disturbance" language improves the proportionality of the criminal code by allowing courts to recognize mitigating circumstance that may not have long standing common law precedent, but nonetheless meaningfully reduce the accused's culpability. This flexibility allows courts to mitigate murder to first degree manslaughter to reflect the accused's reduced culpability when appropriate.

Second, the revised murder statute recognizes that "acting with an unreasonable belief that the use of deadly force was necessary to prevent a *person* from unlawfully causing death or serious bodily injury" constitutes a mitigating circumstance. Under this language, the actor need not have believed that the *decedent* would unlawfully cause death or serious bodily injury.[168] There is no DCCA case law on point as to whether mitigation applies if the actor believed that the use of lethal force was necessary to prevent someone other than the decedent from causing death or serious bodily injury.[169] The revised statute clarifies that mitigation applies in these circumstances.

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[162] *See*, *Comber*, 584 A.2d at 41 ("The mitigation principle is predicated on the legal system's recognition of the 'weaknesses' or 'infirmity' of human nature, R. Perkins & R. Boyce, supra, at 84; Bradford, supra, 344 A.2d at 214 (citation omitted), as well as a belief that those who kill under "extreme mental or emotional disturbance for which there is reasonable explanation or excuse" are less 'morally blameworth[y]' than those who kill in the absence of such influences. Model Penal Code, supra, § 210.3 comment 5").

[163] *E.g.*, *High*, 972 A.2d at 833.

[164] *Brown v. United States*, 584 A.2d at 542.

[165] *Brown v. United States*, 584 A.2d at 542.

[166] *Simpson v. United States*, 632 A.2d 374, 377 (D.C. 1993).

[167] For example, the DCCA has explicitly declined to decide whether the decedent must have provided the provoking circumstance.

[168] For example, if A shoots at B, unreasonably believing that B is threatening to kill A, but misses and hits bystander C, the offense could be mitigated from murder to voluntary manslaughter.

[169] Commentators have long recognized that "if the circumstances of the killing are such that it would have been manslaughter had the blow fallen on and killed the intended victim, it will also result in manslaughter if a third person is killed." Homicide by Unlawful Act Aimed at Another, 18 A.L.R. 917 (Originally published in 1922). It does not appear that the DCCA has squarely addressed whether *perfect* self defense applies when an actor reasonably believes that the use of lethal force is necessary to prevent a person from causing death or serious injury, and accidentally kills a bystander. *See*, *Commonwealth v. Fowlin*, 710 A.2d 1130, 1131 (Pa. 1998) (holding that defendant who shot assailant in self defense, and also struck innocent bystander may not be held criminally liable for injuries to the bystander).

Third, the revised murder offense may change current District law by explicitly including any other legally-recognized partial defenses, apart from imperfect self-defense, or defense of others, as a mitigating circumstance.[170] While the District's murder statutes are silent as to the relevance or definition of mitigating circumstances, DCCA case law has recognized that mitigating circumstances may be found in situations besides imperfect self-defense or defense of others.[171] However, the DCCA has not specified when the use of deadly force is justified in other circumstances,[172] and whether mitigation would be available for mistakes as to those justifications. By contrast, the RCC specifically recognizes that any other legally-recognized partial defense which substantially diminishes either the accused's culpability or the wrongfulness of the accused's conduct constitute mitigating circumstances. For example, if lethal force may be justified under certain circumstances, even absent the fear of death or serious bodily harm, then an unreasonable belief that those circumstances existed could constitute a mitigating circumstance.[173] The RCC's recognition of mitigation in situations besides imperfect self-defense or defense of others clarifies the revised murder statutes while leaving to courts the precise contours of such mitigating circumstances. Explicitly recognizing these partial defenses as mitigating circumstances improves the proportionality of the offense, by allowing courts to recognize mitigation when appropriate to reflect the accused's reduced culpability.

Fourth, in the revised second degree murder offense, felony murder requires that the accused negligently caused the death of another. While the current statute is clear that intent to cause death is not required, DCCA case law has not clearly stated whether strict liability as to death is sufficient. Some case law suggests no culpable mental state is necessary,[174] while at least one *en banc* decision suggests that a mental state of negligence is required.[175] The RCC second degree murder statute clarifies this ambiguity

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[170] *Fersner v. United States*, 482 A.2d 387, 390 (D.C. 1984).

[171] *Comber*, 584 A.2d at 41 ("mitigation may also be found in other circumstances, such as "when excessive force is used in self-defense or in defense of another and '[a] killing [is] committed in the mistaken belief that one may be in mortal danger.'"). It is possible that mitigation exists in some cases in which a person uses lethal force to prevent significant, but not serious, bodily injury.

[172] *But see*, *Evans v. United States*, 277 F.2d 354, 356 (D.C. Cir. 1960) (reversing conviction for second degree murder when trial court did not allow evidence of decedent's intoxication when defendant claimed she was "defending herself from a sexual assault.").

[173] For example, it is unclear if a person may use lethal force to prevent a sexual assault, absent fear of death or serious bodily harm. However, if repelling sexual assault justifies the use of lethal force, then a genuine but unreasonable belief that lethal force was necessary to repel a sexual assault could constitute a mitigating circumstance. *See generally*, Christine R. Essique, *The Use of Deadly Force by Women Against Rape in Michigan: Justifiable Homicide?*, 37 Wayne L. Rev. 1969 (1991).

[174] For example, the DCCA has held that "[t]he government need not establish that the killing was intended or even foreseeable." *Bonhart v. United States*, 691 A.2d 160, 162 (D.C. 1997). Notably, however, it appears that in every instance where the DCCA has applied this principle, the accused does indeed appear to have acted negligently as to the death of the victim.

[175] The *en banc* court in *Wilson-Bey* stated that the felony murder doctrine applies "in the case of a *reasonably foreseeable* killing, without a showing that the defendant intended to kill the decedent, if the homicide was committed in the course of one of several enumerated felonies." *Wilson-Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006). Other statements in the *Wilson-Bey* decision strongly suggest that "reasonably foreseeable" is the practical equivalent of criminal negligence. The opinion quotes the Model Penal Code, "To say that the accomplice is liable if the offense . . . is 'reasonably foreseeable' or the

by requiring negligence as to causing death of another. To the extent that requiring negligence may change current District case law, this change would improve the proportionality of the statute by ensuring a person who was not even negligent as to the death of another could not be punished for murder.[176] A person who was not even negligent as to death does not share the relatively high culpability that justifies murder liability for unintentionally causing the death of another while committing a specified felony.

Fifth, under the revised second degree murder offense, felony murder liability does not exist if the person killed was an accomplice to the predicate felony.[177] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when the decedent was an accomplice to the predicate felony.[178] The RCC second degree murder statute resolves this ambiguity under current law, and, to the extent it may change law, improves the proportionality of the offense. Under the revised offense, felony murder would provide greater punishment only for victims of the predicate offense or other innocent bystanders who are killed during the commission or attempted commission of an enumerated felony. When the decedent was an accomplice to the underlying offense, he or she assumed the risk in taking part in an inherently dangerous felony, and the negligent death of such a person does not warrant as severe a punishment.

Sixth, the revised second degree murder offense requires that the lethal act be committed by the accused.[179] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when someone other than the accused committed the lethal act. The revised second degree murder offense resolves this ambiguity under current law and improves the proportionality of the offense insofar as it is disproportionately severe to punish a person for murder when another person commits the lethal act (assuming no accessory or conspiracy liability).[180]

'probable consequence' of another crime is to make him liable for negligence, even though more is required in order to convict the principal actor. This is both incongruous and unjust."

[176] Even if this revision constitutes a change to current law, the practical effect of this change likely would be slight. Negligently causing death of another requires that the defendant failed to regard a substantial risk of death, and that the defendant's conduct grossly deviated from the ordinary standard of care. Even if strict liability suffices, felony murder still requires that the defendant committed or attempted to commit an inherently dangerous felony. These enumerated felonies in almost all cases create a substantial risk of death, and constitute a gross deviation from the ordinary standard of care. Fact patterns in which a defendant commits or attempts to commit an enumerated felony, and proximately causes the death of another, but do *not* also satisfy the requirements of negligence are extremely unlikely to occur.

[177] For example, if in the course of committing an armed robbery, the defendant's gun accidentally fires and fatally wounds his accomplice who was acting as a lookout, the defendant could not be convicted of felony murder based on the accomplice's death.

[178] Numerous other jurisdictions do not apply the felony murder doctrine when the decedent was an accomplice or participant in the underlying felony. Alaska Stat. Ann. § 11.41.110; N.J. Stat. Ann. § 2C:11-3; N.Y. Penal Law § 125.25; Or. Rev. Stat. Ann. § 163.115; Wash. Rev. Code Ann. § 9A.32.030.

[179] For example, if in the course of robbery, the intended robbery victim lawfully defends himself by firing shots at the robber and accidentally hits and kills a bystander, the robber himself cannot be convicted of felony murder based on the death of that bystander. Further, if the use of force by the intended robbery victim was *unlawful*, the robber's liability for that unlawful use of force is governed by RCC § 22E-1201.

[180] This limitation of the felony murder rule does not preclude murder liability anytime a non-participant's voluntary act contributes to the death of another. *See Bonhart v. United States*, 691 A.2d 160 (D.C. 1997)

Seventh, the revised second degree murder offense does not criminalize unintentionally causing the death of another while committing or attempting to commit a felony that is not specified in the statute. Although the current first degree murder statute's felony murder provisions do not specifically provide for such liability, the DCCA has stated that it is unclear if second degree murder liability applies to a non-purposeful killing that occurs during the commission of a non-enumerated felony.[181] The revised second degree murder statute resolves this ambiguity by clarifying that unintentionally causing the death of another person while committing or attempting to commit any unspecified felony is not criminalized as murder under the RCC.[182] To the extent that it may change current law, eliminating second degree murder liability for non-purposeful felony murder predicated on any felony offense also improves the proportionality of the RCC. Punishing as murder unintentionally causing death of another while committing or attempting to commit any felony, regardless of the inherent dangerousness of the felony would be disproportionately severe.[183]

Eighth, the enhanced penalty provisions recognize as aggravating circumstances that that the accused knowingly subjected the decedent to extreme physical pain or mental suffering prior to the victim's death, or mutilated or desecrated the decedent's body. Under current law, first degree murder is subject to enhanced penalties if the murder "was especially heinous, atrocious, or cruel."[184] The phrase "especially heinous, atrocious, or cruel" (EHAC) is not statutorily defined and case law is unclear as to its meaning.[185] The DCCA has held that a murder may be EHAC if it involves inflicting substantial physical pain or mental anguish prior to death,[186] but substantial physical or mental suffering may not be necessary. The Court has recognized that EHAC does "not focus exclusively upon the sensations of the victim before death."[187] For example, the DCCA has recognized that a murder involving mutilation of body parts, regardless of

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(affirming felony murder conviction when defendant committed arson, and victim ran back into burning building to rescue his property).

[181] In *Comber v. United States*, the DCCA noted that "[w]hat remains unclear in the District of Columbia is the status of one who commits a non-purposeful killing in the course of a [felony not enumerated in the first degree murder statute]."[181]

[182] Depending on the facts of the case, such an unintentional killing may be prosecuted as manslaughter or negligent homicide.

[183] This is especially true given the modern expansion of criminal code. The felony murder rule originates in English common law, and developed at a time when English law only recognized a small number of inherently dangerous felonies. Lafave, Wayne. § 14.5.Felony murder, 2 Subst. Crim. L. § 14.5 (3d ed.).

[184] D.C. Code § 22-403.01 (b-2)(2)(D).

[185] *See* Rosen, Richard, A. *The "Especially Heinous" Aggravating Circumstance in Capital Cases-the Standardless Standard*, 64 N.C. L. Rev. 941 (1986).

[186] *Parker v. United States*, 692 A.2d 913 (D.C. 1996) (murder was especially heinous, atrocious, or cruel when defendant stalked victim and victim was aware of the possibility of harm, and the victim experienced prolonged and excruciating pain, including mental suffering); *Henderson v. United States*, 678 A.2d 20, 23 (D.C. 1996) (victim suffered severe injuries, and "death came neither swiftly nor painlessly" and therefore "the death in this case was a form of torture which was especially heinous, atrocious, or cruel."); *Keels v. United States*, 785 A.2d 672, 681 (D.C. 2001) (murder was especially, heinous, or cruel based on evidence that victim "did not die instantly, that she had suffered numerous wounds, and that an object had been inserted into her vagina").

[187] *Rider v. United States*, 687 A.2d 1348, 1355 (D.C. 1996).

whether this inflicted additional suffering on the victim, can render a murder EHAC.[188] The DCCA also has stated that a murder may be EHAC if the killing is unprovoked,[189] if the accused did not deny his role in the killing,[190] if the murder involved a violation of trust,[191] if the accused's motive for the murder was to avoid returning to prison,[192] or if the murder was committed "for the fun of it."[193] However, although the DCCA has recognized these circumstances as relevant to determining whether a murder is EHAC, the DCCA has never held that these circumstances alone render a murder EHAC. In these cases, the murder also involved infliction of substantial physical or mental suffering, or both.[194]

The RCC enhanced penalty provision more clearly identifies murders involving extreme and prolonged physical or mental suffering prior to death, or mutilation or desecration of the body, as subject to heightened penalties. Other circumstances referenced in DCCA descriptions of EHAC that do not involve substantial physical or mental suffering, or mutilation or desecration of the body do not increase penalties for murder unless they satisfy another enumerated aggravating circumstance. Specifying that inflicting extreme physical pain or mental suffering, or mutilating or desecrating the body are aggravating circumstances improves the clarity of the code, and, to the extent it may change current law, helps to ensure proportionate penalties. The current EHAC formulation is vague, and creates the possibility of arbitrariness in sentencing. As the DCCA has noted, all murders "are to some degree heinous, atrocious, and cruel"[195] and the difficulty in distinguishing those murders that are especially heinous, atrocious, or cruel can lead to arbitrary and disproportionate results.[196] By omitting the vague EHAC formulation, the enhanced penalty provision improves penalty proportionality by more clearly defining the class of murders that warrant heightened punishment.

Ninth, through reference to the term "protected person," the RCC enhanced penalty provision applies recklessness as to whether the decedent is a law enforcement officer or public safety employee engaged in the course of his or her official duties. The

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[188] *Id*, at 1355 (affirming finding that murder was EHAC when defendant slashed victim's testicles and ankles despite evidence indicating that at the time victim was unconscious and unable to feel pain).
[189] *Parker*, 692 A.2d at 917 n.6.
[190] *Id.*
[191] *Henderson v. United States*, 678 A.2d 20, 24 (D.C. 1996).
[192] *Id. at* 24.
[193] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014) (noting that the legislative history of D.C. Code § 22-2104.01 indicates that murders committed "just for the fun of it" may be deemed especially heinous, atrocious, or cruel). Committee Report on the "First Degree Murder Amendment Act of 1992", Bill 9-118, at 2.
[194] *Parker*, 692 A.2d 913 (D.C. 1996) (victim experienced prolonged and excruciating pain, including mental suffering, and was stalked prior to the killing making her aware of the possibility of violence); *Henderson*, 678 A.2d 20 (D.C. 1996) (victim was alive when defendant stabbed her, severed her windpipe, and then strangled her, and her death was "a form of torture").
[195] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014); see also *State v. Salazar*, 844 P.2d 566, 585–86 (Ariz. 1992) ("If there is some 'real science' to separating 'especially' heinous, cruel, or depraved killers from 'ordinary' heinous, cruel, or depraved killers, it escapes me. It also has escaped the court.").
[196] *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (noting that the words "outrageously or wantonly vile, horrible and inhuman" in the Georgia criminal code do not create "any inherent restraint on the arbitrary and capricious infliction of the death sentence.").

current murder of a law enforcement statute[197] criminalizes intentionally causing the death of another "with knowledge or reason to know that the victim is a law enforcement officer or public safety employee" while that officer or employee is "engaged in . . . performance of such officer's or employee's official duties[.]"[198] Although the DCCA has clearly held that actual knowledge that the victim was a law enforcement officer or public safety employee is not required[199], the DCCA has not further specified the mental state as to whether the officer or employee was engaged in performance of official duties. RCC subparagraph (c)(3)(A) of the revised murder statute resolves this ambiguity and requires that the accused caused the death of another with recklessness as to whether the decedent was a law enforcement officer or public safety employee in the course of his or her official duties. Specifying a recklessness mental state improves the clarity of the criminal code by resolving this ambiguity under current District law, and is consistent with the culpable mental state requirement for other offenses in the RCC based on the decedent being a protected person.[200]

Tenth, through the definition of "protected person" the revised statute recognizes as an aggravating circumstance that the accused was reckless as to the victim being a "vulnerable adult." Under current law, it is an aggravating circumstance to first degree murder (but not second degree) that the victim is a "especially vulnerable due to age or a mental or physical infirmity."[201] Similarly, it is an aggravating circumstance to second degree murder (but not first degree) that the victim is "vulnerable because of mental or physical infirmity."[202] No current statute, nor DCCA case law, however, clarifies what types of mental or physical infirmities are required to be proven per this language. The relevant statutes are silent and there is no case law on what, if any, culpable mental state is required as to these circumstances under current District law. However, in the RCC murder statutes the penalty enhancements under subsection (c) include as an aggravating circumstance to both first and second degree murder that the victim a "vulnerable adult."[203] This change improves the consistency and proportionality of the RCC, by reflecting the special status these individuals have elsewhere in current District law,[204] and by making enhancement for murder consistent with enhancements for RCC offenses.[205]

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

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[197] D.C. Code § 22-2106.
[198] D.C. Code § 22-2106 (emphasis added).
[199] *Dean v. United States*, 938 A.2d 751, 762 (D.C. 2007).
[200] *E.g.*, RCC § 22E-1202.
[201] D.C. Code § 22-2104.01
[202] D.C. Code § 24-403.01 (b-2)(2)(G).
[203] RCC § 22E-701 ("'Vulnerable adult' means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests.").
[204] Current D.C. Code §§ 22-933 and 22-936 make it a separate offense to assault a "vulnerable adult," with penalties depending on the severity of the injury.
[205] See, e.g., RCC § 22E-1202.

First, the revised statute eliminates as a distinct form of first degree murder causing the death of another by means of poison. Current District statutory language states that a person commits first degree murder if he or she "kills another purposely . . . by means of poison[.]" This statutory language is superfluous. Virtually any purposeful murder by means of poison would involve premeditation and deliberation. This change improves the clarity of the revised first degree murder statute.

Second, the revised statute eliminates any statutory reference to the accused being "of sound memory and discretion." Current District statutory language states that "[w]hoever, being of sound memory and discretion" kills another with the requisite mens rea is "guilty of murder in the first degree."[206] Yet, under current law, it is not an element of first degree murder that the accused was "of sound memory and discretion."[207] Rather, the words "of sound memory and discretion" only refers to the basic requirement of legal sanity.[208] Under the RCC this statutory language is superfluous. The accused's sanity remains a general defense to all crimes, not just first degree murder. This change improves the clarity of the revised murder statute.

Third, the revised second degree murder offense explicitly codifies causing the death of another recklessly with extreme indifference to human life (commonly called "depraved heart murder") in paragraph (b)(1). The current second degree murder statute only defines the offense as killing another person "with malice aforethought."[209] However, the DCCA has recognized that "malice aforethought" is a common law term of art that encompasses multiple distinct mental states, including depraved heart malice.[210] The revised statute abandons this archaic legal term of art and instead specifies that causing the death of another recklessly with extreme indifference to human life constitutes second degree murder. This language is not intended to change any current DCCA case law with respect to "depraved heart murder."

Fourth, the revised second degree murder offense does not specifically criminalize acting with intent to cause serious bodily harm, and thereby causing the death of another. Under current District case law, a person commits second degree murder if

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[206] D.C. Code § 22-2101.

[207] *Hill v. United States*, 22 App. D.C. 395, 409-10 (D.C. Cir. 1903); *Shanahan v. United States*, 354 A.2d 524, 526 (D.C. 1976) (in prosecuting first degree murder, government was not required to affirmatively prove that defendant was of sound memory and discretion).

The formulation of murder requiring that the defendant be of "sound memory and discretion" dates at least as far back as 17th century England. Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi: Unintentional Killings*, 71 MISS. L.J. 35, 39 (2001) (noting that William Blackstone defined murder in the 18th relying on Sir Edward Coke's 17th century formulation, which required that the defendant be "a man of sound memory, and of the age of discretion[.]"). American courts dating back to the 19th century have interpreted the words "sound memory and discretion" as referring to the basic requirement of legal sanity. *E.g.*, *Davis v. United States*, 160 U.S. 469, 484 (1895) ("All this is implied in the accepted definition of murder, for it is of the very essence of that heinous crime that it be committed by a person of 'sound memory and discretion[.]' . . . Such was the view of the court below, which took care in its charge to say that the crime of murder could only be committed by a sane being[.]"

[208] *E.g.*, *Davis v. United States*, 160 U.S. 469, 484 (1895) ("All this is implied in the accepted definition of murder, for it is of the very essence of that heinous crime that it be committed by a person of 'sound memory and discretion[.]' . . . Such was the view of the court below, which took care in its charge to say that the crime of murder could only be committed by a sane being[.]"

[209] D.C. Code § 22-2103.

[210] *Comber* 584 A.2d at 38-39.

he causes the death of another without intent to cause death, but with intent to cause "serious bodily harm."[211] However, under the revised second degree murder offense, causing death by engaging in conduct with intent to commit serious bodily injury is still criminalized as second degree murder because it constitutes depraved heart murder under paragraph (b)(1). The current second degree murder statute's reference to acting with intent to cause serious bodily harm and thereby killing a person is superfluous to the revised second degree murder offense and its elimination clarifies the statute.

[211] *Comber* 584 A.2d at 38-39.

RCC § 22E-1102. Manslaughter.

Explanatory Note. *This section establishes the voluntary and involuntary manslaughter offenses for the Revised Criminal Code (RCC). A person commits voluntary manslaughter if he or she causes the death of another in a manner that would otherwise constitute murder, but for the presence of mitigating circumstances. At a minimum, killing another person recklessly with extreme indifference to human life, or negligently in the course of and in furtherance of specified felonies constitutes voluntary manslaughter where there are mitigating circumstances. Committing murder with a more serious culpable mental state (e.g. intentionally or purposely) would also constitute voluntary manslaughter where there are mitigating circumstances. However, the presence of mitigating circumstances is not a required element of voluntary manslaughter, and in a voluntary manslaughter prosecution the government is not required to prove that mitigating circumstances were present. Rather, the presence of mitigating circumstances is a defense to murder that, if proven, lowers the charge to manslaughter.*

The RCC voluntary manslaughter offense replaces, in part, the current manslaughter statute, D.C. Code §22-2105. A person commits involuntary manslaughter if he or she, at a minimum, recklessly causes the death of another person. The RCC involuntary manslaughter offense replaces, in part, the current manslaughter statute, D.C. Code §22-2105. Specifically, the RCC involuntary manslaughter offense replaces the two types of involuntary manslaughter recognized under current District case law: criminal negligence manslaughter,[1] and misdemeanor manslaughter.[2] Insofar as they are applicable to current manslaughter offenses, the revised manslaughter statute also partly replaces the protection of District public officials statute[3] and six penalty enhancements: the enhancement for committing an offense while armed;[4] the enhancement for senior citizens;[5] the enhancement for citizen patrols;[6] the enhancement for minors;[7] the enhancement for taxicab drivers;[8] and the enhancement for transit operators and Metrorail station managers.[9]

Subsection (a) specifies the elements of voluntary manslaughter. Paragraph (a)(1) specifies that one way a person commits voluntary manslaughter is if that person recklessly, with extreme indifference for human life, causes death of another. This subsection requires a "reckless" culpable mental state, a term defined at RCC § 22E-206, which here requires that the accused consciously disregards a substantial risk of causing death of another, and the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, recklessness alone is insufficient. The

[1] *Morris v. United States*, 648 A.2d 958, 959-60 (D.C. 1994).
[2] *Walker*, 380 A.2d at 1391.
[3] D.C. Code § 22-851.
[4] D.C. Code § 22-4502.
[5] D.C. Code § 22-3601.
[6] D.C. Code § 22-3602.
[7] D.C. Code § 22-3611.
[8] D.C. Code §§ 22-3751; 22-3752.
[9] D.C. Code §§ 22-3751.01; 22-3752.

accused must also act "with extreme indifference to human life." This form of voluntary manslaughter is identical to the "depraved heart"[10] version of second degree murder,[11] although the presence of a mitigating circumstance is a defense to this form of second degree murder. In contrast to the "substantial" risks required for ordinary recklessness, depraved heart murder (and voluntary manslaughter) requires that the accused consciously disregarded an "*extreme* risk of causing death or serious bodily injury."[12] For example, the DCCA has recognized there to be extreme indifference to human life when a person caused the death of another by: driving at speeds in excess of 90 miles per hour, and turning onto a crowded onramp in an effort to escape police[13]; firing ten bullets towards an area where people were gathered[14]; and providing a weapon to another person, knowing that person would use it to injure a third person.[15] Although it is not possible to specifically define the degree and nature of risk that is "extreme," the "extreme indifference" language in subsection (b)(1) codifies DCCA case law that recognizes those types of unintentional homicides that warrant criminalization as second degree murder.

Although consciously disregarding an extreme risk of death or serious bodily injury is necessary for this form of voluntary manslaughter, it is not necessarily sufficient. There may be some instances in which a person causes the death of another person by consciously disregarding an extreme risk of death or serious bodily injury that do not constitute extreme indifference to human life. Whether an actor engages in conduct with extreme indifference to human life depends not only on the degree and nature of the risk consciously disregarded, but also on other factors that relate to the actor's culpability.

Specifically, the same factors that determine whether an actor's conscious disregard of a substantial risk is "clearly blameworthy" as required for ordinary recklessness[16] also bear on the determination of whether an actor's conscious disregard of an extreme risk of death or serious bodily injury manifests extreme indifference to human life. These factors are: (1) the extent to which the actor's disregard of the risk was intended to further any legitimate social objectives[17]; and (2) any individual or situational

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[10] *See Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (en banc) (noting that examples of depraved heart murder include firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into . . . a moving automobile, necessarily occupied by human beings . . . .; playing a game of 'Russian roulette' with another person [.]"); *Jennings v. United States*, 993 A.2d 1077, 1078 (D.C. 2010) (depraved heart murder when defendant fired a gun at across a street towards a group of people, hitting and killing one of them); *Powell v. United States*, 485 A.2d 596 (D.C. 1984) (defendant guilty of depraved heart murder when he led police on a high speed chase, drove at speeds of up to 90 miles per hour, turned onto a congested ramp and caused a fatal car crash).

[11] *See* Commentary to RCC § 22E-1101.

[12] *Comber*, 584 A.2d at 39 (emphasis added).

[13] *Powell v. United States*, 485 A.2d 596, 598 (D.C. 1984).

[14] *Jennings v. United States*, 993 A.2d 1077, 1081 (D.C. 2010).

[15] *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (note that the defendant was guilty of second degree murder on an accomplice theory).

[16] See Commentary to RCC § 22E-206.

[17] For example, consider a person who causes a fatal car crash by driving at extremely high speeds as he rushes his child, who has suffered a painful compound fracture, to a hospital. The actor's intent to seek

factors beyond the actor's control[18] that precluded his or her ability to exercise a reasonable level of concern for legally protected interests. In cases where these factors negate a finding that the actor exhibited extreme indifference to human life, a fact finder may nonetheless find that the actor behaved recklessly, provided that the actor's conduct was clearly blameworthy.

Under the hierarchical relationship of culpable mental states defined in RCC § 22E-206, a person who purposely or knowingly causes the death of another satisfies the culpable mental state required in paragraph (a)(1).[19]

Paragraph (a)(2) specifies that a person commits voluntary manslaughter if he or she negligently causes the death of another person, other than an accomplice,[20] while committing or attempting to commit one of the enumerated felonies. This form of voluntary manslaughter is identical to the felony murder version of second degree murder,[21] although the presence of mitigating circumstances is a defense to this form of first degree murder. The statute specifies that a culpable mental state of "negligently" applies, a term defined at RCC § 22E-206 that here means that the actor should have been aware of a substantial risk that death would result from his or her conduct, and the risk is of such a nature and degree, that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive that risk is clearly blameworthy.[22] The negligently culpable mental state does not, however, apply to the enumerated felonies in subsection (b)(2), which must have their own culpable mental state requirements which must be proven. Also, it is not sufficient that a death happened to occur during the commission or attempted commission of the felony. The "mere coincidence in time" between the underlying felony and death is insufficient for felony murder liability.[23] There also must be "some causal connection between the homicide and the underlying felony."[24] The death must have been caused by an act "in furtherance" of the underlying felony.[25] The revised statute codifies this case law by requiring that the death be "in the course of and in furtherance of committing, or

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medical care and to alleviate his child's pain may weigh against finding that he acted with extreme indifference to human life.

[18] For example, consider a person who is habitually abused by her husband, who drives at extremely high speeds under threat of further abuse (insufficient to afford a duress defense) from her husband if she slows down. If that person then causes a fatal car crash, her emotional state and external coercion from her husband may weigh against finding that she acted with extreme indifference to human life.

[19] RCC § 22E-206 specifies that "When the law requires recklessness as to a result element or circumstance element, the requirement is also satisfied by proof of intent, knowledge, or purpose." Moreover, absent any applicable defense, any time a person purposely or knowingly causes the death of another ,that person manifests extreme indifference to human life.

[20] For example, if in the course of an armed robbery, the accused accidentally fires his gun, striking and killing his accomplice who was acting as a lookout, there would be no felony murder liability.

[21] *See* Commentary to RCC § 22E-1101.

[22] RCC 22E-206(e).

[23] *Head v. United States*, 451 A.2d 615, 625 (D.C. 1982).

[24] *Johnson v. United States*, 671 A.2d 428 (D.C. 1995).

[25] It is not required that the death itself facilitated commission or attempted commission of the predicate felony. Rather the lethal act must have facilitated commission or attempted commission of the predicate felony. For example, if during a robbery a defendant fires a gun in order to frighten the robbery victim, and accidentally hits and kills a bystander, felony murder liability is appropriate so long as the *act of firing the gun* facilitated the robbery.

attempting to commit" an enumerated offense.[26] In addition, the lethal act must have been committed by the accused.[27] A person may not be convicted under paragraph (b)(2) for lethal acts committed by another person.

Subsection (b) specifies that a person commits involuntary manslaughter if he or she recklessly causes the death of another. The culpable mental state of recklessness, a term defined at RCC § 22E-206, requires that the accused was consciously aware of a substantial risk of causing death, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy.[28]

Subsection (c) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[29] However, as discussed above, extreme indifference to human life in paragraph (a)(1) of the RCC murder statute requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.[30]

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and weighs against finding that the person acted with extreme indifference to human life.[31] In these cases, although the

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[26] Causing death of another is in furtherance of the predicate felony if it facilitated commission or attempted commission of the felony, or avoiding apprehension or detection of the felony. *E.g.*, *Craig v. State*, 14 S.W.3d 893, 899 (Ark. 2000) ("appellant should not have been charged with first-degree felony murder because he did not kill Jake McKinnon in the course of and in furtherance of committing or attempting to avoid apprehension for an independent felony"); *Lovette v. State*, 636 So. 2d 1304, 1307 (Fla. 1994) ("These killings lessened the immediate detection of the robbery and apprehension of the perpetrators and, thus, furthered that robbery.").

[27] For example, if during a robbery, police arrive at the scene and in an ensuing shootout the police fatally shoot a bystander, there would be no felony murder liability. However, this rule does not limit liability under any other form of homicide. If the person committing the robbery recklessly caused the death of the bystander, he may still be convicted of involuntary manslaughter, as defined in subsection (b).

[28] *See* Commentary to RCC § 22E-206.

[29] Imputation of recklessness under RCC § 22E-209 also requires that the person was negligent as to the result or circumstance.

[30] For further discussion of these terms, see Commentary to RCC § 22E-209.

[31] This is perhaps clearest where a person's self-induced intoxication is pathological—i.e., "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." Model Penal Code § 2.08(5)(c). The following hypothetical is illustrative. X consumes a single alcoholic beverage at an office holiday party, and immediately thereafter departs to the metro. While

awareness of risk may be imputed, the person could still be acquitted of voluntary manslaughter. However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for involuntary manslaughter[32], provided that his or her conduct was clearly blameworthy.

Subsection (d) establishes the penalties for voluntary and involuntary manslaughter. Paragraph (d)(1) specifies that voluntary manslaughter is a [Class X offense… RESERVED]. Paragraph (d)(2) specifies that involuntary manslaughter is a [Class X offense… RESERVED].

Paragraph (d)(3) provides enhanced penalties for both voluntary and involuntary manslaughter. If the government proves the presence of at least one aggravating factor listed under paragraph (d)(3), the penalty classification for voluntary and involuntary manslaughter may be increased in severity by one penalty class. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 8.

Subparagraph (d)(3)(A) specifies that recklessness as to whether the decedent is a protected person is an aggravating circumstance. Recklessness is defined at RCC § 22E-206, and requires that the accused was aware of a substantial risk that the decedent was a protected person, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person,

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waiting for the train, X begins to experience an extremely high level of intoxication—unbeknownst to X, the drink has interacted with an allergy medication she is taking, thereby producing a level of intoxication ten times greater than what X normally experiences from that amount of alcohol. As a result, X has a difficult time standing straight, and ends up stumbling in another train-goer, V, who X fatally knocks onto the tracks just as the train is approaching. If X is subsequently charged with voluntary manslaughter on these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances— may weigh against finding that she manifested extreme indifference to human life. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for voluntary manslaughter under the RCC if X's conduct manifested an extreme indifference to human life.

It is also possible, under narrow circumstances, for a person's self-induced intoxication to negate his or her blameworthiness even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death. If X is charged with voluntary manslaughter, under current law evidence of her voluntary intoxication could *not* be presented to negate the culpable mental state. *Wheeler v. United States, 832 A.2d 1271, 1273 (D.C. 2003) (quoting Bishop v. United States, 71 App.D.C. 132, 107 F.2d 297 (D.C. Cir. 1939)).* For example, the government's affirmative case might focus on the fact that an ordinary, reasonable (presumably sober) person in X's position would have possessed the subjective awareness required to establish extreme indifference to human life—whereas X might have difficulty persuading the factfinder that she lacked this subjective awareness without being able to point to her voluntarily intoxicated state. *See, e.g.*,Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 Sup. Ct. Rev. 191, 200 (1996) (arguing that such an approach, in effect, creates a permissive, but unrebuttable presumption of *mens rea* in situations of self-induced intoxication); Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Cal. L. Rev.943, 955 (1999) (arguing that "retain[ing] a *mens rea* requirement in the definition of the crime, but keep[ing] the defendant from introducing evidence to rebut its presence would, in effect, "rid[] the law of a culpability requirement").

[32] RCC § 22E-1102.

its disregard is clearly blameworthy. The term "protected person" is defined in RCC § 22E-701.[33]

Subparagraph (d)(3)(B) specifies that causing the death of another with the purpose of harming the decedent because of his or her status as a law enforcement officer, public safety employee, or district official is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose" a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[34] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[35] "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" 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. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

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

Relation to Current District Law. *The revised manslaughter statute changes current law in seven main ways, three of which track changes in the RCC murder statutes.*[36]

First, the revised involuntary manslaughter offense replaces the "misdemeanor manslaughter" type of manslaughter liability with a requirement that requires that the accused recklessly caused the death of another. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, including the culpable mental state required. However, the DCCA has held that one way a person commits involuntary manslaughter is if he or she

[33] RCC § 22E-701 "Protected person" means a person who is:

(A) Under 18 years of age old, and when, in fact, the defendant actor is at least 18 years of age or older old and at least 2 4 years older than the other person complainant;

(B) 65 years old or older, when, in fact, the actor is under the age of 65 years and at least 10 years younger than the complainant;

(C) A vulnerable adult;

(D)A law enforcement officer, while in the course of official duties;

(E) A public safety employee while in the course of official duties;

(F) A transportation worker, while in the course of official duties; or

(G)A District official, while in the course of official duties.

[34] For example, a defendant who murders an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing murder with the purpose of harming the decedent due to his status as a law enforcement officer.

[35] For example, if a person fires several shots above a police officer's head with the purpose of frightening the officer, and accidentally hits and kills the officer, the aggravating factor under (c)(3)(B) may apply, even if the person did not have the purpose of causing bodily injury.

[36] Under current law and the RCC, causing the death of another in a manner that constitutes murder also constitutes voluntary manslaughter, a lesser-included offense. Consequently, some RCC changes in the scope of murder liability accordingly change the scope of voluntary manslaughter.

causes the death of another person while committing or attempting to commit any offense that is "dangerous in and of itself,"[37] which requires that the offense creates "an inherent danger of physical injury[.]"[38] The DCCA has further required that the offense be committed "in a way which is dangerous under the particular circumstances of the case,"[39] meaning "the manner of its commission entails a reasonably foreseeable risk of appreciable injury."[40] In practice, this form of involuntary manslaughter in the current D.C. Code is called "misdemeanor manslaughter." By contrast, under the revised manslaughter statute there is no requirement that the accused committed or attempted to commit any other "dangerous" offense, only that the accused recklessly caused the death of another. Recklessness is defined under RCC § 22E-206, and requires that the accused consciously disregarded a substantial risk of death, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. This change improves the clarity and consistency of the criminal code by codifying a culpable mental state requirement using defined terms, and improves the proportionality of the homicide statutes by creating an intermediate offense between negligent and depraved heart killings.

Second, the revised involuntary manslaughter offense eliminates the "criminal negligence" type of involuntary manslaughter liability. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, including the culpable mental state required. However, the DCCA, relying on common law precedent, has held that a second way a person commits involuntary manslaughter is if that person causes the death of another by engaging in conduct that creates an "extreme risk of death . . . under circumstances in which the actor should have been aware of the risk."[41] The DCCA has explained that "the only difference between risk-creating activity sufficient to sustain a 'depraved heart' murder conviction and [an involuntary manslaughter] conviction 'lies in the quality of [the actor's] awareness of the risk.'"[42] Whereas depraved heart murder requires that the accused consciously disregard the risk, negligent manslaughter only requires that the accused should have been aware of the risk.[43] By contrast, the revised manslaughter statute requires that the accused consciously disregarded a substantial, though not

[37] *Walker*, 380 A.2d at 1391.
[38] *Comber*, 584 A.2d at 50.
[39] *Id.* at 51. This additional restriction was adopted to avoid injustice in cases where the underlying offense is inherently dangerous in the abstract, but can be committed in non-violent ways. For example, simple assault may generally be deemed "dangerous in and of itself," but under current law a person can commit simple assault by making non-violent but unwanted physical contact with another person. Such a non-violent assault would not be committed "in a way which is dangerous under the particular circumstances of the case," and death resulting from a non-violent simple assault would not constitute misdemeanor manslaughter.
[40] *Donaldson v. United States*, 856 A.2d 1068, 1076 (D.C. 2004) (citing *Comber*, 584 A.2d at 49 n. 33). This requirement is intended to prevent injustice when "death freakishly results" from conduct that constitutes an inherently dangerous offense, such as simple assault, that can be committed in ways that do not create a foreseeable risk of appreciably injury. *Comber*, A.2d at 50.
[41] *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996).
[42] *Comber*, 584 A.2d at 49 (quoting *Dixon v. United States*, 419 F.2d 288, 293 (D.C. Cir. 1969)).
[43] *Id.* at 48-49.

necessarily extreme, risk of death. In addition, the risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, it is not required that the accused acted with extreme indifference to human life. Negligently causing the death of another continues to be criminalized as negligent homicide, per RCC § 22E-1103. This change improves the proportionality of the revised homicide statutes by more finely grading the offense. Actors who are genuinely unaware of the risk they create, even extreme risks, are less culpable than those who are consciously aware of the risk they create.

Third, applying the general culpability principles for self-induced intoxication in RCC § 22E-209 allows a defendant to claim that due to intoxication, he or she did not form the awareness of risk required to act "recklessly, with extreme indifference to human life." However, subsection (c) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. Although self-induced intoxication is generally culpable, and weighs in favor of finding that the person acted with extreme indifference to human life, it is possible, however unlikely, that self-induced intoxication reduces the blameworthiness, and negates finding that the person acted with extreme indifference to human life.[44]

Although the current manslaughter statute is silent as to the effect of voluntary intoxication, the DCCA has held that voluntary intoxication "is not a defense to voluntary manslaughter."[45] By contrast, although subsection (c) allows for imputation of the awareness of risk, in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for voluntary manslaughter. This change improves the proportionality of the revised offense.

Fourth, the revised manslaughter statute includes multiple penalty enhancements based on the status of the decedent. The current District manslaughter statute, D.C. Code § 22-2105, does not itself provide for any enhanced penalties. However, various separate statutes in the current D.C. Code authorize enhanced penalties for manslaughter based on the victim's status, as a minor,[46] as an elderly adult[47], as a specified transportation worker,[48] or as a citizen patrol member.[49] A separate protection of District public officials offense also criminalizes harming a District official, or family member, while official is engaged in official duties, or on account of those duties.[50] By contrast, the

[44] *Infra*, at 241.
[45] *Davidson v. United States*, 137 A.3d 973, 975 (D.C. 2016).
[46] 22-3611 (enhancement for specified crimes committed against minors).
[47] D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens);
[48] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22- 3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).
[49] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).
[50] D.C. Code §22-851. Specifically, the offense criminalizes intimidating, impeding, interfering with, retaliating against, stalking, assaulting, kidnapping, injuring a District official or employee or family member of an official or employee, or damages or vandalizes the property of a District official or employee or family member of an official or employee.

RCC manslaughter offense incorporates penalty enhancements based on the status of the decedent. If a person commits voluntary or involuntary manslaughter, and was either reckless as to the victim being a "protected person," or had purpose to harm the victim because of the victim's status as a public safety employee or District official, the penalty classification for either offense may be increased by one penalty class. The term "protected person" is defined under RCC § 22E-701,[51] and differs in scope in various respects from current law.[52] For example, a victim's status as a member of a "citizen patrol" no longer is sufficient for an enhanced manslaughter penalty. Because the various types of victim-specific enhancements applicable to manslaughter are all included in the penalty enhancement provision, it is not possible to "stack" enhancements based on the status of the victim. This improves the revised penalty's proportionality by ensuring the main offense elements and gradations are the primary determinants of penalties rather than stacked enhancements. Incorporating these various enhancements, and the offense for harming a District employee or official, into a single penalty enhancement provision also reduces unnecessary overlap and improves the clarity of the code.

Fifth, through the definition of "protected person," the revised manslaughter statute provides heightened penalties if the accused was reckless as to the decedent being a law enforcement officer or public safety employee engaged in the course of official duties,[53] or had purpose to harm the decedent because of the decedent's status as a law enforcement officer or public safety employee. Currently, there is no separate manslaughter of a law enforcement officer offense, or any separate statute that provides for enhanced penalties for manslaughter of a law enforcement officer or public safety employee. By contrast, the revised manslaughter statute provides for more severe penalties than first degree manslaughter when the victim was a law enforcement officer or public safety employee. This change improves the proportionality and consistency of the criminal code by ensuring that punishment is proportionate when manslaughter is committed against a law enforcement officer or public safety employee in a manner consistent with aggravating factors applied to other offenses against persons in the RCC.

Sixth, the revised manslaughter statute does not provide enhanced penalties for committing manslaughter while armed with a dangerous weapon. Under current law, manslaughter is subject to heightened penalties if the accused committed the offense "while armed" or "having readily available" a dangerous weapon.[54] In contrast, under

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[51] RCC § 22E-701 "Protected person" means a person who is:

(A) Under 18 years of age old, and when, in fact, the defendant actor is at least 18 years of age or older old and at least 2 4 years older than the other person complainant;

(B) 65 years old or older, when, in fact, the actor is under the age of 65 years and at least 10 years younger than the complainant;

(C) A vulnerable adult;

(D)A law enforcement officer, while in the course of official duties;

(E) A public safety employee while in the course of official duties;

(F) A transportation worker, while in the course of official duties; or

(G)A District official, while in the course of official duties.

[52] *See* Commentary to RCC § 22E-1101 (describing differences in the relative ages of victims and perpetrators under the RCC as compared to current District penalty enhancements).

[53] The term "protected person" includes law enforcement officers and public safety employees engaged in the course of official duties. RCC § 22E-701.

[54] D.C. Code § 22-4502.

the revised statute, committing manslaughter while armed does not increase the severity of penalties. This change improves the proportionality of the revised code, as manslaughter while armed does not inflict greater harm than unarmed manslaughter, and therefore does not warrant heightened penalty.

Beyond these six changes to current District law, eight other aspects of the revised manslaughter statute may constitute substantive changes of law.

First, the revised manslaughter statute specifically includes felony murder as a form of voluntary manslaughter. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, including the culpable mental state required. Moreover, the DCCA has not clarified whether the current manslaughter offense includes felony murder. In *Comber v. United States*, the DCCA stated that "in all voluntary manslaughters, the perpetrator acts with the state of mind which, but for the presence of legally recognized mitigating circumstances, would constitute malice aforethought, *as the phrase has been defined for the purposes of second-degree murder*."[55] In defining malice-aforethought for the purposes of second degree murder, the DCCA noted that *first degree* murder liability attaches when the defendant accidentally kills another while committing a specified felony, but does not further clarify whether felony murder malice is included within the voluntary manslaughter offense.[56] In a later case, the DCCA noted that "this court has never explicitly recognized voluntary manslaughter to be a lesser-included-offense of first-degree felony murder" and declined to decide the issue in that case.[57] The RCC resolves this ambiguity by defining voluntary manslaughter to include felony murder. In doing so, the manslaughter statute also incorporates all changes to felony murder included in the revised second degree murder statute.

Second, the revised manslaughter statute incorporates the revised second degree murder statute's changes to felony murder liability by requiring that the accused cause the death of another while acting "in furtherance" of the predicate felony.[58] Under current law felony murder does not require that the killing be "in furtherance" of the predicate felony, and the DCCA has held that "[t]here is no requirement in the law . . . that the government prove the killing was done in furtherance of the felony in order to convict the actual killer of felony murder."[59] However, while there is no "in furtherance" requirement under current law,[60] the DCCA has held that "[m]ere temporal and locational coincidence"[61] between the underlying felony and the death are not enough. There must have been an "actual legal relation between the killing and the crime . . . [such] that the

[55] *Comber*, 584 A.2d at 37 (emphasis added).
[56] The *Comber* court explicitly declined to decide whether accidentally causing the death of another while committing or attempting to commit any *non-enumerated* felony constitutes second degree murder.
[57] *West v. United States*, 499 A.2d 860, 864 (D.C. 1985).
[58] *See* Commentary to RCC § 22E-1101.
[59] *Butler v. United States*, 614 A.2d 875, 887 (D.C. 1992).
[60] However, the DCCA has clearly held that when one party to the underlying felony causes the death of another, an aider and abettor to the underlying felony may only be convicted of felony murder if the "killing takes place in furtherance of the underlying felony." *Butler v. United States*, 614 A.2d 875 (D.C. 1992).
[61] *Johnson v. United States*, 671 A.2d 428, 433 (D.C. 1995).

killing can be said to have occurred *as a part of the perpetration of the crime*."[62] By contrast, the revised manslaughter statute, through use of the "in furtherance" phrase, requires that the accused's conduct that caused the death of another in some way facilitated the commission or attempted commission of the offense, including avoiding apprehension or detection of the offense or attempted offense.[63] Practically, this change in law may have little impact, as most cases in which the accused causes the death of another as "part of perpetration of the crime," he or she would also have been acting in furtherance of the crime. However, this change improves the proportionality of the offense insofar as a person whose risk-creating behavior is not in furtherance of the felony is not as culpable as a person who otherwise negligently kills someone in the course of committing a specified felony.[64] This change to the revised statute also maintains the revised manslaughter offense as a lesser-included offense of the revised murder offenses.

Third, the revised manslaughter statute incorporates the revised second degree murder statute's five changes to the specified felonies that can serve as a predicate to felony murder.[65] The current felony murder predicates include: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[66] (4) mayhem; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[67] By contrast, the revised

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[62] *Id.* 433 (emphasis original).

[63] Courts in other states have disagreed about the meaning of "in furtherance" language that is common in felony murder statutes. Some courts have held that "in furtherance" requires that the act that caused the death must have advanced or facilitated commission of the underlying crime. *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982); *Auman v. People*, 109 P.3d 647, 656 (Colo. 2005) (the death must occur either "in the course of" or "in furtherance of" immediate flight, so that a defendant commits felony murder only if a death is caused during a participant's immediate flight or while a person is acting to promote immediate flight from the predicate"). However, other states have interpreted "in furtherance" to only require a "logical nexus" between the underlying crime and death, to "exclude those deaths which are so far outside the ambit of the plan of the felony and its execution as to be unrelated to them." *State v. Young*, 469 A.2d 1189, 1192–93 (Conn. 1983); see also, *Noble v. State*, 516 S.W.3d 727, 731 (Ark. 2017) (rejecting appellant's argument that "in furtherance" requires that lethal act facilitated the underlying crime, but noting that a burglary committed with intent to kill cannot serve as a predicate offense to felony murder when the defendant completes the murder, because the murder was not committed in furtherance of the burglary); *People v. Henderson*, 35 N.E.3d 840, 845 (N.Y. 2015) ("[Appellant] asserts that the statutory language "in furtherance of" requires that the death be caused in order to advance or promote the underlying felony. We have not interpreted "in furtherance of" so narrowly."). The RCC tracks the former approach, requiring the death to have advanced or facilitated the commission of the underlying crime.

[64] For example, if in the course of committing a kidnapping, the defendant binds and gags the victim to prevent him from escaping, and the defendant suffocates as a result, felony murder liability would be appropriate. If however, the defendant leaves the kidnapping victim to go on an unrelated errand, and while doing so causes the death of another by driving negligently, felony murder liability would not be appropriate.

[65] *See* Commentary to RCC § 22E-1101.

[66] D.C. Code §22-2101.

[67] Under current law, burglary is divided into two grades, both of which appear to be included in the felony murder statutory reference to "housebreaking." The original 1901 Code codified the offense now known as burglary, but called it "housebreaking." The original "housebreaking" offense only had one grade, and criminalized entry of *any building* with intent to commit a crime therein. In 1940, Congress amended the

manslaughter statute changes current law by clarifying or limiting these predicate crimes to match liability as described in the revised second degree murder statute.[68] This change to the manslaughter offense improves the proportionality and consistency of the criminal code, by ensuring that the punishment is proportionate to the accused's culpability, and maintaining manslaughter as a lesser-included offense of murder offenses.

Four other changes to felony murder liability provided in the revised second degree murder offense may constitute substantive changes to the current law of manslaughter: 1) requiring a negligence mental state as to causing death for felony murder; 2) barring felony murder liability when the decedent was an accomplice to the underlying felony; 3) barring application of felony murder liability when a person other than the accused committed the fatal act; and 4) barring a person from being convicted as an accomplice to felony murder. These three changes limit the scope of felony murder to ensure that the doctrine is only applied when warranted by the accused's culpability, and when innocent bystanders are killed.[69] To the extent that these revisions change the scope of felony murder, they also change the scope of voluntary manslaughter. These possible changes to current law improve the proportionality and consistency of the criminal code. They ensure that the punishment is proportionate to the accused's culpability and maintaining manslaughter as a lesser-included offense of murder offenses.

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first degree murder statute and included an enumerated list of felonies, which included housebreaking, for felony murder. See H.R. Rep. Doc. No. 76-1821, at 1 (1940) (Conf. Rep). In 1967, Congress relabeled "housebreaking" as "second degree burglary," and created first degree burglary, which required that the burglar entered an occupied dwelling. However, the DCCA has held that only the current first degree burglary offense may serve as a predicate to non-purposeful felony murder. *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014).

[68] *See* Commentary to RCC § 22E-1101 for a detailed description of the RCC felony murder predicates as compared to current District law.

[69] *See* Commentary to RCC § 22E-1101.

RCC § 22E-1103. Negligent Homicide.

Explanatory Note. *This subsection establishes the negligent homicide offense for the Revised Criminal Code (RCC). This offense criminalizes negligently causing the death of another person. The revised offense replaces the current negligent homicide statute in D.C. Code § 50-2203.01, the criminal negligence version of involuntary manslaughter offense recognized under current District case law, and, in relevant part, the misdemeanor manslaughter version of involuntary manslaughter offense recognized under current District case law.*

Subsection (a) specifies that a person commits negligent homicide if he or she negligently causes the death of another person. The section specifies a culpable mental state of "negligence" a term defined in RCC § 22E-206 to mean that the accused should have been aware of a substantial risk of death, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy.[1]

Subsection (b) states that voluntary manslaughter is a [Class X offense… RESERVED]

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

Relation to Current District Law. *The revised negligent homicide offense changes current District law in three main ways.*

First, the revised negligent homicide offense requires that the accused acted with criminal negligence, as defined under RCC § 22E-206, rather than the civil standard of negligence required in tort actions. The District's current negligent homicide statute requires that the accused operate a vehicle in a "careless, reckless, or negligent manner[.]"[2] The D.C. Court of Appeals (DCCA) has interpreted this language to require that the accused operated a vehicle without "that degree of care that a person of ordinary prudence would exercise under the same or similar circumstances . . . It is a failure to exercise ordinary care."[3] This standard is borrowed directly from civil tort cases.[4] Although the DCCA does not always clearly define the test,[5] in accordance with general

[1] See Commentary to RCC § 22E-206.

[2] D.C. Code § 50-2203.01; *see Stevens v. United States*, 249 A.2d 514, 514-15 (D.C. 1969) ("In prosecutions for negligent homicide, the Government must prove three elements: (1) the death of a human being, (2) by instrumentality of a motor vehicle, (3) operated at an immoderate speed or in a careless reckless, or negligent manner, but not willfully or wantonly.").

[3] *Butts v. United States*, 822 A.2d 407, 416 (D.C. 2003).

[4] *See Sanderson v. United States*, 125 A.2d 70, 73 (D.C. 1956) (citing to a tort case, *Am. Ice Co. v. Moorehead*, 66 F.2d 792, 793 (D.C. Cir. 1933), to determine whether defendant was criminally liable under the negligent homicide statute). *See also*, D.C. Crim. Jur. Instr. § 4-214 (noting that the instruction defining negligence was "based primarily on instructions found in the Standardized Civil Jury Instructions for the District of Columbia").

[5] At times, District courts simply assert that conduct was "negligent" without actually discussing the relevant standard of care, and whether the defendant deviated from it. *E.g.*, *Sanderson v. United States*, 125 A.2d 70, 73 (D.C. 1956) ("Defendant admitted that he did not see the lady pedestrian until he was even with the south curb-line of P Street, when she was 3 to 5 feet away, and that he could not account for his failure to see her sooner. This was clearly negligence.").

principles of tort law, the standard of care is determined by weighing the degree of risk and severity of potential harm against the benefit of the risk-creating activity (or, the cost of abstaining from or preventing the risk-creating activity).[6]

By contrast, the revised negligent homicide statute requires criminal negligence under the RCC, a more exacting standard than civil law negligence. Whereas tort negligence requires that the accused failed "to exercise ordinary care . . . that a person of ordinary prudence would exercise under the same or similar circumstances,"[7] negligence under the RCC requires that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy.[8] The RCC's definition of negligence also requires that the accused created a "substantial" risk, whereas tort negligence has no substantial risk requirement.[9] The revised negligent homicide statute's use of the RCC definition of criminal "negligence" improves the clarity and consistency of the homicide statutes by using a codified, standardized culpable mental state definition used in other offenses. The revised statute's use of the RCC definition of criminal "negligence" also improves the proportionality of the revised homicide statutes by requiring at least a culpable mental state of criminal negligence for felony liability.[10]

Second, the revised negligent homicide offense is not limited to deaths caused by operation of a motor vehicle. The current negligent homicide offense only applies if the accused causes the death of another "by operation of any vehicle in a careless, reckless,

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[6] *See D.C. v. Walker*, 689 A.2d 40, 45 (D.C. 1997) (stating that to determine if officer's pursuing fleeing suspect acted negligently, court should inquire "whether the need to apprehend [the fleeing suspect's car] was outweighed by the foreseeable hazards of the pursuit."); *see generally*, Restatement (Second) of Torts § 282 (1965). The DCCA also has stated "a fundamental legal principle to which this court has adhered . . . [is that] the greater the danger, the greater the care which must be exercised." *Pannu v. Jacobson*, 909 A.2d 178, 198 (D.C. 2006) (internal quotations omitted).

[7] *Butts*, 822 A.2d at 416.

[8] Commentary to RCC § 22E-206.

[9] RCC § 22E-206. A defendant who causes the death of another by creating a very slight risk of death cannot be guilty of the revised negligent homicide, even if his risk-creating activity is of very little or no social value. The substantial risk requirement however overlaps significantly with the "gross deviation" requirement in the definition of negligence. It is unlikely a person can grossly deviate from the ordinary standard of care without also creating a sufficiently substantial risk of death.

[10] Requiring more than civil negligence for felony crimes is a norm of American criminal law has deep roots, dating back to English common law. *See Morissette v. United States*, 342 U.S. 246, 251-52 (1952) ("A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized."). Similarly, the DCCA has recently relied on "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability." *Owens v. United States*, 90 A.3d 1118, 1121 (D.C. 2014) (citing *DiGiovanni v. United States*, 580 A.2d 123, 126 (D.C. 1990) (J. Steadman, concurring)). However, using civil negligence as a basis for criminal liability is not unheard of, nor does applying simple negligence necessarily violate Due Process. *See State v. Hazelwood*, 946 P.2d 875, 878-79 (Alaska 1997) ("there must be some level of mental culpability on the part of the defendant. However, this principle does not preclude a civil negligence standard.").

or negligent manner[.]"[11] By contrast, the revised negligent homicide offense criminalizes negligently causing the death of another regardless of whether a vehicle was involved. This change improves the proportionality of the revised negligent homicide offense insofar as negligently causing the death of another by operation of a motor vehicle is not more culpable than negligently causing the death of another by other means.

Third, revised negligent homicide offense requires a lower culpable mental state than that required under the current "criminal negligence" form of involuntary manslaughter. The current "criminal negligence" form of involuntary manslaughter requires that the accused causes the death of another by engaging in conduct that creates an "extreme risk of death . . . under circumstances in which the actor should have been aware of the risk."[12] The DCCA has explained that "the only difference between risk-creating activity sufficient to sustain a 'depraved heart' murder conviction and [an involuntary manslaughter] conviction 'lies in the quality of [the actor's] awareness of the risk.'"[13] Whereas depraved heart murder requires that the accused consciously disregard the risk, negligent manslaughter only requires that the accused should have been aware of the risk.[14] By contrast, the revised negligent homicide uses a less exacting standard than the current involuntary homicide case law indicates, and does not require that the accused created an extreme risk of death. Any conduct that would have satisfied the "criminal negligence" form of involuntary manslaughter would satisfy the revised negligent homicide offense. This change improves the clarity and consistency of the criminal code by codifying a culpable mental state requirement using defined terms, and improves the proportionality of the homicide statutes by creating an intermediate grade that requires less culpability than reckless manslaughter, but more than negligence required in tort law.

[11] D.C. Code § 50-2203.01.
[12] *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996).
[13] *Comber v. United States*, 584 A.2d 26, 49 (quoting *Dixon v. United States*, 419 F.2d 288, 293 (D.C. Cir. 1969)).
[14] *Id.* at 48-49.

RCC § 22E-1201. Robbery.

Explanatory Note. *This section establishes the robbery offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes taking, or exercising control over property that another person possesses on their person or has within their immediate physical control by means of causing bodily injury, use of overpowering physical force, or threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act, or by taking property from the person's hands or arms. The penalty gradations are based on the severity of bodily injury caused, whether the robbery or bodily injury was caused by means of a dangerous weapon or imitation dangerous weapon, whether the robbery was committed against a protected person, and whether the property involved was a motor vehicle. Taking or exercising control over property from the person or from the immediate physical control of another without bodily injury, threats, or overpowering physical force is no longer criminalized as robbery in the RCC, but as a form of theft. The revised robbery statute replaces the District's current robbery statute,[1] its carjacking statute,[2] and associated penalty provisions.[3] Insofar as they are applicable to current robbery and carjacking offenses, the revised robbery offense also replaces the protection of District public officials statute[4] and seven penalty enhancements: the enhancement for committing an offense while armed;[5] the enhancement for senior citizens;[6] the enhancement for citizen patrols;[7] the enhancement for minors;[8] the enhancement for taxicab drivers;[9] and the enhancement for transit operators and Metrorail station managers;[10] and aggravating circumstances to impose a sentence in excess of 30 years for armed carjacking.[11]*

Subsection (e) establishes the elements for fifth degree robbery, which are also required for all other grades of robbery. Paragraph (e)(1) specifies that the defendant must take, or exercise control over property of another.[12] The term "property of another" is defined under RCC § 22E-701 as property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property.[13] Paragraph (e)(1) also specifies that the culpable mental state

[1] D.C. Code § 22-2801.
[2] D.C. Code § 22-2803.
[3] D.C. Code § 24-403.01(e) (statutory minimum of 2 year imprisonment sentence for adults committing armed robbery in violation of D.C. Code § 22-4502 if a prior conviction for crime of violence).
[4] D.C. Code § 22-851.
[5] D.C. Code § 22-4502.
[6] D.C. Code § 22-3601.
[7] D.C. Code § 22-3602.
[8] D.C. Code § 22-3611.
[9] D.C. Code §§ 22-3751; 22-3752.
[10] D.C. Code §§ 22-3751.01; 22-3752.
[11] D.C. Code § 24-403.01(b-2).
[12] The conduct described by the phrase "takes, or exercises control over" is the same as the conduct described by identical language in the RCC § 22E-2102 theft and other property offenses.
[13] Generally, this element bars robbery liability if a person uses force or threats to take his or her own property. A person who uses force to take his own property could potentially be found guilty of criminal menacing or assault, though a defense of property could be available depending on the facts of the case. *See, Gatlin v. United States*, 833 A.2d 995, 1008 (D.C. 2003) ("It is well settled that a person may use as much force as is reasonably necessary to eject a trespasser from his property, and that if he uses more force

for (e)(1) is knowledge, a term defined at RCC § 22E-206 to mean that the accused must have been aware to a practical certainty that he would take or exercise control over property of another. Per the rule of interpretation in RCC § 22E-207, the "knowingly" mental state from (e)(1) applies to the "property of another" element, requiring that the defendant was aware to a practical certainty that the item is "property of another."

Paragraph (e)(2) specifies that the defendant must take or exercise control over property "[t]hat the complainant possesses either on his or her person or within his or her immediate physical control[.]" The phrase "immediate physical control" is intended to follow current District case law defining "immediate actual" possession. Property is within the complainant's "immediate physical control" when the property is in an "area within which the victim can reasonably be expected to exercise some physical control over the property."[14] Property also is in the immediate physical control of a person when that person is able to exercise control over it at the time of the alleged crime, even it is located far enough from that person that he or she cannot exercise physical control over it,[15] or if the property is intangible and is therefore not located in any specific place.[16] Per the rule of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to the element in paragraph (e)(2), requiring that the accused was aware to a practical certainty or consciously desired that the property was possessed by the complainant either on his or her person, or within his or her immediate physical control.

Paragraph (e)(3) requires that the defendant act "with intent to" deprive the owner of property.[17] "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. 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 a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (e)(4) requires that the person takes or exercises control over property by employing one of the four alternatives listed in (e)(4)(A)-(D). The phrase "does so by" requires that the alternatives listed under (e)(4)(A)-(D) must play a causal role in the taking, or exercise of control over the property. Temporally, it is not required that when

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than is necessary, he is guilty of assault."). However, robbery liability may still apply if a person uses force or threats to take property that he *jointly owns*.

[14] *Sutton v. United States*, 988 A.2d 478, 485 (D.C. 2010).

[15] For example, if a person is able to immediately transfer an object by calling from her phone, that object may be within her immediate physical control, even though the object is located farther away than would permit for physical control.

[16] For example, if a person is able to immediately transfer electronic funds from his phone, those electronic funds may be within his immediate physical control, even though the funds are intangible and in no specific location.

[17] The culpable mental state described by the phrase "With intent to deprive that person of the property" is the same as the culpable mental state described by identical language in the RCC § 22E-2102 theft and other property offenses.

the defendant caused bodily injury, made threats, or used force, he or she had already formed an intent to take or exercise control over property.[18] The phrase "does so by" also includes the use of force or threats to repel an immediate attempt by the owner to re-obtain property taken by the accused,[19] or to keep property permanently after the other person consented to an initial temporary taking.[20] The phrase "physical force that overpowers" is intended to include significant uses of force[21] and incidental jostling or touching does not satisfy this element.[22] "Bodily injury" is a term defined under RCC § 22E-701, and requires "physical pain, illness, or any impairment of physical condition." The terms "sexual act" and "sexual contact" are defined in RCC § 22E-701, and include various forms of sexual penetration and touching.[23]

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[18] For example, a person who causes bodily injury with no intent to take or exercise control over property, but then realizes that the bodily injury creates an opportunity to take or exercise control over property—and does so or attempts to do so—could still be convicted of robbery. *See, Gray v. United States*, 155 A.3d 377 (D.C. 2017).

[19] *See, Jacobs v. United States*, 861 A.2d 15 (D.C. 2004), recalled and vacated, 886 A.2d 510 (D.C. 2005). 4 CHARLES W. TORCIA, WHARTON'S CRIMINAL LAW § 463, at 39-40 (15th ed. 1996) ("A thief who finds it necessary to use force or threatened force after a taking of property in order to retain possession may in legal contemplation be viewed as one who never had the requisite dominion and control of the property to qualify as a 'possessor.' Hence, it may be reasoned, the thief has not 'taken' possession of the property until his use of force or threatened force has effectively cut off any immediate resistance to his 'possession.' "); *but see*, Lafave, Wayne. § 20.3.Robbery, 3 Subst. Crim. L. § 20.3 (2d ed.) ("under the traditional view it is not robbery to steal property without violence or intimidation . . . although the thief later, in order to retain the stolen property or make good his escape, uses violence or intimidation upon the property owner").

[20] *See, Jacobs v. United States*, 861 A.2d 15, 20 (D.C. 2004) *recalled, vacated, and reissued*, 886 A.2d 510 (D.C. 2005).

[21] Examples may include pushes, pulling, and holds if the facts of the case show that such conduct overwhelmed the complainant.

[22] There is no clear bright line rule for determining the degree of force required under this subparagraph. For example, grabbing a purse from someone's hand or from under their arm would not necessarily constitute robbery. The relevant question is whether the physical force overpowered the complainant or satisfied another means of committing robbery. If in the process of taking a purse from under the complainant's arm or out of their hand the complainant experiences some pain (e.g. from yanking their arm) or is overpowered (e.g. losing a tug of war over the object or pulling that involves enough force to cause that person to fall to the ground), the actor is liable. Similarly, the force necessary to complete pickpocketing, may constitute robbery if there was a bodily injury (a defined term that includes the infliction of any pain), a threat of a specified type, or the use of physical force that overpowers another person. Typically, pickpocketing is unlikely to involve such conduct, but may in some circumstances (e.g., an actor who, while running, crashes into the complainant, knocking them to the ground while surreptitiously taking the complainant's wallet).

[23] The term "sexual act" 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 someone with such a desire; or (D)Conduct described in subsections (A)-(C) between a person and an animal.

The term "sexual contact" 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 someone with such a desire.

Paragraph (e)(4) also specifies a "knowingly" culpable mental state, requiring that the accused be aware to a practical certainty that he or she took or exercised control over property, by one of the means listed in subparagraphs (e)(4)(A)-(D). This requires both that the defendant was aware to a practical certainty that he or she was causing bodily injury or other act specified in (e)(4)(A)-(D); and that the defendant was aware that the use of these means in some way causally aided or facilitated taking or exercising control over the property.[24] Temporally, it is not required that when the defendant caused bodily injury, made threats, or used overpowering physical force, he or she had already formed an intent to take or exercise control over property.[25]

Subsection (d) defines four alternative ways of committing fourth degree robbery. Fourth degree robbery requires that the defendant commit the elements of fifth degree robbery, and in the course of doing so, also satisfies the elements under sub-subparagraphs (d)(2)(A)(i)-(iii), or (d)(2)(B).[26] Under sub-subparagraph (d)(2)(A)(i), a person commits fourth degree robbery when, in the course of committing fifth degree robbery, he or she recklessly causes significant bodily injury to someone physically present, other than an accomplice. "Significant bodily injury" is a term defined under RCC § 22E-701, as an injury that "to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer."[27] The defendant still must have satisfied all the elements of fourth degree robbery,[28] including *knowingly* using physical force, causing bodily injury, or making threats. However, it is sufficient if the defendant was merely *reckless* as to causing *significant* bodily injury.[29] Under (d)(2)(A)(ii), a person commits fourth degree robbery when in the course of committing fifth degree robbery, he or she recklessly displays or uses what is, in fact, a dangerous weapon or imitation dangerous

[24] Because it must be proven that the defendant knew that his or her use of overpowering physical force, bodily injury, or criminal menace was a cause of his or her taking or exercising control over property, an effective consent defense is not applicable to robbery.

[25] For example, a person who causes bodily injury with no intent to take or exercise control over property, but then realizes that the bodily injury creates an opportunity to take or exercise control over property—and does so or attempts to do so—could still be convicted of robbery. *See, Gray v. United States*, 155 A.3d 377 (D.C. 2017).

[26] Notably, the elements in sub-subparagraphs (d)(2)(A)(i)-(iii) of third degree robbery—as well as the gradation-specific elements third degree, second degree, and first degree, robbery—need not aid or facilitate the robbery. It is only in fifth degree robbery, and the incorporation of the elements of fifth degree robbery into more serious gradations, that there is a requirement that the defendant's use of physical force or, bodily injury, or threats must be a means of committing or facilitating flight from the taking or exercise of control over property.

[27] In addition, "significant bodily injury" also includes: "a fracture of a bone; a laceration that is at least one inch in length and at least one quarter inch in depth; a burn of at least second degree severity; a temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation." RCC §22E-701.

[28] The reference to a third degree robbery in more serious robbery gradations imposes no additional culpable mental state requirements on the elements of third degree robbery, nor eliminates any such culpable mental state requirements.

[29] For example, the culpable mental state requirements as to sub-subparagraph (c)(2)(A)(i) may be satisfied when the accused knowingly causes bodily injury by shoving a person to the ground, and in doing so accidentally breaks the person's arm. Although the accused did not intend to break the person's arm, if he was reckless as to that degree of injury, third degree robbery liability may apply.

weapon. The terms "dangerous weapon" and "imitation dangerous weapon" are defined under RCC § 22E-701. Under sub-subparagraph (d)(2)(A)(iii) a person commits fourth degree robbery if in the course of committing fifth degree robbery, he or she recklessly causes bodily injury to a protected person. The term "protected person" is defined under RCC § 22E-701. Under subparagraph (d)(2)(B), a person commits fourth degree robbery when the property that he or she takes or exercises control over is a motor vehicle. Subparagraph (d)(2)(B) uses the term "in fact" to specify that there is no culpable mental state as to whether the property was a motor vehicle.

Subsection (c) defines three alternate versions of third degree robbery. Third degree robbery requires that the person commit the elements of fifth degree robbery, and in the course of doing so satisfies at least one of the elements under subparagraphs (c)(2)(A)-(B). Under sub-subparagraph (c)(2)(A)(i), a person commits third degree robbery if he or she recklessly causes significant bodily injury to a protected person, other than an accomplice. The term "significant bodily injury" is defined in RCC § 22E-701 as "a bodily injury that, to prevent long term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer." Under this subsection the person must be reckless as to the complainant being a protected person. Under sub-subparagraph (c)(2)(A)(ii), a person commits third degree robbery if he or she recklessly causes bodily injury by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. This sub-subparagraph requires that the person actually cause bodily injury by displaying or using a dangerous weapon or imitation dangerous weapon.[30] The term "use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[31] Under subparagraph (c)(2)(B), a person commits third degree robbery when the property of another that he or she takes or exercises control over is a motor vehicle, and the person displays or uses a dangerous weapon or imitation weapon. Subparagraph (c)(2)(B) uses the term "in fact" to specify that there is no culpable mental state requirement as to whether the property was a motor vehicle, or as to whether the object used to commit the robbery was a dangerous weapon or imitation dangerous weapon.

Subsection (b) defines two alternate versions of second degree robbery. Second degree robbery requires that the person commit the elements of fifth degree robbery, and in the course of doing so, satisfies at least one of the elements under subparagraph (b)(2)(A) or (b)(2)(B). Under subparagraph (b)(2)(A), a person commits second degree robbery if he or she recklessly causes serious bodily injury to someone present, other than

[30] It is insufficient if the person causes bodily injury by some other means, while merely possessing, but not displaying or using, a dangerous weapon or imitation dangerous weapon. However, this element may be satisfied if the person displays a weapon or imitation weapon in order to frighten or incapacitate the other person, and then uses other means to cause the bodily injury. For instance, an actor may satisfy this element if the actor brandishes a firearm or imitation firearm that causes the complainant to stop walking and submit to the actor's directions, then pushes the complainant down a flight of steps which causes bodily injury. In such a case, the question is whether the display of the dangerous weapon or imitation dangerous weapon incapacitated the complainant in a way that made the complainant vulnerable to the subsequent harm of being pushed down the steps.

[31] For further detail on what conduct constitutes "using" a dangerous weapon, see Commentary to menacing, RCC § 22E-1203.

an accomplice.[32] The term "serious bodily injury" is defined in RCC § 22-701 as an injury "that involves: a substantial risk of death; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member or organ." As with fifth degree robbery, although the defendant must knowingly use physical force, cause bodily injury, or make threats, recklessness as to causing serious bodily injury suffices. Under subparagraph (b)(2)(B), a person commits second degree robbery if he or she recklessly causes significant bodily injury by displaying or using a dangerous weapon or imitation dangerous weapon, in the course of committing fifth degree robbery. This subparagraph requires that the defendant actually used the dangerous weapon or imitation dangerous weapon to cause the significant bodily injury.[33] The term "use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[34] The phrase "in fact" specifies that there is no culpable mental state requirement as to whether the weapon used to cause the significant bodily injury was a "dangerous weapon."

Subsection (a) defines two alternate versions of first degree robbery. First degree robbery requires that the defendant commit the elements of fifth degree robbery, and, in the course of doing so, satisfies the elements under (a)(2)(A) or (B). Under subparagraph (a)(2)(A) a person commits first degree robbery if he or she recklessly causes serious bodily injury to any person physically present, other than an accomplice, by using or displaying a dangerous weapon or imitation dangerous weapon. This subparagraph requires that the defendant actually used the dangerous weapon or imitation dangerous weapon to cause the serious bodily injury.[35] The term "use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[36] The phrase "in fact" specifies that there is no culpable mental state as to whether the weapon used to cause the serious bodily injury was a "dangerous weapon." Under subparagraph (a)(2)(B), a person commits first degree robbery if he or she recklessly causes serious bodily injury to a "protected person" other than an accomplice. A reckless mental state applies as to whether the person who suffered the serious bodily injury was a "protected person." Although the defendant must have knowingly used overpowering physical force, caused bodily injury, or made specified threats, a recklessness mental state suffices as to causing serious bodily injury.

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[32] A serious bodily injury necessarily constitutes a significant bodily injury.

[33] It is insufficient if the defendant causes significant bodily injury by some other means, while merely possessing, but not displaying or using, a dangerous weapon or imitation dangerous weapon. However, this element may be satisfied if the person displays a weapon in order to frighten or incapacitate the other person, and then uses other means to cause the bodily injury. See footnote to commentary on subsection (c) of robbery.

[34] For further detail on what conduct constitutes "using" a dangerous weapon, see Commentary to menacing, RCC § 22E-1203.

[35] It is insufficient if the defendant causes serious bodily injury by some other means, while merely possessing, but not displaying or using, a dangerous weapon or imitation dangerous weapon. However, this element may be satisfied if the person displays a weapon in order to frighten or incapacitate the other person, and then uses other means to cause the bodily injury. See footnote to commentary on subsection (c) of robbery.

[36] For further detail on what conduct constitutes "using" a dangerous weapon, see Commentary to menacing, RCC § 22E-1203.

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

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

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

First, the revised robbery offense does not criminalize non-violent pickpocketing or taking or exercising control over property without the use of bodily injury, overpowering physical force, or threats to cause bodily injury or to engage in a sexual act or sexual contact. The current robbery and carjacking statutes criminalize all pickpocketing and other takings of property from the person or from the immediate physical control of another by sudden or stealthy seizure, or snatching, even when the complainant did not know the property was taken (and so was not menaced, let alone injured).[37] By contrast, under the RCC, such non-violent pickpocketing from the person are criminalized as theft[38] instead of robbery, unless the property is taken from the person's hands or arms. Taking an object from the person or from the immediate physical control of another person without his or her knowledge,[39] or with only minor

[37] *Spencer v. United States*, 73 App. D.C. 98 (D.C. Cir. 1940) (affirming robbery conviction when defendant took cash from person's pants, which were resting on a chair at the foot of a bed that defendant was using at the time); *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994). Unlike the clear case law on robbery, whether current District law on carjacking extends liability to takings that occur without a criminal menace or use of force is not firmly established in District case law. However, the statutory language regarding "sudden or stealthy seizure, or snatching" that requires no use of force or criminal menace is identical in the current robbery and carjacking statutes. And, in at least one case, the DCCA, ruling on other issues, appears to have upheld a carjacking conviction on facts that involved a sudden and stealthy seizure with no apparent criminal menace, use of physical force, or bodily injury. *See Young v. United States*, 111 A.3d 13, 14 (D.C. 2015) (affirming multiple convictions for carjacking, first degree theft, and unauthorized use of a motor vehicle based on the defendant's taking a car with keys in it while the owner was standing nearby).

In a 2017 case, in response to an argument in the dissent, the DCCA rejected the proposition that any taking from the person of another person is robbery instead of theft because "[s]uch a principle would completely nullify the 'by force or violence' element of robbery." *Gray v. United States*, 155 A.3d 377, 386 (D.C. 2017); *see also id.* at 386 n.18 (recognizing that "there are passages in opinions . . . that, divorced from context, could be read as supporting the broad proposition advanced by the dissent" that any theft from a person or from his or her immediate possession constitutes a robbery, but stating that "[w]e are unaware of any opinion binding on us that actually *holds* that this is the case."). However, this discussion about the limits of sudden or stealthy seizure or snatching under the current robbery statute is dicta. The jury was not instructed on sudden or stealthy seizure or snatching, *id.* at 382 & n. 13, and this provision of the current robbery statute was not addressed in the court's holding. The issue in *Gray* was whether the trial court erred in refusing to instruct the jury on the lesser included offense of second degree theft. *Id.* at 382. The court stated that "[o]ur earlier opinions glossed 'by force or violence' as 'using force or violence' or 'accomplished by force of by putting the victim in fear' . . . suggesting that we understood the statute to require proof of some sort of purposeful employment or at least knowing exploitation of force or violence." *Id.* at 384 (internal citations omitted). The DCCA held that the trial court did err because, under the "unusual" facts of the case, "the jury rationally could have doubted that [appellant] assaulted the women intending to effectuate the theft or that, in taking [complainant's] money, [appellant] was conscious of any fear (and lowered resistance) [complainant] might have experienced from the assaults." *Id.* at 383.

[38] *See* D.C. Code § 22E-2101.

[39] The DCCA has defined "immediate actual possession" under the robbery statute "refers to the area within which the victim can reasonably be expected to exercise some physical control over the property."

touching that does not cause bodily injury or involve overpowering physical force merits less severe punishment than takings that involve physical harm or criminal menacing. This change improves the proportionality of the robbery statute.

Second, the revised robbery statute divides the offense into five grades of robbery based chiefly on the extent of the violence involved in taking or exercising control over property. The current robbery statute consists of a single grade that does not distinguish between crimes in which the defendant went entirely unnoticed by the complainant (e.g., pickpocketing) and those where the defendant inflicted serious bodily injury. By contrast, the revised statute is graded chiefly by the extent of violence in the robbery. The revised robbery statute largely follows existing District law in conceptualizing robbery as a composite offense involving a theft from a person and an assault. All grades of the revised robbery statute require that the defendant took or exercised control over property from the person or from the immediate physical control of another by causing bodily injury, threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act, or using overpowering physical force. The chief variations in the lower four grades of the revised statutes correspond to the main distinctions in intrusion under the current and revised assault statute—threats/overpowering physical force/bodily injury (lowest level harm), significant bodily injury (intermediate level harm), display or use of a dangerous weapon (intermediate level harm); and serious bodily injury (most severe harm). The taking of a motor vehicle, accounting for the current carjacking offense, is also integrated into the revised robbery gradations. The revised robbery offense's new grading scheme creates consistency with the revised assault offenses, and improves the proportionality of punishment by matching more severe penalties to those robberies that inflict greater harms.

Third, the revised robbery statute's grading scheme integrates penalty enhancements for using a dangerous weapon or imitation dangerous weapon, and replaces the enhanced penalties authorized under current D.C. Code § 22-4502, when committing robbery "while armed" or "having readily available" a dangerous weapon or imitation dangerous weapon. The replacement of D.C. Code § 22-4502 by the weapon provisions in the revised robbery offense changes current District law. Existing District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the defendant either had "actual physical possession of [a weapon]";[40] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[41] provided that the defendant also constructively possessed the

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Sutton v. United States, 988 A.2d 478, 485 (D.C. 2010). *See also*, *Beaner v. United States*, 845 A.2d 525, 532-33 (D.C. 2004) (holding that the term "immediate actual possession," as used in the carjacking statute was borrowed from the robbery statute, includes a car that was several feet from the owner when it was taken).

[40] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).

[41] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).

weapon.[42] There is no further requirement under current law that the defendant actually used the weapon or caused any injury.[43] By contrast, in the RCC robbery offense the defendant must actually cause bodily injury or make threats "by displaying or using" a dangerous weapon or imitation dangerous weapon. Merely being armed with or having readily available, a dangerous weapon or imitation dangerous weapon would not be sufficient for the higher grades of robbery.[44] Including enhancements for use of a dangerous weapon or imitation dangerous weapon within the revised robbery statute gradations improves the proportionality of punishment both by matching more severe penalties to those robberies that actually inflict greater harms by use of a weapon, and tailoring the effects of the weapon enhancement instead of relying on a separate statute that generally enhances multiple offenses and levels of robbery with the same penalty.

Fourth, through the revised robbery statute's references to a "protected person," the offense creates new penalty enhancements for harms to several groups of persons, reduces penalty enhancements for some persons, and creates more proportionate penalties for harms to other groups of persons. Current District statutes provide additional liability for robbery committed against certain groups of persons. The District's protection of District public officials statute penalizes various actions, including robberies, against a District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee.[45] The District also has penalty enhancements for robbery or carjacking of: minors;[46] senior citizens;[47] taxicab drivers;[48] and transit operators and Metrorail station managers.[49] Robbery and assault with intent to rob a member of a citizen patrol[50] are also subject to enhanced penalties.

In contrast with current law, the RCC robbery statute, through its references to harms to a "protected person," extends a new penalty enhancement to groups recognized elsewhere in the current D.C. Code as meriting special treatment: non-District

[42] *Cox v. United States*, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

[43] *See, Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).

[44] Note that per the revised possession of a dangerous weapon during a crime offense, RCC § 22E-4104, the revised criminal code will still provide for additional punishments when committing a robbery while possessing, but not using or displaying, a dangerous weapon.

[45] D.C. Code § 22-851. A defendant who commits robbery under the revised statute necessarily commits an assault, and would be subject to the provisions of D.C. Code § 22-851(c) and (d). Where a robbery "intimidates, impedes, interferes" or has other statutorily specified results on a District official or employee, the defendant may be subject to D.C. Code § 22-851(b). In addition, since robbery requires taking property, any person who commits a robbery of a District official, employee, or family member of a District official or employee, may be subject to D.C. Code § 22-851 (c) or (d).

[46] D.C. Code § 22-3611.

[47] D.C. Code § 22-3601.

[48] D.C. Code §§ 22-3751; 22-3752.

[49] D.C. Code §§ 22-3751.01; 22-3752.

[50] D.C. Code § 22-3602.

government law enforcement and public safety employees in the course of their duties;[51] operators of private-vehicles-for hire in the course of their duties;[52] vulnerable adults.[53] Unlike current law, the RCC robbery statute, however, does not provide a penalty enhancement for: persons robbed because of their participation in a citizen patrol (but not while on duty);[54] persons robbed because of their status as District employees who do not qualify as District officials (but not while on duty);[55] and persons robbed because of their familial relationship to a District official or employee;[56] persons under the age of 18 (unless the defendant is 18 years of age or older, and at least 4 years older than the complainant);[57] or persons more than 65 years of age when the defendant is less than 10 years younger than the complainant.[58] The RCC robbery statute also applies penalty enhancements across multiple gradations, rather than the one robbery and one carjacking gradation in current law, creating a more proportionate application of all these penalty enhancements.[59] The RCC robbery statute also limits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the use of a weapon.[60]

Collectively, these changes provide a consistent enhanced penalty for robbing the categories of individuals included in the definition of "protected person," removing gaps in the current patchwork of separate enhancements, clarifying the law, and improving the proportionality of offenses. Extending enhanced protection for robbing individuals such as operators of private vehicles-for-hire, "vulnerable adults," and on-duty law enforcement officers and public safety employees who are not-District employees further reduces unnecessary gaps and improves the proportionality of the statutes.

Fifth, the revised robbery offense provides distinct liability for carjacking and carjacking by using or displaying a dangerous weapon or imitation dangerous weapon in its gradations, and requires a person to act knowingly with respect to taking or exercising

[51] See commentary to RCC § 22E-701 regarding the definition of a law enforcement officer.
[52] While taxicab drivers are currently the subject of a separate enhancement in § 22-3751, the enhancement was enacted in 2001, well before the ubiquity of private vehicles-for-hire. The Council recently amended certain laws applicable to taxicabs and taxicab drivers to include private vehicles-for-hire. Vehicle-for-Hire Accessibility Amendment Act of 2016.
[53] Current D.C. Code §§ 22-933 and 22-936 make it a separate offense to assault a "vulnerable adult," with penalties depending on the severity of the injury.
[54] D.C. Code § 22-3602(b).
[55] D.C. Code § 22-851.
[56] D.C. Code § 22-851.
[57] D.C. Code § 22-3611 authorizes heightened penalties for robbery when the complainant is under the age of 18, and the actor is at least 2 years older than the complainant.
[58] D.C. Code § 22-3601 authorizes heightened penalties for robbery when the complainant is 65 years of age or older, but does not require that the defendant be at least 10 years younger than the complainant.
[59] The District's current penalty enhancements for minors, senior citizens, taxicab drivers, transit operators, and citizen patrol members increase the maximum term of imprisonment by 1 ½ times the amount otherwise authorized. Robbery currently has a 2-15 year imprisonment penalty (3-22.5 years with one enhancement) and carjacking has a 7-21 year imprisonment penalty (10.5-31.5 years with one enhancement).
[60] Current District statutory law does not address the stacking of such enhancements, and case law has not addressed the stacking of enhancements based on the categories covered in the RCC definition of protected person. However, convictions have been upheld applying both a "while armed" enhancement under D.C. Code § 22-4502 and an enhancement based on the victim's status as a senior or minor.

control over a motor vehicle. Under current law carjacking is a legally distinct offense and only requires that the person acts "recklessly" with respect to the taking or exercise of control over the motor vehicle. However, there is no clear basis for requiring a lower culpable mental state for carjacking as compared to robbery generally, and it is not clear from legislative history that the Council intended such a difference.[61] By contrast, requiring a knowing culpable mental state is consistent with the current D.C. Court of Appeal's (DCCA) requirement of knowledge as to the lack of effective consent in the District's unauthorized use of a motor vehicle (UUV) statute[62] and in the revised UUV statute. Requiring a knowing culpable mental state also makes the revised robbery offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[63] Including carjacking as a form of robbery also improves the proportionality of punishment by prohibiting convictions for both robbery and carjacking based on a single act or course of conduct.[64] In addition, including carjacking by using or displaying a dangerous weapon or imitation dangerous weapon as a gradation of robbery also replaces the portion of current D.C. Code § 24-403.01(b-2) that authorizes heightened penalties for committing carjacking while armed.[65] Replacing this portion of the current statute improves the clarity and proportionality of the revised offense.

Sixth, the revised robbery statute punishes attempted robbery the same as most other criminal attempts.[66] Current District law provides a specific penalty for attempted robbery, apart from the general penalty for attempted crimes.[67] There is no clear rationale for such special attempt penalties in robbery as compared to other offenses. In contrast, under the revised robbery statute, the general part's attempt provisions[68] will establish penalties for attempted robbery (including robbery of a motor vehicle)

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[61] The legislative history of the current carjacking statute does not discuss why a recklessly mental state was adopted. The committee report makes no mention of recklessness, and actually states that the statute "[d]efines the offenses of carjacking and armed carjacking as the knowing and/or forceful taking from another the possession of that person's motor vehicle." Committee Report to the Carjacking Prevetion Act of 1993, Bill 10-16 at 3. Moreover, the DCCA has recognized that the carjacking statute "eases the government's burden of proving traditional robbery . . . [by requiring] only that the taking be performed 'recklessly'". *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997). However, there are no published cases in which a carjacking conviction was premised on a defendant recklessly taking a motor vehicle.

[62] *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[63] *See, e.g.*, RCC § 22E-2101.

[64] *Bryant v. United States*, 859 A.2d 1093, 1108 (D.C. 2004) (noting that armed carjacking and armed robbery convictions do not merge) (citing *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997)).

[65] D.C. Code § 22-403.01 (b-2) (enumerating aggravating circumstances that authorize a maximum penalty of more than 30 years for armed carjacking).

[66] To clarify, attempted robbery is distinguished from completed robbery that involves an attempted theft. Completed robbery still requires that the defendant actually used physical force, caused bodily injury, or committed criminal menace. Attempted robbery does not necessarily require that the defendant actually satisfied any of those elements.

[67] D.C. Code § 22-2802.

[68] RCC § 22E-301.

consistent with other offenses. This change improves the consistency of the revised robbery statute with other offenses.

Beyond these six changes to current District law, seven other aspects of the revised robbery statute may constitute substantive changes of law.

First, the revised robbery statute applies a culpable mental state of knowledge to paragraph (e)(1) which requires that the defendant takes or exercises control over property. The current robbery statute does not specify a culpable mental state for these elements and no case law exists directly on point. However, the DCCA has stated that robbery requires a "felonious taking,"[69] suggesting that a culpable mental state similar to that of theft should be applied. As a "knowing" culpable mental state applies to the revised theft statute,[70] an identical culpable mental state is provided for robbery. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[71] Requiring a knowing culpable mental state also makes the revised robbery statute consistent with offenses like theft, which generally require that the defendant act knowingly with respect to the elements of the offense.[72]

Second, the revised robbery statute requires that the property be "of another." The current statute does not explicitly require that the property taken be "of another." However, as noted above, the DCCA has held that the current robbery statute incorporates the elements of "larceny,"[73] which requires that property be of another.[74] Moreover, DCCA case law and current District practice suggests that carjacking liability similarly requires the property to be of another.[75] Requiring that the property be "of another" would codify this element suggested in District case law, and would bar a robbery conviction in cases in which the defendant took his or her own property.[76] This change clarifies existing law and improves penalty proportionality by limiting the more

[69] *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996).
[70] RCC § 22E-2101.
[71] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[72] *See, e.g.*, RCC § 22E-2101.
[73] *Lattimore*, 684 A.2d at 359 ("In the District of Columbia, robbery retains its common law elements.").
[74] At common law larceny required an intent to deprive the owner of the property, which is not possible if the property belongs to the person who takes it. Wayne, Lafave. § 20.3.Robbery, 3 Subst. Crim. L. § 20.3 ("Robbery consists of all six elements of larceny—a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it—plus two additional requirements: (7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished b means of force or putting in fear.").
[75] Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership. *See Allen v. United States*, 697 A.2d 1 (D.C. 1997) (listing as one of the elements of carjacking as the taking "of a person's vehicle," implying the taking of a vehicle owned by someone other than the defendant); *see also Pixley v. United States*, 692 A.2d 438 (D.C. 1997) (making no distinction between robbery and carjacking on the issue of actual ownership; thus, implying that a defendant could not be guilty of carjacking if he was the lawful owner of the motor vehicle).").
[76] Depending on the facts, prosecutions for criminal menace or assault nonetheless may be warranted where a person takes back one's own property by criminal menace, overpowering physical force, or bodily injury.

severe robbery penalties to conduct that involves an illegal taking, exercise of control, or attempted taking or exercise of control over another's property.

Third, the revised robbery statute incorporates statutory provisions that increase penalties based on the complainant's age, the status of the complainant as a vulnerable adult, a law enforcement officer, public safety employee, District official or transportation worker acting in the course of his or her duties, applying a reckless culpable mental state to these circumstances. The current robbery statute does not itself provide for any additional penalties based on the status of the victim. However, multiple separate statutory provisions apply to robbery in existing law, and are captured by the language in the revised robbery statute.[77] The language of these statutes is silent as to the culpable mental state, and there is virtually no case law construing these statutory enhancements.[78] However, while none of the statutes specify a culpable mental state, it is notable that D.C. Code § 22-3601 and D.C. Code § 22-3602 have affirmative defenses that exculpate where the defendant "reasonably believed" the victim was not a senior or minor. Such affirmative defenses suggest that strict liability does not apply, at least to those penalty enhancements, and suggest that some subjective awareness is necessary. Accordingly, the revised robbery statute requires a reckless culpable mental state as to the relevant circumstances of age, occupation, etc. This change clarifies the requisite culpable mental state requirements.

Fourth, the revised robbery statute can be satisfied if the defendant "takes or exercises control over" property. In contrast, the current robbery statute requires that the defendant "takes" property, but does not use the words "exercise control over" property. However, it is not clear that these words substantively alter the scope of the offense. The DCCA has held that robbery incorporates the elements of larceny, and both the revised and current theft statutes include "taking" and "exercising control over" property.[79] Including "exercises control over" in the revised robbery statute would ensure that various means of conduct constituting theft would suffice for robbery even if there was no taking.[80] Including "exercises control over" also is consistent with current law with respect to carjacking. The DCCA has stated that a person may be convicted of carjacking "by burning the vehicle (or, perhaps stripping it) without taking, using, operating or removing it from its location."[81] The revised robbery statute more clearly and consistently tracks the theft-type conduct recognized in current law.

Fifth, the revised robbery statute requires that the defendant knowingly caused bodily injury; threatened to immediately kill, kidnap, inflict bodily injury, or cause a person to engage in a sexual act or sexual contact; used overpowering physical force; or

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[77] D.C. Code § 22-3601, Enhanced penalty for crimes against senior citizens; D.C. Code § 22-3611, Enhanced penalty for committing crime of violence against minors; D.C. Code § 22-3751.01, Enhanced penalties for offenses committed against transit operators and Metrorail station managers; and D.C. Code § 22-851, Protection of District public officials.

[78] There is no case law regarding the mental state as to the status of the victim under D.C. Code §§ 22-3601; 22-3611; 22-3751.01; 22-851.

[79] D.C. Code § 22E-2101; D.C. Code §22-3211(a)(1).

[80] For example, if a defendant used threat of force to compel a person to relinquish property and give it to a third person, the defendant could still be convicted of robbery even though he himself did not take the property.

[81] *Allen v. United States*, 697 A.2d 1, 2 (D.C. 1997).

took property from the hands or arms of the complainant. If a defendant is only reckless as to these elements, he or she cannot be convicted of robbery, even if he or she recklessly caused force or injury that facilitates taking property. The current District robbery and carjacking statutes are silent as to what, if any culpable mental state applies to such conduct, and District case law has not clarified the issue.[82] The lack of clarity on this issue is perhaps not surprising, given that the current robbery offense only requires that the defendant took property from the from the person or from the immediate physical control of a person, and provides that the force requirement can be satisfied by moving the property to the slightest degree. Under current law, a defendant who injures another, and then intentionally takes property from that person's immediate possession would be guilty of robbery, regardless of whether he caused the injury knowingly or recklessly.[83] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[84] Requiring a knowing culpable mental state also makes the revised robbery statute consistent with offenses like theft, which generally require that the defendant act knowingly with respect to the elements of the offense.[85]

Sixth, under the revised robbery statute the defendant not only must have taken or exercised control over property, by causing bodily injury, making threats, or using overpowering physical force—the defendant also must know that the bodily injury, threats, or use of physical force in some way facilitated taking or exercising control over the property. The current robbery and carjacking statutes are silent as to what culpability may be required as to whether the use of force, etc. facilitated taking or exercising control over the property. Current District case law holds that a person can commit robbery if he or she "takes advantage of a situation which he created by use of force," and that "it is hard to see how that is done without some *awareness* of the opportunity being exploited."[86] The DCCA does not specify, however, what degree of awareness is required under the current robbery statute. The revised statute requires knowledge, which is consistent with the DCCA's current holding, and reflects longstanding recognition that the conduct constituting a case generally must be known by the defendant.[87]

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[82] *See*, *Gray*, 155 A.3d at 396 (J. McCleese dissenting) ("Our cases leave me uncertain as to whether a defendant must laws have intentionally deployed force or violence in order to be guilty of robbery").

[83] *But see*, *Gray*, 155 A.3d at 386 ("We are not persuaded by the dissent's argument that *Leak* stands for the proposition that 'any taking' from the 'immediate actual possession' of the victim 'is a robbery—not simple larceny.'").

[84] *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)").

[85] *See, e.g.*, RCC § 22E-2101.

[86] *Gray*, 155 A.3d at 383 (emphasis added).

[87] *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)"). The causal relationship between the use of overpowering force, bodily injury, or menace and the taking or exercising control over property is at the heart of robbery as a composite offense comprised of assault and theft-type conduct.

RCC § 22E-1202. Assault.

Explanatory Note. *The RCC assault offense proscribes a broad range of conduct in which there is bodily harm. The penalty gradations are primarily based on the degree of bodily harm, with enhancements in the gradations for harms to special categories of persons or harms caused by displaying or using a dangerous weapon. Along with the offensive physical contact offense,[1] the revised assault offense replaces eighteen distinct offenses in the current D.C. Code: assault with intent to kill,[2] assault with intent to commit first degree sexual abuse,[3] assault with intent to commit second degree sexual abuse,[4] assault with intent to commit child sexual abuse,[5] and assault with intent to commit robbery;[6] willfully poisoning any well, spring, or cistern of water;[7] assault with intent to commit mayhem;[8] assault with a dangerous weapon;[9] assault with intent to commit any other felony;[10] simple assault;[11] assault with significant bodily injury;[12] aggravated assault;[13] assault on a public vehicle inspection officer[14] and aggravated assault on a public vehicle inspection officer;[15] assault on a law enforcement officer[16] and assault with significant bodily injury to a law enforcement officer;[17] mayhem[18] and malicious disfigurement.[19] Insofar as they are applicable to current assault-type offenses, the revised assault offense also replaces the protection of District public officials statute,[20] certain minimum statutory penalties for assault-type offenses,[21] and six*

[1] RCC § 22E-1205.
[2] D.C. Code § 22-401.
[3] D.C. Code § 22-401.
[4] D.C. Code § 22-401.
[5] D.C. Code § 22-401.
[6] D.C. Code § 22-401.
[7] D.C. Code § 22-401.
[8] D.C. Code § 22-401.
[9] D.C. Code § 22-402.
[10] D.C. Code § 22-403.
[11] D.C. Code § 22-404(a)(1).
[12] D.C. Code § 22-401(a)(2).
[13] D.C. Code § 22-404.01.
[14] D.C. Code § 22-404.02.
[15] D.C. Code § 22-404.03.
[16] D.C. Code § 22-405.
[17] D.C. Code § 22-405.
[18] D.C. Code § 22-406.
[19] D.C. Code § 22-406.
[20] D.C. Code § 22-851.
[21] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f)(1) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

penalty enhancements: the enhancement for committing an offense while armed;[22] *the enhancement for senior citizens;*[23] *the enhancement for citizen patrols;*[24] *the enhancement for minors;*[25] *the enhancement for taxicab drivers;*[26] *and the enhancement for transit operators and Metrorail station managers.*[27]

Subsection (a) specifies the various types of prohibited conduct in first degree assault, the highest grade of the revised assault offense. Paragraph (a)(1) specifies one type of prohibited conduct—causing serious and permanent disfigurement to the complainant. Paragraph (a)(2) specifies another type of prohibited conduct—destroying, amputating, or permanently disabling a member or organ of the complainant's body. Paragraphs (a)(1) and (a)(2) also specify that the culpable mental state for paragraphs (a)(1) and (a)(2) is "purposely," a term defined at RCC § 22E-206 to mean here that the accused must consciously desire that he or she causes serious and permanent disfigurement to the complainant (paragraph (a)(1)) or destroys, amputates, or permanently disables a member or organ of the complainant's body (paragraph (a)(2)).

Paragraphs (a)(3) and (a)(4) specify the final two types of prohibited conduct for first degree of the revised assault statute. Paragraphs (a)(3) and (a)(4) specify a culpable mental state of "recklessly, with extreme indifference to human life" for causing serious bodily injury. A "recklessly" culpable mental state is a defined term in RCC § 22E-206. Here "recklessly" means that the accused consciously disregarded a substantial risk of causing serious bodily injury to another, and the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, recklessness alone is insufficient for the culpable mental state of "recklessly, with extreme difference to human life," that is required in paragraphs (a)(3) and (a)(4). In paragraphs (a)(3) and (a)(4), the accused must also act "with extreme indifference to human life." This language is intended to codify the same standard used in current D.C. Court of Appeals (DCCA) case law defining what is commonly known as "depraved heart murder."[28] In contrast to the "substantial" risks required for ordinary recklessness, the depraved heart murder standard requires that the accused consciously disregarded an "*extreme* risk of causing serious bodily injury."[29] For example, the DCCA has recognized extreme indifference to human life when a person caused the death of another by driving at speeds in excess of 90 miles

[22] D.C. Code § 22-4502.
[23] D.C. Code § 22-3601.
[24] D.C. Code § 22-3602.
[25] D.C. Code § 22-3611.
[26] D.C. Code §§ 22-3751; 22-3752.
[27] D.C. Code §§ 22-3751.01; 22-3752.
[28] *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011) (Farrell, J. concurring). *See also Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (en banc) (noting that examples of depraved heart murder include firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into . . . a moving automobile, necessarily occupied by human beings . . . .; playing a game of 'Russian roulette' with another person [.]"); *Jennings v. United States*, 993 A.2d 1077, 1078 (D.C. 2010) (depraved heart murder when defendant fired a gun at across a street towards a group of people, hitting and killing one of them); *Powell v. United States*, 485 A.2d 596 (D.C. 1984) (defendant guilty of depraved heart murder when he led police on a high speed chase, drove at speeds of up to 90 miles per hour, turned onto a congested ramp and caused a fatal car crash).
[29] *Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (en banc) (emphasis added).

per hour, and turning onto a crowded onramp in an effort to escape police[30]; firing ten bullets towards an area where people were gathered[31]; and providing a weapon to another person, knowing that person would use it to injure a third person.[32] Although it is not possible to specifically define the degree and nature of risk that is "extreme," the "extreme indifference" language codifies all DCCA case law regarding "depraved heart" murder, which is also applicable to the current aggravated assault statute.

Paragraph (a)(3) specifically prohibits recklessly, with extreme indifference to human life, causing serious bodily injury to the complainant by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. Paragraph (a)(3) specifies the culpable mental state of "recklessly, with extreme indifference to human life." This culpable mental state is discussed at length above. Per the rules of interpretation in RCC § 22E-207, the culpable mental state of recklessly, with extreme indifference to human life, applies to both causing serious bodily injury and causing such injury by displaying or using an object. "Dangerous weapon" and "imitation dangerous weapon" are defined terms in RCC § 22E-701. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the object displayed or used is a "dangerous weapon" or "imitation dangerous weapon." "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted unconsciousness, or protracted loss or impairment of the function of a bodily member or organ.

Paragraph (a)(4) specifically prohibits recklessly, with extreme indifference to human life, causing serious bodily injury to the complainant. Paragraph (a)(4) specifies the culpable mental state of "recklessly, with extreme indifference to human life." This culpable mental state is discussed at length above. "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted unconsciousness, or protracted loss or impairment of the function of a bodily member or organ.

Subparagraphs (a)(4)(A) and (a)(4)(B) specify two alternative bases of liability for recklessly, with extreme difference to human life, causing serious bodily injury under paragraph (a)(4). In subparagraph (a)(4)(A), the complainant must be one of the categories in the definition of a "protected person" in RCC § 22E-701, such as being a law enforcement officer in the course of his or her duties. The culpable mental state of "recklessly" applies in subparagraph (a)(4)(A) to the fact that the complainant is a "protected person." "Recklessly," a term defined at RCC § 22E-206, here means the accused must disregard a substantial risk that the complainant is a "protected person." In subparagraph (a)(4)(B), the actor must cause serious bodily injury "with the purpose" of harming the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official." This alternative requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a "law enforcement

[30] *Powell v. United States*, 485 A.2d 596, 598 (D.C. 1984).
[31] *Jennings v. United States*, 993 A.2d 1077, 1081 (D.C. 2010).
[32] *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (note that the defendant was guilty of second degree murder on an accomplice theory).

officer," "public safety employee," or "District official."[33] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes. "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" 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. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Subsection (b) specifies the two types of conduct prohibited in second degree assault. Paragraph (b)(1) specifies one type of prohibited conduct—causing serious bodily injury to the complainant. Subsection (b)(1) specifies the culpable mental state for causing serious bodily injury subsection to be "recklessly, with extreme indifference to human life." This culpable mental state is discussed at length above. "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ.

Paragraph (b)(2) specifies the other type of prohibited conduct for second degree assault—causing significant bodily injury to the complainant by displaying or using an what, in fact, is a dangerous weapon or imitation dangerous weapon. "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. The culpable mental state of "recklessly" applies in paragraph (b)(2) and is defined in RCC § 22E-206 to mean here being aware of a substantial risk that the accused will cause significant bodily injury by displaying or using an object. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "recklessly" applies to both causing significant bodily injury and causing such injury by displaying or using an object. "Dangerous weapon" and "imitation dangerous weapon" are defined terms in RCC § 22E-701. "In fact," a defined term per RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the item displayed or used is a "dangerous weapon" or "imitation dangerous weapon."

Paragraph (c)(1) specifies one type of prohibited conduct for third degree of the revised assault statute—recklessly causing significant bodily injury. "Recklessly," a defined term in RCC § 22E-206, here means that the accused is aware of a substantial risk that he or she will cause significant bodily injury. "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Subparagraphs (c)(1)(A) and (c)(1)(B) specify two alternative bases of liability for recklessly causing significant bodily injury under paragraph (c)(4). The protected individuals and requirements in subparagraphs (c)(1)(A)

[33] For example, a defendant who commits aggravated assault an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing aggravated assault with the purpose of harming the decedent due to his status as a law enforcement officer.

and (c)(1)(B) are identical to those in subparagraphs (a)(4)(A) and (a)(4)(B) of first degree assault.

Paragraph (c)(2) specifies the other type of prohibited conduct for third degree assault—causing bodily injury to the complainant by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. "Bodily injury" is the lowest level of bodily injury in the RCC and is defined in RCC § 22E-701 to require "physical pain, physical injury, illness, or any impairment of condition." The culpable mental state of "recklessly" applies in paragraph (c)(2) and is defined in RCC § 22E-206 to mean here being aware of a substantial risk that the accused will cause bodily injury by displaying or using an object. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "recklessly" applies to both causing bodily injury and causing such injury by the display or use of an object. "Dangerous weapon" and "imitation dangerous weapon" are defined terms in RCC § 22E-701. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the item displayed or used is a "dangerous weapon" or "imitation dangerous weapon."

Subsection (d) specifies the prohibited conduct for fourth degree assault—causing significant bodily injury to the complainant. The culpable mental state of "recklessly" applies and is defined in RCC § 22E-206 to mean here being aware of a substantial risk that the accused will cause significant bodily injury. "Significant bodily injury" is the intermediate level of bodily injury in the revised assault statute and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone.

Paragraph (e)(1) specifies one type of prohibited conduct for fifth degree of the revised assault statute—recklessly causing bodily injury. "Recklessly," a defined term in RCC § 22E-206, here means that the accused is aware of a substantial risk that he or she will cause bodily injury. "Bodily injury" is the lowest level of bodily injury in the RCC and is defined in RCC § 22E-701 to mean "physical pain, physical injury, illness, or any impairment of physical condition." Subparagraphs (e)(1)(A) and (e)(1)(B) specify two alternative bases of liability for recklessly causing bodily injury under paragraph (e)(1). The protected individuals and requirements in subparagraphs (e)(1)(A) and (e)(1)(B) are identical to those in subparagraphs (a)(4)(A) and (a)(4)(B) of first degree assault.

Paragraph (e)(2) specifies the other type of prohibited conduct for fifth degree assault—causing bodily injury to the complainant by discharging what, in fact, is a firearm, a defined term in RCC § 22E-701. The culpable mental state of "negligently" applies in paragraph (e)(2) and is defined in RCC § 22E-206 to here mean that a person should be aware of a substantial risk that he or she will cause bodily injury by discharging an object. Per the rules of interpretation in RCC § 22E-207, the culpable mental state of "negligently" applies to both causing bodily injury and causing such injury by discharging the object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the object used in the offense is a firearm as defined in RCC § 22E-701. "Bodily injury" is the lowest level of bodily injury in the RCC and is defined in RCC § 22E-701 to mean "physical pain, physical injury, illness, or any impairment of physical condition."

Subsection (f) specifies the prohibited conduct for the lowest grade of the revised assault statute, sixth degree assault—causing bodily injury to the complainant. The culpable mental state for subsection (f) is "recklessly" and is defined in RCC § 22E-206 to mean here being aware of a substantial risk that the accused will cause bodily injury to the complainant. "Bodily injury" is the lowest level of bodily injury in the RCC and is defined in RCC § 22E-701 to mean "physical pain, physical injury, illness, or any impairment of physical condition."

Subsection (g) prohibits justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] when an individual actively opposes a use of physical force by a law enforcement officer and, in doing so, allegedly assaults the law enforcement officer. The limitation applies to all gradations of the revised assault statute, whether or not the gradation provides a penalty enhancement for the status of the complainant. There are three requirements for this limitation. Per paragraph (g)(1), the accused must be "reckless" as to the fact that the complainant is a "law enforcement officer." "Reckless," a defined term in RCC § 22E-206, means here that the accused was aware of a substantial risk that the complainant was a "law enforcement officer," as that term is defined in RCC § 22E-701. Per paragraph (g)(2), "in fact," the use of force must occur during an arrest, stop, or detention for a legitimate police purpose, regardless of whether the arrest, stop, or detention is lawful. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the use of force occurred during one of the specified situations, such as an arrest, whether lawful or unlawful. Finally, per paragraph (g)(3), the law enforcement officer uses only the amount of force that appears reasonably necessary. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (g)(2) applies to paragraph (g)(3). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the law enforcement officer used only the amount of force that appears physically necessary.

Subsection (h) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[34] However, as discussed above, extreme indifference to human life in paragraphs (a)(3), (a)(4), and (b)(1) require that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.[35]

[34] Imputation of recklessness under RCC § 22E-209 also requires that the person was negligent as to the result or circumstance.

[35] For further discussion of these terms, see Commentary to RCC § 22E-209.

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and negates finding that the person acted with extreme indifference to human life.[36] In these cases, although the awareness of risk may be imputed, the person could still be acquitted under paragraphs (a)(3), (a)(4), and (b)(1). However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for other forms of assault, provided that his or her conduct was clearly blameworthy.

Subsection (i) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised assault statute changes current District law in fourteen main ways.*

First, the revised assault statute does not criminalize (as a completed offense) conduct that falls short of inflicting "bodily injury," as that term is defined in RCC § 22E-701. Under current District law, an assault[37] includes: 1) intent-to-frighten assaults that do not result in physical contact with the complainant's body;[38] 2) non-violent sexual

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[36] This is perhaps clearest where a person's self-induced intoxication is pathological—i.e., "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." Model Penal Code § 2.08(5)(c). The following hypothetical is illustrative. X consumes a single alcoholic beverage at an office holiday party, and immediately thereafter departs to the metro. While waiting for the train, X begins to experience an extremely high level of intoxication—unbeknownst to X, the drink has interacted with an allergy medication she is taking, thereby producing a level of intoxication ten times greater than what X normally experiences from that amount of alcohol. As a result, X has a difficult time standing straight, and ends up stumbling in another train-goer, V, who X knocks onto the tracks just as the train is approaching, resulting in serious bodily injury. If X is subsequently charged with second degree assault on these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances— may weigh against finding that she manifested extreme indifference to human life. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for second degree assault under the RCC if X's conduct manifested an extreme indifference to human life.

It is also possible, under narrow circumstances, for a person's self-induced intoxication to negate his or her blameworthiness even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall and suffer serious bodily injury. If X is charged with second degree assault, it is unclear under current law whether evidence of her voluntary intoxication could be presented to negate the culpable mental state required for second degree assault.

[37] D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults . . . another . . . shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[38] *See, e.g.*, *Joiner-Die v. United States*, 899 A.2d 762, 765 (D.C. 2006) ("To establish intent-to-frighten assault, the government must prove: (1) that the defendant committed a threatening act that reasonably would create in another person the fear of immediate injury; (2) that, when he/she committed the act, the defendant had the apparent present ability to injure that person; and (3) that the defendant committed the

touching[39] that causes no pain or impairment to the complainant's body; and 3) any completed battery where the accused inflicts an unwanted touching on the complainant that causes no pain or impairment to the complainant's body.[40] However, a recent DCCA case that is in active litigation may ultimately call into question whether an unwanted touching on the complainant that causes no pain or impairment is sufficient.[41] In contrast, the revised assault statute is limited to causing three types of bodily injury—"serious bodily injury," "significant bodily injury," and "bodily injury,"—all defined terms in RCC § 22E-701—as well as serious and permanent disfigurement and injuries. Depending on the facts of a given case, conduct no longer included in the revised assault statute still may be criminalized as attempted assault under the general attempt provision (RCC § 22E-301), or as menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), offensive physical contact (RCC § 22E-1205), or second degree nonconsensual sexual conduct (RCC § 22E-1307(b)).[42] This change improves the clarity and the proportionality of the revised assault statute.

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act voluntarily, on purpose, and not by accident or mistake."). The DCCA has made it clear that in intent-to frighten assaults, the accused must have the intent to cause fear in the complaining witness. *See, e.g.*, *Sousa v. United States*, 400 A.2d 1036, 1044 (D.C. 1979) ("Our attention is focused "upon the menacing conduct of the accused and his purposeful design either to engender fear in or do violence to his victim."); *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986) ("Intent-to-frighten assault, on the other hand, requires proof that the defendant intended either to cause injury or to create apprehension in the victim by engaging in some threatening conduct; an actual battery need not be attempted.") (citing W. LaFave & A. Scott, Handbook on Criminal Law § 82, at 610–612 (1972)).

[39] "Where the assault involves a nonviolent sexual touching the court has held that there is an assault . . . because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'" *Matter of A.B.*, 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

[40] *See, e.g.*, *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Dunn v. United States*, 976 A.2d 217, 218-19, 220, 221 (D.C. 2009) (stating that the injury resulting from an assault "may be extremely slight," requiring "no physical pain, no bruises, no breaking of the skin, no loss of blood, no medical treatment" and finding the evidence sufficient for assault when appellant "shoved" the complainant because the contact was "offensive.").

[41] A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[42] As is discussed in the commentary to the revised nonconsensual sexual conduct statute (RCC § 22E-1307), second degree nonconsensual sexual conduct generally replaces liability for the non-violent sexual touching form of assault. The offensive physical contact statute (RCC § 22E-1205) provides general

Second, the RCC no longer criminalizes as separate offenses assault with intent to kill, assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, assault with intent to commit child sexual abuse, assault with intent to commit robbery, assault with intent to commit mayhem, and assault with intent to commit any other felony. Current District law criminalizes this conduct as separate offenses[43] collectively referred to as the "assault with intent to" or "AWI" offenses. In contrast, in the RCC, liability for the conduct criminalized by the current AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[44] The *actus reus*[45] and the required culpable mental state[46] of an attempt in the RCC provide for liability that is at least as expansive as that afforded by

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liability for offensive touching because the offense does not require an intent to sexually degrade, arouse, or gratify.

[43] D.C. Code §§ 22-401 (assault with intent to kill, assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, assault with intent to commit child sexual abuse, assault with intent to commit robbery); 22-402 (assault with intent to commit mayhem); 22-403 (assault with intent to commit any other felony).

[44] For example, rather than having a separate offense of assault with intent to kill, as is codified in current D.C. Code § 22-401, the RCC criminalizes that conduct as an attempt to commit an offense such as murder or aggravated assault. The District's varied AWI offenses, enacted in 1901, were originally "created to allow a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end." *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011). However, as provided in RCC § 22E-301(c) and described in the accompanying commentary, the penalty for general attempts in the RCC differs from existing law.

[45] The *actus reus* of some criminal attempts and the comparable AWI offense will not always be the same. For example, both case law and commentary indicate that, as a matter of current and historical practice, one can indeed be convicted of an attempt to commit an offense against the person, such as mayhem, without having necessarily committed a simple assault. Compare, R. Perkins, *Criminal Law* 578 (2d ed. 1969) with *Hardy v. State*, 301 Md. 124, 129, 482 A.2d 474, 477 (1984). However, factually, any conduct which falls within the scope of an AWI offense also necessarily constitutes an attempt to commit the target of that AWI offense.

[46] Under current District law, both AWI offenses and criminal attempts require proof of a "specific intent" to commit the target offense. For District authority on the specific intent requirement in the context of AWI offenses, *see Nixon v. United States*, 730 A.2d 145, 148 (D.C. 1999); *Riddick v. United States*, 806 A.2d 631, 639 (D.C. 2002); *Di Snowden v. United States*, 52 A.3d 858, 868 (D.C. 2012); *Robinson v. United States*, 50 A.3d 508, 533 (D.C. 2012). For District authority on the specific intent requirement in the context of criminal attempts, see Judge Beckwith's concurring opinion in *Jones v. United States*, 124 A.3d 127, 132–34 (D.C. 2015) (discussing, among other cases, *Sellers v. United States*, 131 A.2d 300 (D.C.1957); *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987); and *Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975)).

Notably, the DCCA has never clearly defined the meaning of the phrase "specific intent"—indeed, as one DCCA judge has observed, the phrase itself is little more than a "rote incantation[]" of "dubious value" which obscures "the different *mens rea* elements of a wide array of criminal offenses." *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring). Ambiguities aside, however, it seems relatively clear from District authority in the context of both AWI and attempt offenses that, first, the *mens rea* applicable to both categories of offenses—the intent to commit the ulterior or target offense—is the same. *Compare* D.C. Crim. Jur. Instr. § 4.110-12 (jury instructions on AWI offenses) *with* D.C. Crim. Jur. Instr. § 7.101 (jury instruction on criminal attempts). And second, it seems clear that this *mens rea* roughly translates to acting purposely or knowingly. *See* Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code—Basic Requirements of Offense Liability, pgs. 5-8 (May 5, 2017); First Draft of Report No. 7, Recommendations for Chapter 3 of the Revised Criminal Code—Definition of a Criminal Attempt, pgs. 8-11 (June 7, 2017).

the current AWI offenses. This change improves the clarity of the revised assault statute, eliminates unnecessary overlap between the AWI offenses and general attempt liability for assault-type offenses, and improves the proportionality of the revised statutes by applying a consistent attempt penalty.

Third, the revised assault statute replaces the separate common law offenses of mayhem and malicious disfigurement. The D.C. Code currently specifies penalties for the crimes of mayhem and malicious disfigurement,[47] although the elements of these offenses are established wholly by case law. The DCCA has said that malicious disfigurement requires proof that a person caused a permanent disfigurement[48] and mayhem requires proof that someone caused a permanently disabling injury.[49] Both offenses require a mental state of malice[50] and proof of the absence of mitigating circumstances,[51] although the DCCA has said that malicious disfigurement requires a specific intent to injure that mayhem does not.[52] Yet, while such requirements are similar to, and for some fact patterns more demanding than, the current aggravated assault

[47] D.C. Code § 22-406 ("Every person convicted of mayhem or of maliciously disfiguring another shall be imprisoned for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[48] *See, e.g.*, *Edwards v. United States*, 583 A.2d 661, 668-669 (D.C. 1990) ("The elements of malicious disfigurement are: (1) that the defendant inflicted an injury on another; (2) that the victim was permanently disfigured; (3) that the defendant specifically intended to disfigure the victim; and (4) that the defendant was acting with malice.") (citing *Perkins v. United States*, 446 A.2d 19 (D.C. 1982); *see also Perkins v. United States*, 446 A.2d 19, 26 (D.C. 1982) (stating that "to disfigure is 'to make less complete, perfect or beautiful in appearance or character' and disfigurement, in law as in common acceptance, may well be something less than total and irreversible deterioration of a bodily organ" and defining "permanently disfigured" for a proper jury instruction as "the person is appreciably less attractive or that a part of his body is to some appreciable degree less useful or functional than it was before the injury) (quoting *United States v. Cook*, 149 U.S. App. D.C. 197, 200, 462 F.2d 301, 304 (1972)).

[49] *Edwards v. United States*, 583 A.2d at 668 & n.12 ("The elements of mayhem are: (1) that the defendant caused permanent disabling injury to another; (2) that he had the general intent to do the injurious act; and (3) that he did so willfully and maliciously.") (citing *Wynn v. United States*, 538 A.2d 1139, 1145 (D.C. 1988)); *see also Peoples v. United States*, 640 A.2d 1047, 1054 (D.C. 1994) ("The court has stated that '[t]he mayhem statute seeks to protect the preservation of the human body in its normal functioning and the and the integrity of the victim's person from permanent injury or disfigurement.'" (quoting *McFadden v. United States*, 395 A.2d 14, 18 (D.C. 1978)).

[50] *See, e.g.*, *Edwards v. United States*, 583 A.2d 661, 668-669 (D.C. 1990) (stating that the "elements of malicious disfigurement are . . . that the defendant was acting with malice" and that the "elements of mayhem are . . . that he [caused the permanent disabling injury] willfully and maliciously.") (internal citations omitted).

[51] *Burton v. United States*, 818 A.2d 198, 200 (D.C. 2003) (approving a jury instruction for malicious disfigurement that, instead of using the term "malice," listed the requirements of the mental state, including that "there were no mitigating circumstances."); *see also Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("In other non-homicide areas of the law," including malicious disfigurement, "we have defined malice as intentional conduct done without provocation, justification, or excuse . . . Therefore, provocation would be a defense to charges in these areas of the law as well.") (citations and quotations omitted); D.C. Crim. Jur. Instr. §§ 4.104 and 4.105 (requiring as an element of mayhem and of malicious disfigurement that "there were no mitigating circumstances.").

[52] *See, e.g.*, *Edwards v. United States*, 583 A.2d 661, 668 ("The elements of malicious disfigurement are . . . (3) that the defendant specifically intended to disfigure the victim."); *Perkins v. United States*, 446 A.2d 19, 23 (D.C. 1982) ("We conclude that the crime of malicious disfigurement requires proof of specific intent . . .").

statute,[53] mayhem and malicious disfigurement have the same ten-year maximum penalty as the current aggravated assault statute. In contrast, the revised assault statute has two new gradations in paragraph (a)(1) and paragraph (a)(2) that require purposeful, permanent injuries. These new gradations cover conduct currently prohibited by mayhem and malicious disfigurement. The culpable mental state of "malice" no longer applies to conduct currently prohibited by mayhem and maliciously disfiguring, nor does the special mitigating circumstances defense[54] that accompanies malice. Conduct currently prohibited by mayhem and malicious disfigurement that does not satisfy the purposely culpable mental state or required injuries in paragraph (a)(1) or paragraph (a)(2) of the revised assault offense is covered by paragraph (b)(1) as second degree assault. This change clarifies and reduces unnecessary overlap in the current D.C. Code.

Fourth, the RCC does not codify a separate assault with a dangerous weapon (ADW) offense. Under current D.C. Code § 22-402, ADW is a separate offense with a ten-year maximum penalty.[55] ADW prohibits engaging in any conduct that constitutes a simple assault, including intent-to-frighten assaults and offensive physical contact, "with" a dangerous weapon.[56] In contrast, the revised assault statute incorporates into its

[53] Unlike mayhem and malicious disfigurement, the current aggravated assault offense in D.C. Code § 22-404.01 does not require proof of the absence of mitigating circumstances. D.C. Code § 22-404.01(a)(1), (a)(2) (subsection (a)(1) requiring "knowingly or purposely causes serious bodily injury to another person" and subsection (a)(2) requiring "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury."). In addition, while mayhem and malicious disfigurement require permanent injuries, "serious bodily injury" in the current aggravated assault statute, as defined in DCCA case law, requires only "protracted and obvious disfigurement." *See, e.g.*, *Jackson v. United States*, 940 A.2d 981, 986 (D.C. 2008) (stating that the definition of "serious bodily injury" as interpreted by the DCCA includes "protracted and obvious disfigurement.").

[54] *Burton v. United States*, 818 A.2d 198, 200 (D.C. 2003) (approving a jury instruction for malicious disfigurement that, instead of using the term "malice," listed the requirements of the mental state, including that "there were no mitigating circumstances."); *see also Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("In other non-homicide areas of the law," including malicious disfigurement, "we have defined malice as intentional conduct done without provocation, justification, or excuse . . . Therefore, provocation would be a defense to charges in these areas of the law as well.") (citations and quotations omitted); D.C. Crim. Jur. Instr. §§ 4.104 and 4.105 (requiring as an element of mayhem and of malicious disfigurement that "there were no mitigating circumstances.").

[55] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

The more stringent 10-year maximum penalty, as opposed to 180 days for simple assault in D.C. Code § 22-404(a)(1), is "imposed as 'a practical recognition of the additional risks posed by use of the weapon.'" *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (*quoting Parker v. United States*, 359 F.2d 1009, 1012 (D.C. Cir. 1966)).

[56] The current ADW statute merely requires "an assault with a dangerous weapon," D.C. Code § 22-402, and DCCA case law establishes that the ADW statute requires "the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon." *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011). Thus, the broad range of conduct included under "assault" is subject to a weapons enhancement under the current ADW statute. *See, e.g.*, *Frye v. United States*, 926 A.2d 1085, 1094 (D.C. 2005) (finding that the evidence was sufficient for ADW when "appellant intended to and did try to injure or frighten [the complaining witness] by using his van as a weapon in a manner likely to cause [the complaining witness] to have a car accident" and listing as an element of ADW that there "was an attempt,

gradations enhanced penalties for causing different types of bodily injury "by displaying or using" a dangerous weapon or imitation dangerous weapon. "Displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch."[57] The dangerous weapon or imitation dangerous weapon must, directly[58] or indirectly,[59] cause the resulting bodily injury.[60] The use or display of a dangerous weapon or imitation dangerous weapon that falls short of causing the required types of bodily injury is no longer criminalized as assault. Instead, such threatening acts or offensive physical contact are prohibited by first degree menacing (RCC § 22E-1203).[61] In addition, the use or display of objects that the complaining witness incorrectly perceives to be a "dangerous weapon," "imitation dangerous weapon," or "imitation firearm," as those terms are defined in RCC § 22E-701, no longer receives an assault enhanced penalty as they do under current District law.[62] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a deadly or dangerous weapon was used.[63] This change reduces unnecessary overlap in the current D.C. Code between multiple means of enhancing

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with force or violence, to injure another person, or a menacing threat, which may or may not be accompanied by a specific intent to injure.").

[57] *See* the commentary to the RCC menacing statute (RCC § 22E-1203).

[58] A dangerous weapon can directly cause the injury, e.g., shooting the complainant with a firearm, or stabbing the complainant with a knife. However, an imitation dangerous weapon can also directly cause the injury, e.g., beating the complainant repeatedly with an imitation firearm and causing "significant bodily injury."

[59] An example of a dangerous weapon or imitation dangerous weapon indirectly causing bodily harm under the revised statute is brandishing a firearm or imitation firearm in a manner that causes the complainant to jump backward, falling down steps and suffering bodily injury. As long as other required elements are met, including causation, such a display or use of a firearm or imitation firearm would be sufficient for enhanced liability under the revised assault statute.

[60] If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an imitation firearm under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon." A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104. In addition, depending on the facts of a given case, the display of a dangerous weapon or imitation dangerous weapon may be sufficient to establish liability for first degree menacing per RCC § 22E-1203 or an attempt to commit a gradation of the revised assault statute requiring the harm be caused by "displaying or using" a dangerous weapon or imitation dangerous weapon.

[61] First degree menacing prohibits making specified threats "by displaying or using a dangerous weapon or imitation dangerous weapon." RCC § 22E-1203. The RCC offensive physical contact statute (RCC § 22E-1205) does not provide a gradation for engaging in offensive physical contact with a dangerous weapon, but likely fact patterns would almost certainly constitute first degree menacing.

[62] Current District case law establishes that "any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon," *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986), and that "an imitation or blank pistol used in an assault by pointing it at another is a 'dangerous weapon' in that it is likely to produce great bodily harm." *See, e.g.*, *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975). Under the revised assault statute, the "use" of such an object receives an enhanced penalty only if it causes the required bodily injury and satisfies the definitions of "dangerous weapon," "imitation dangerous weapon," or imitation firearm."

[63] *See, e.g., In re M.M.S.*, 691 A.2d 136, 138 (D.C. 1997) ("Finally, without direct evidence, the government may prove the existence of a weapon by adequate circumstantial evidence.").

assaults committed with a weapon and improves the proportionality of the revised offense.[64]

Fifth, the revised assault statute is no longer subject to a separate penalty enhancement for committing assault-type crimes "while armed" or "having readily available" a dangerous weapon. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of assault-type offenses[65] "while armed" with or "having readily available" a dangerous weapon.[66] In contrast, the revised assault statute requires an individual to cause the injury "by displaying or using" a "dangerous weapon" or "imitation dangerous

[64] Under current District law, simple assault involving the use of a deadly or dangerous weapon may be enhanced by three different, largely overlapping, provisions. First, the assault may be charged as ADW under D.C. Code § 22-402, which is a felony with a ten year maximum prison sentence. Second, ADW is subject to further enhancement under D.C. Code § 22-4502 as a "crime of violence" if the offense is committed "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-4502(a). ADW is not subject to the "while armed" enhancement under D.C. Code § 22-4501(a)(1), but the recidivist "while armed" enhancement does apply under D.C. Code § 22-4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982). Finally, if, while committing the assault, a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm," he or she is guilty of the additional offense of possession of a firearm during a crime of violence (PFCOV). PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, the offenses of ADW and PFCOV do not merge. *Freeman v. United States*, 600 A.2d 1070, 1070 (D.C. 1991).
The RCC removes the overlap between these multiple means of enhancing an armed assault and grades the offense according to the role of the weapon in the offense. In the RCC, the use or display of a dangerous weapon or imitation dangerous weapon, including a firearm or imitation firearm, that causes the required bodily injury receives a single enhancement in the revised assault statute. If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an imitation firearm under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon." A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104.

[65] Assault-type offenses subject to the enhancement in D.C. Code § 22-4502 include: aggravated assault, the collective "assault with intent to" offenses, felony assault on a police officer, assault with a dangerous weapon, malicious disfigurement, and mayhem.

[66] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

weapon," as those terms are defined in RCC § 22E-701, resulting in several changes to current District law. First, merely being armed with or having the weapon readily available is not sufficient for an enhanced assault penalty. "Displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch."[67] Second, through the definitions of "dangerous weapon," "imitation dangerous weapon," and "imitation firearm," in RCC § 22E-701, the use or display of objects that the complaining witness incorrectly perceives to be a dangerous weapon, imitation dangerous weapon, or imitation firearm, no longer receives an enhanced penalty as they do under current District law.[68] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a dangerous weapon was used.[69] Third, because the revised assault statute incorporates enhancements for the display or use of a dangerous weapon in the offense gradations, it is no longer possible to enhance an assault with both a weapon enhancement and an enhancement based on the identity of the complainant,[70] or to double-stack different weapon penalties and offenses.[71] Fourth, the revised assault statute caps the maximum penalty for an

[67] *See* the commentary to the RCC menacing statute (RCC § 22E-1203).

[68] Current District case law establishes that "any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon," *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986), and the current "while armed" enhancement specifically includes imitation firearms. D.C. Code § 22-4502(a). Under the revised assault statute, the "use" of such an object receives an enhanced penalty only if it causes the required bodily injury and satisfies the definitions of "dangerous weapon," "imitation dangerous weapon," or imitation firearm."

[69] *See, e.g.*, *In re M.M.S.*, 691 A.2d 136, 138 (D.C. 1997) ("Finally, without direct evidence, the government may prove the existence of a weapon by adequate circumstantial evidence.").

[70] There are several penalty enhancements under current District law based upon the age or work status of the complaining witness. *See, e.g.*, D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3611 (enhancement for specified crimes committed against minors); 22-3751 (enhancement for specified crimes committed against taxicab drives); 22-3751.01 (enhancement for specified crimes committed against a transit operator or Metrorail station manager). Nothing in current District law appears to prohibit enhancing an assault with one or more of these separate enhancements based on age or work status, in addition to the weapon enhancement in current D.C. Code § 22-4502. Indeed, the facts as discussed in several DCCA cases indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g.*, *McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

[71] Under current District law, certain crimes are considered "crimes of violence" and are subject to enhanced penalties under several overlapping provisions. First, crimes of violence are subject to enhancement under D.C. Code § 22-4502 if a person commits them "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-402(a). A person so convicted with no prior convictions for certain armed crimes may be subjected to a significantly increased maximum term of imprisonment and "shall" receive a mandatory minimum prison sentence of five years if he or she committed the offense "while armed with any pistol or firearm." D.C. Code § 22-4501(a)(1). If the person has one or more prior convictions for armed offenses, he or she "shall" be subject to an increased maximum prison sentence as well as mandatory minimum sentences. D.C. Code § 22-4501(a)(2). ADW is a crime of violence, but it may not receive the "while armed" enhancement under D.C. Code § 22-4501(a)(1) because "the use of a dangerous weapon is already included as an element" of the offense. *Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000). ADW is subject to enhancement, however, under the recidivist while armed provision in D.C. Code § 22-4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982). Second, crimes of violence are subject to the additional, separate offense of possession of a firearm

enhancement based on the display or use of a dangerous weapon or imitation dangerous weapon to never be greater than the most egregious type of physical harm that the revised assault statute prohibits—the purposeful infliction of a permanently disabling injury in paragraphs (a)(1) and (a)(2) of the revised assault statute.[72] This change clarifies and reduces unnecessary overlap between multiple means of enhancing assaults committed with a weapon and improves the proportionality of the revised statute.[73]

Sixth, the revised assault statute criminalizes for the first time negligently causing bodily injury to another person by discharging what, in fact, is a firearm, as defined in RCC § 22E-701. Current District law does not criminalize such conduct when done negligently, but case law establishes that a culpable mental state of at least

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during a crime of violence (PFCOV) if a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm" while committing the offense. PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, offenses enhanced with the "while armed" enhancement and PFCOV do not merge. *See Little v. United States*, 613 A.2d 880, 881 (D.C. 1992) (holding that a conviction for assault with intent to kill while armed does not merge with a conviction for PFCOV due to the holding in *Thomas v. United States*, 602 A2.d 647 (D.C. 1992)). Depending on the weapon at issue and the facts of a given case, additional offenses that may be charged include carrying dangerous weapons (D.C. Code § 22-4504) and possession of prohibited weapons (D.C. Code § 22-4514).

[72] The current mayhem and malicious disfigurement offenses in D.C. Code § 22-406 are deleted from the revised assault statute, but the conduct is covered under either aggravated assault (paragraphs (a)(1) and (a)(2)) or first degree assault (paragraph (b)(1)). Due to the nature of the injuries required in paragraphs (a)(1) and (a)(2), there is no enhancement for using a dangerous weapon. However, use of a dangerous weapon would enhance conduct in paragraph (b)(1), meaning it would fall under paragraph (a)(2) of aggravated assault.

[73] Under current District law, simple assault involving the use of a deadly or dangerous weapon may be enhanced by three different, largely overlapping, provisions. First, the assault may be charged as ADW under D.C. Code § 22-402, which is a felony with a ten year maximum prison sentence. Second, ADW is subject to further enhancement under D.C. Code § 22-4502 as a "crime of violence" if the offense is committed "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-4502(a). ADW is not subject to the "while armed" enhancement under D.C. Code § 22-4501(a)(1), but the recidivist "while armed" enhancement does apply under D.C. Code § 22-4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982). Finally, if, while committing the assault, a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm," he or she is guilty of the additional offense of possession of a firearm during a crime of violence (PFCOV). PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, the offenses of ADW and PFCOV do not merge. *Freeman v. United States*, 600 A.2d 1070, 1070 (D.C. 1991).

The RCC removes the overlap between these multiple means of enhancing an armed assault and grades the offense according to the role of the weapon in the offense. In the RCC, the use or display of a dangerous weapon or imitation dangerous weapon, including a firearm or imitation firearm, that causes the required bodily injury receives a single enhancement in the revised assault statute. If an individual merely possesses a dangerous weapon or firearm during an assault, or uses such a weapon or firearm, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon or firearm in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. RCC § 22E-4104 does not apply to any imitation weapon but other than an imitation firearm. A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104. In addition, depending on the facts of a given case, the display of a dangerous weapon or imitation dangerous weapon may be sufficient to establish liability for first degree menacing per RCC § 22E-1203 or an attempt to commit a gradation of the revised assault statute requiring the harm be caused by "displaying or using" a dangerous weapon or imitation dangerous weapon.

recklessness is required for ADW[74] and suggests that it may suffice for simple assault.[75] In contrast, the revised assault statute requires a lower culpable mental state of negligence for causing "bodily injury" by discharging a firearm. The lower culpable mental state is justified because the grade is limited to "firearm," an inherently dangerous weapon that warrants heightened caution in its use. This change fills a gap in existing District law for misuse of a firearm.

Seventh, together with the RCC offensive physical contact offense (RCC § 22E-1205) and RCC menacing offense (RCC § 22E-1203), the revised assault statute's enhanced penalties for harming a law enforcement officer (LEO) replace the separate assault on a police officer (APO) offenses. Under current District law, a simple assault against a LEO "on account of, or while that law enforcement officer is engaged in the performance of his or her official duties"[76] is a misdemeanor, with a maximum term of imprisonment of 6 months,[77] and an assault that causes "significant bodily injury" or "a violent act that creates a grave risk of causing significant bodily injury" carries a maximum penalty of ten years imprisonment.[78] In contrast, the revised assault statute provides enhanced penalties for injuries to LEOs for serious bodily injury, significant bodily injury, and bodily injury.

Codifying the LEO enhancement in the revised assault statute results in several changes to current District law. First, the LEO enhancement in the revised assault statute is limited to assaults that cause specified types of "bodily injury."[79] Conduct that fails to

[74] *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone.").

[75] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."); 22-404.01(a)(2) (aggravated assault statute requiring "under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury.").

[76] D.C. Code § 22-405(b), (c).

[77] D.C. Code § 22-405(b).

[78] D.C. Code § 22-405(c).

[79] Limiting enhanced penalties for assaulting a LEO to causing specified physical injury is consistent with recent District legislation that amended the APO statute. Prior to June 30, 2016, in addition to an assault, the APO statute prohibited "resist[ing], oppos[ing], imped[ing], intimidate[ingt], or interfer[ing] with a law enforcement officer" in the course of his or her official duties or on account of those duties. D.C. Code § 22-405(b), (c) (repl.). On January 28, 2016, the Office of the District of Columbia Auditor issued a report titled "The Durability of Police Reform: The Metropolitan Police Department and Use of Force, 2008-2015," available at http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf (Office of the District of Columbia Auditor Report). The report recommended that the APO misdemeanor statute "be amended so that the elements of the offense require an actual assault rather than mere resistance or interference with a [Metropolitan Police Department] officer." Office of the District of Columbia Auditor Report at 107.

satisfy the revised assault statute, as well as "a violent act that creates a grave risk of significant bodily injury," may be criminalized elsewhere in the RCC.[80] Second, the revised assault statute provides substantial penalty enhancements for inflicting "serious bodily injury" on a LEO[81] and for causing "bodily injury" to a LEO,[82] both of which are absent in current District law. Third, the enhanced gradations of the revised assault offense require recklessness as to whether the LEO is a "protected person," rather than negligence.[83] A culpable mental state of recklessness makes the enhanced LEO gradations of the revised assault statute consistent with the other enhancements in the revised offense that are based on the complainant's status. Fourth, the revised definition of "law enforcement officer" in RCC § 22E-701 excludes certain members of fire departments, investigators, and code inspectors[84] that are included in the current APO

The Neighborhood Engagement Achieves Results Amendment Act of 2016 ("NEAR Act") amended the current APO statute by limiting it to "assault[s]" and created a new statute for resisting arrest (D.C. Code § 22-405.01). The Committee Report for this legislation cited the Office of the District of Columbia Auditor Report. Committee on the Judiciary, *Report on Bill 21-0360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016)* (January 27, 2016).

[80] Unwanted physical contacts that fail to satisfy the revised assault statute may entail liability for offensive physical contact (RCC § 22E-1205), which has identical provisions for a "protected person" and harming a complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official. Intent-to-frighten assaults and incomplete batteries against LEOs may be punishable under the criminal threats (RCC § 22E-1204) statute, the menacing (RCC § 22E-1203) statute, which has a "protected person" penalty enhancement, or attempted assault or offensive physical contact under the RCC general attempt provision (RCC § 22E-301). A violent act against a LEO may constitute an attempt to commit second degree assault per RCC § 22E-1202(c)(2) or a fourth degree assault per RCC § 22E-1202(e)(1).

[81] It is unclear why the current APO statute does not enhance an assault that causes "serious bodily injury" when it does enhance an assault that causes "significant bodily injury." The limited legislative history for the current APO statute does not address the matter and the lack of an enhancement for "serious bodily injury" is inconsistent with other current penalty enhancements that apply enhanced penalties to aggravated assaults committed against complainants with a special status. *See, e.g.*, D.C. Code §§ 22-3611(a), (c)(2) 23-1331(4) (penalty enhancement for crimes committed against minors applying to all "crime[s] of violence," which includes aggravated assault); 22-3751, 22-3751.01, 22-3752 (penalty enhancement for crimes committed against taxicab drivers, transit operators, and Metrorail station managers applying to aggravated assault).

[82] Under current District law, a simple assault against a police officer is punishable by 6 months maximum imprisonment, a trivial increase above the 180 day maximum penalty ordinarily applicable to a simple assault (D.C. Code § 22-404(a)(1).

[83] The current APO statute does not specify a culpable mental state for the fact that the complainant is a LEO in the course of his or her official duties. D.C. Code § 22-405(b), (c). However, DCCA case law suggests that a culpable mental state akin to negligence applies to this element. *See, e.g., Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[84] It should be noted that these excluded categories of complainants are instead covered by the revised definition of "public safety employee," also defined in RCC § 22E-701. As such, they still receive enhanced protection as a category of "protected person" and as a category of complainant when the assault is "caused with the purpose of harming the complainant" due to the complainant's status.

statute,[85] but also expands the definition with a broad catch-all provision. Lastly, the revised assault statute does not enhance assaults against family members of LEOs due to their relation to a LEO, which is part of the repeal of the general provision prohibiting targeting family members of District officials and employees in D.C. Code § 22-851.[86] Collectively, these changes replace the APO offenses in current law with enhanced penalties in the gradations of the revised assault statute, improve the clarity of existing statutes, and generally provide for consistent treatment of LEOs and other specially protected complainants. The changes reduce unnecessary gaps and overlap between offenses, and improve the proportionality of the statutes as well.

Eighth, together with the RCC offensive physical contact offense (RCC § 22E-1205) and RCC menacing offense (RCC § 22E-1203), the revised assault statute replaces the current offenses of assault and aggravated assault on a public vehicle inspection officer. Under current District law, "assault[ing]" a "public vehicle inspection officer" or "imped[ing], intimidate[ing], or interfer[ing] with" that officer while that officer "is engaged in or on account of the performance of his or her official duties" is a misdemeanor with a maximum term of imprisonment of 180 days.[87] If the accused causes "serious bodily injury," the offense is a felony with a maximum penalty of ten years imprisonment.[88] In contrast, in the revised assault statute, assaults against a "vehicle inspection officer"[89] receive enhanced penalties, but are no longer separate

[85] D.C. Code § 22-405(a) (defining "law enforcement officer.").

[86] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee" on account of the District official or employee's performance of official duties. "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d). Many law enforcement officers, as "LEO" is defined in the current APO statute, are District employees and therefore D.C. Code § 22-851 criminalizes targeting their families because of their relation to a LEO. However, there is no provision in current law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[87] D.C. Code § 22-404.02.

[88] D.C. Code § 22-404.03(a)(1), (a)(2) (subsection (a)(1) requires "knowingly or purposely causes serious bodily injury to the public vehicle inspection officer" and subsection (a)(2) requires "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury."). The term "serious bodily injury" is not statutorily defined and it is unclear whether the DCCA would apply the definition of "serious bodily injury" from the sexual abuse statutes to the offenses like it has with aggravated assault.

[89] Although the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 state that the term "public vehicle inspection officer shall have the same meaning as provided in § 50-303(19)," the term "public vehicle inspection officer" no longer exists in Title 50 of the D.C. Code. The definition of "public vehicle inspection officer" was repealed with the passage of the Vehicle-For-Hire Innovation Amendment Act of 2014 ("VFHIAA") (Mar. 10, 2015, D.C. Law 20-197, § 2(a), 61 DCR 12430). However, the VFHIAA included a substantially similar, new definition for a "vehicle inspection officer" and that RCC uses that term instead. D.C. Code § 50-301.03(30B) ("'Vehicle inspection officer' means a District employee trained in the laws, rules, and regulations governing public and private vehicle-for-hire service to ensure the proper provision of service and to support safety through street enforcement

offenses. A "vehicle inspection" officer is included in the definition of "protected person" in RCC § 22E-701 as a "public safety employee," also defined in RCC § 22E-701. Since they are included in the definition of "public safety employee," vehicle inspection officers are also included in the enhanced gradations for an assault "caused with the purpose of harming the complainant" due to the complainant's status. However, the conduct that receives an enhanced penalty is narrowed to causing bodily injury, significant bodily injury, or causing serious bodily injury. Conduct that falls short of these requirements may receive an enhanced penalty elsewhere in the RCC,[90] but conduct that consists merely of "imped[ing], intimidat[ing], or interfer[ing] with" a public vehicle inspection officer does not.

Replacing the offenses of assault and aggravated assault on a public vehicle inspection officer with the revised assault statute results in several additional changes to District law. First, under the revised assault statute, unlike current law,[91] there is no longer an automatic civil penalty of loss of a license to operate public vehicles-for-hire upon conviction of assault of a vehicle inspection officer. Second, the revised assault statute does not enhance assaults against family members of vehicle inspection officers because of their relation to the public vehicle inspection officers, which is part of the repeal of the general provision regarding targeting family members of District officials and employees in D.C. Code § 22-851.[92] Third, the revised assault statute does not bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority.[93] This change clarifies the revised assault statute and reduces

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efforts, including traffic stops of public and private vehicles-for-hire, pursuant to protocol prescribed under this act and by regulation."). The VFHIAA legislative history does not appear to include reference to the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 or discuss how those offenses might be affected by the elimination of the term "public vehicle inspection officer."

[90] Depending on the facts of the case, unwanted touchings that fail to satisfy the revised assault statute may entail liability for RCC § 22E-1205, offensive physical contact, which has identical provisions for a "protected person" and harming a complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official. Intent-to-frighten assaults and incomplete batteries against vehicle inspection officers may be punishable under the revised criminal threats statute (RCC § 22E-1204) or the menacing (RCC § 22E-1203) statute, which has a "protected person" penalty enhancement.

[91] D.C. Code §§ 22-404.02(b)(2), 22-404.03(b)(2) (stating that upon conviction for assault or aggravated assault of a public vehicle inspection officer, an individual "shall" "have his or her license or licenses for operating a public vehicle-for-hire, as required by the Commission pursuant to subchapter I of Chapter 3 of Title 50, revoked without further administrative action by the Commission.").

[92] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee" on account of the District official or employee's performance of official duties. "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d). Vehicle inspection officers, as defined in D.C. Code § 50-301.03(30B), are District employees and therefore D.C. Code § 22-851 criminalizes targeting their families because of their relationship.

[93] The current assault on a public vehicle inspection officer statutes bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority. D.C. Code §§ 22-404.02(c),

unnecessary overlap with other provisions that specially penalize assaults on District officials.

Ninth, the RCC definition of "protected person," discussed in the commentary to RCC § 22E-701, results in several changes to the scope of enhanced assault conduct. First, through the definition of "protected person," assaults against complainants under the age of 18 years or against complainants 65 years of age or older receive enhanced penalties in the revised assault offense, but only if certain age requirements are met. Current District law enhances various assault offenses against complainants under the age of 18 years if there is at least a two year age gap between the complainant and an actor that is 18 years of age or older,[94] and against all complainants 65 years of age or older.[95] In contrast, the "protected person" gradations of the revised assault statute require at least a four year age gap between a complainant under 18 years of age and an actor that is 18 years of age or older, and require that the actor be under 65 years of age and at least 10 years younger than a complainant that is 65 years of age or older. With respect to minors, these age requirements are consistent with other offenses in current District law[96] and the age gap for seniors,[97] while new to District law, reserve the enhanced penalties for predatory behavior. Second, assaults against a driver of a private vehicle-for-hire, a "vulnerable adult," and a "public safety employee" receive new enhanced penalties in the revised assault statute through the definition of a "protected person." A driver of a

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22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such enforcement action is lawful."). Subsection (i)(3) of the revised assault statute contains such a prohibition, but it is limited to a "law enforcement officer," as that term is defined in RCC § 22E-1001, which excludes vehicle inspection officers.

[94] D.C. Code § 22-3611(a) ("Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both."); 22-3611(c)(1), (c)(3) (defining "adult" as "a person 18 years of age or older at the time of the offense" and a "minor" as "a person under 18 years of age at the time of the offense.").

[95] D.C. Code § 22-3601(a) ("Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[96] Many of the District's offenses against complainants under the age of 18 years require at least a four year age gap between the actor and the complainant. *See, e.g.*, D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (child sexual abuse statutes and defining "child" as "a person who has not yet attained the age of 16 years."); 22-3010, 22-3001(3) (enticing a child statute and defining "child" as "a person who has not yet attained the age of 16 years."); 22-3010.02 (arranging for a sexual contact with a real or fictitious child and defining "child" as "a person who has not yet attained the age of 16 years."); 22-811(a), (f)(1), (f)(2) (contributing to the delinquency of a minor statute and defining "adult" as "a person 18 years of age or older at the time of the offense" and "minor" as "a person under 18 years of age at the time of the offense.").

[97] None of the District's offenses targeting harms against complainants that are over the age of 65 years require any age gap between the actor and the complainant. See D.C. Code §§ 22-932, 22-933, 22-933.01, 22-934. However, requiring at least a ten year age gap between an actor that is under the age of 65 years and a complainant that is at least 65 years of age is consistent with requiring an age gap in the offenses against complainants that are under 18 years of age. The 10 year age gap recognizes that both the complainant and the actor are adults, as opposed to teenagers.

private vehicle-for-hire does not receive any enhanced penalties under current District law, and a vulnerable adult[98] or "public safety employee"[99] receives enhanced penalties in a few non-assault offenses. By contrast, the "protected person" gradations of the revised assault statute recognize the prevalence of drivers of private vehicles-for-hire and the special status elsewhere under current District law for vulnerable adults and public safety employees. Third, assault offenses against a "citizen patrol member"[100] or a "District employee" no longer receive enhanced penalties in the revised assault offenses as they do under current District law.[101] The breadth of these current enhancements is inconsistent as compared to other penalty enhancements in current District law.

The RCC definition of "protected person" also makes broader changes to the revised assault statute. First, the "protected person" enhanced gradation applies to each type of "bodily injury" in the revised assault statute, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[102] the "assault with intent to" offenses,[103] and the various felony assault offenses,[104] resulting in disproportionate penalties for similar conduct. Second, the revised assault statute applies a mental state of "recklessness" to whether the complainant is a "protected person."

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[98] D.C. Code §§ 22-933 (criminal abuse of a vulnerable adult statute); 22-933.01 (financial exploitation of a vulnerable adult statute); 22-934 (criminal neglect of a vulnerable adult statute).

[99] D.C. Code § 22-2016 (murder of a law enforcement officer statute).

[100] D.C. Code § 22-3602.

[101] D.C. Code § 22-851(d).

[102] Only one of the separate penalty enhancements under current District law applies to simple assault—the enhancement for crimes against citizen patrol members. D.C. Code § 22-3602(c). Assaulting or injury a District "official or employee" also receives an enhanced penalty under the protection of District public officials statute. D.C. Code § 22-851(c).

[103] Of the separate penalty enhancements under current District law, only the separate enhancements for crimes against senior citizens and crimes against minors apply to all the AWI offenses. D.C. Code §§ 22-3601(b); 22-3611(c)(2). No AWI offenses are covered in the separate enhancements for crimes against taxicab drives or crimes against transit operators and Metrorail station managers. D.C. Code § 22-3752. The separate enhancement for crimes against citizen patrol members, D.C. Code § 22-3602, only applies to assault with intent to commit "forcible rape," which is an offense that no longer exists after the District's sexual abuse laws were revised in 1995. D.C. Code § 22-4801 (repl.). It is unclear whether assault with intent to commit an offense such as first degree sexual abuse would be covered by the enhancement. The protection of District public officials statute does not specifically mention AWI offenses, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

[104] All the separate penalty enhancements under current District law apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but they do not consistently apply to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate penalty enhancements also apply inconsistently to malicious disfigurement and mayhem, with the citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602, and the other penalty enhancements applying to both offenses. D.C. Code §§ 22-3601(b); 22-3611(b)(2); 22-3752. The protection of District public officials statute does not specifically mention any felony assault offenses or mayhem or disfigurement, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for enhancement for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

None of the separate penalty enhancements under current District law specify a culpable mental state, but the penalty enhancements for senior citizens[105] and minors[106] have affirmative defenses for a reasonable mistake of age. The "reckless" culpable mental state[107] in the protected person gradations preserves the substance of these affirmative defenses[108] and establishes a consistent culpable mental state requirement for each category of complainant in the RCC definition of "protected person." Finally, the RCC assault statute prohibits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the use of a weapon.[109]

Collectively, these changes provide a consistent enhanced penalty for assaulting the categories of individuals included in the definition of "protected person," removing

[105] 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.").

[106] D.C. Code § 22-3611(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.").

[107] In subsection (A) and subsection (B) of the RCC definition of "protected person," the revised definition, by use of the phrase "in fact," requires strict liability for the age of the actor and any required age gap. It is unclear whether requiring strict liability for these elements changes District law given that the penalty enhancement statutes do not specify any culpable mental states. There is no DCCA case law on the issue.

[108] The current enhancement for crimes against senior citizens makes it a defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). In the RCC, it must be proven that an actor was reckless that the complainant was 65 years or older or under 18 years of age. The actor must disregard a substantial risk that a circumstance (here the fact that the complainant is over 65 or under 18) exists; and the risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct (here, assaulting the complainant) and the circumstances known to the person, the person's conscious disregard of it is clearly blameworthy. Per RCC § 22E-206, a reasonable mistake as to the complainant's age would negate the recklessness required for an age-based gradation enhancement for assault. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

However, given the inherent difficulty in judging the age of another person, an actor who assesses a person's age based on appearance alone likely would be reckless as to the person being over 65 or under 18 if the actor judges a person to be very close in age to the 65 and 18 year old thresholds. For example, if an actor assessed the complainant's age to be in their early 60s based on appearance alone, the actor is likely aware of a substantial risk that the complainant is actually 65 years or older. Whether the actor's disregard of such risk is blameworthy will depend on why the risk was ignored. For example, an assault based on the actor's allegedly knocking down and harming a complainant, reckless that they were 67 year old might reach different conclusions as to blameworthiness depending on whether the actor was running to a hospital to see a family member versus an actor who was running to the front of a line to see a sports star. Ultimately it is up to the factfinder to determine whether an actor's alleged mistake as to age of the complainant is reasonable given the facts of the case.

[109] Current District statutory law does not prevent stacking of such enhancements, and case law has not addressed the stacking of enhancements based on the categories covered in the RCC definition of protected person. However, convictions have been upheld applying both a "while armed" enhancement under D.C. Code § 22-4502 and an enhancement based on the victim's status as a senior or minor.

gaps in the current patchwork of separate enhancements, clarifying the law, and improving the proportionality of offenses.

Tenth, the revised assault statute enhances the penalty for assaults committed against LEOs, public safety employees, or District officials when the assault is committed "with the purpose of harming the complainant because of the complainant's status." Current District law has separate penalty enhancements or enhanced penalties for committing assault-type offenses because of the complainant's status as a LEO,[110] a member of a citizen patrol,[111] a District "official or employee,"[112] or a "family member" of a District "official or employee."[113] Current District law also enhances the penalty for the murder of a "public safety employee"[114] on account of the complainant's status. In contrast, the revised assault statute limits this type of enhanced penalty to a "law enforcement officer" and a "District official," and extends it to a "public safety employee," resulting in several changes to current District law. First, as is discussed in the commentary to RCC § 22E-§ 22E-701, the revised definitions of "law enforcement officer," "District official," and "public safety employee" change the scope of the revised enhancements as compared to current District law. Second, assaults committed against a citizen patrol member, a District "employee," or the "family member" of a District "official or employee" because of the complainant's status no longer receive an enhanced penalty. These provisions raise a number of difficult definitional issues[115] and current

[110] D.C. Code § 22-405(b), (c) (prohibiting assaulting a LEO, assaulting a LEO with significant bodily injury, or committing a "violent act that creates a grave risk of causing significant bodily injury" to the LEO "on account of . . . the performance of his or her official duties.").

[111] D.C. Code § 22-3602(b) (prohibiting committing specified offenses against a member of a citizen patrol "because of the member's participation in a citizen patrol."); 22-3602(a) (defining "citizen patrol" as "a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for certain District of Columbia neighborhoods with the goal of crime prevention. The term shall include, but is not limited to, Orange Hat Patrols, Red Hat Patrols, Blue Hat Patrols, or Neighborhood Watch Associations.").

[112] Current D.C. Code § 22-851(c) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any District "official or employee," broadly defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(c), (a)(2).

[113] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee." "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d).

[114] D.C. Code § 22-2106(a) ("Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties . . . .").

[115] For example, the enhancement for District employees in D.C. Code § 22-851(b) states that it applies "while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties." However, District case law has held, in construing other statutes, that a law enforcement officer may be considered always on duty, *Mattis v. United States*, 995 A.2d 223, 225 (D.C. 2010). There follows an ambiguity whether any assault of a law enforcement officer is subject to heightened liability—regardless whether the assault was part of a domestic dispute or the officer was off-

sentencing practices in the District indicate that these penalty enhancements rarely, if ever, are necessary to proportionate sentences. Third, the enhancement applies consistently to each type of "bodily injury" in the revised assault statute, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[116] the "assault with intent to" offenses,[117] and the various felony assault offenses,[118] resulting in disproportionate penalties for similar conduct. Codifying enhanced protection for assaulting individuals based on their status as LEOs, public safety employees, or District officials clarifies the law and improves the proportionality of offenses.

Eleventh, the revised assault statute eliminates the separate assault offense of "willfully poisoning any well, spring, or cistern of water."[119] Current D.C. Code § 22-401 contains a provision that appears to separately criminalize such poisoning of a water supply, regardless of whether the poisoning results in injury to a person or there was intent to injure a person. No case law exists interpreting this provision. In contrast, the revised assault statute does not criminalize such poisoning except insofar as such conduct may constitute an attempted assault. Another District felony currently criminalizes such

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duty and not known to the assailant as an officer. The RCC, instead, through a separate reference to law enforcement officers as protected persons, provides heightened penalties where an officer is assaulted while in the performance of his or her duties.

[116] Only one of the separate penalty enhancements under current District law applies to simple assault—the enhancement for crimes against citizen patrol members. D.C. Code § 22-3602(c). Assaulting or injury a District "official or employee" also receives an enhanced penalty under the protection of District public officials statute. D.C. Code § 22-851(c).

[117] Of the separate penalty enhancements under current District law, only the separate enhancements for crimes against senior citizens and crimes against minors apply to all the AWI offenses. D.C. Code §§ 22-3601(b); 22-3611(c)(2). No AWI offenses are covered in the separate enhancements for crimes against taxicab drives or crimes against transit operators and Metrorail station managers. D.C. Code § 22-3752. The separate enhancement for crimes against citizen patrol members, D.C. Code § 22-3602, only applies to assault with intent to commit "forcible rape," which is an offense that no longer exists after the District's sexual abuse laws were revised in 1995. D.C. Code § 22-4801 (repl.). It is unclear whether assault with intent to commit an offense such as first degree sexual abuse would be covered by the enhancement. The protection of District public officials statute does not specifically mention AWI offenses, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

[118] All the separate penalty enhancements under current District law apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but they do not consistently apply to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate penalty enhancements also apply inconsistently to malicious disfigurement and mayhem, with the citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602, and the other penalty enhancements applying to both offenses. D.C. Code §§ 22-3601(b); 22-3611(b)(2); 22-3752. The protection of District public officials statute does not specifically mention any felony assault offenses or mayhem or disfigurement, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

[119] D.C. Code § 22-401.

a poisoning,[120] and, depending on the facts of the case such poisoning may constitute attempted murder under RCC § 22E-1101, or an attempted assault. This change improves the proportionality of District offenses by punishing such conduct consistent with other inchoate attempts to harm persons.

Twelfth, under the revised assault statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" due to his or her self-induced intoxication. Under subsection (h), a factfinder may impute awareness of the risk required to prove the defendant acted with extreme indifference to human life. The current assault statute is silent as to the effect of intoxication. However, District case law appears to have established that assault is a general intent offense,[121] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[122] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[123]—the claim that, due to his or her self-induced intoxicated state, the defendant did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" as required for more serious forms of assault.[124] By contrast, under the revised assault offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the culpable mental states of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" as required to prove some types of assaults. Likewise, where appropriate, the defendant would be entitled to an instruction,

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[120] Current District law has an offense for maliciously polluting water. D.C. Code § 22-3318 ("Every person who maliciously commits any act by reason of which the supply of water, or any part thereof, to the City of Washington, becomes impure, filthy, or unfit for use, shall be fined not less than $500 and not more than the amount set forth in § 22-3571.01, or imprisoned at hard labor not more than 3 years nor less than 1 year.").

[121] For District case law establishing that assault is a general intent crime, see, for example, *Smith v. United States*, 593 A.2d 205, 206–07 (D.C. 1991) and *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011). For District case law indicating that a voluntary intoxication defense may not be raised to an assault charge, see *Parker v. United States*, 359 F.2d 1009, 1013 n.4 (D.C. Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)). *See also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime).

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

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

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

which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" at issue in assault.[125] However, subsection (h) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. But in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for second degree murder. This change improves the clarity, consistency, and proportionality of the offense.

Thirteenth, due to the revised definition of "serious bodily injury" in RCC § 22E-701, first degree assault and second degree assault in the revised statute no longer specifically include rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current aggravated assault statute prohibits "serious bodily injury."[126] While there is no statutory definition of the term's meaning, the definition of "serious bodily injury" under DCCA case law for aggravated assault includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[127] As discussed in the commentary to the revised definition in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised first degree assault and second degree assault offenses, are limited to a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ, or protracted loss of consciousness. This change improves the clarity, consistency, and proportionality of the revised offenses.

Fourteenth, the revised assault statute replaces certain minimum statutory penalties for assault with intent to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse[128] and assault with a dangerous weapon on a police officer.[129] These minimum statutory penalties require specified prior convictions, and it

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

[126] D.C. Code § 22-404.01(a).

[127] The DCCA has adopted for the aggravated assault offense the definition of "serious bodily injury" currently codified for the sexual abuse offenses in D.C. Code § 22-3001. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999).

[128] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia.").

[129] D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

is unclear how the general recidivist statutes in the current D.C. Code apply, if at all, to these provisions.[130] There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. In contrast, the revised assault statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. This change improves the consistency and proportionality of the revised offense.

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

First, the revised assault statute requires a culpable mental state of recklessness for the lower-level gradations of assault: subsection (b)(2) of second degree assault, third degree assault, subsection (e)(1) of fourth degree assault, and fifth degree assault. The current D.C. Code is silent as to the culpable mental states required for simple assault,[131] but the current felony assault with significant bodily injury statute requires recklessness.[132] Current District case law suggests that recklessness may suffice for simple assault,[133] however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient.[134] Instead of this ambiguity, the revised assault statute clearly establishes that recklessness is sufficient for specified gradations. This is consistent with prevailing District case law (including District case law on voluntary intoxication[135]), and is consistent with current District statutes. This change improves the clarity of the law.

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[130] D.C. Code §§ 22-1804; 22-1804a.

[131] D.C. Code § 22-404(a)(1).

[132] D.C. Code § 22-404(a)(2).

[133] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."); 22-404.01(a)(2) (aggravated assault statute requiring "under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury.").

[134] Recently, the DCCA explicitly declined to decide whether assault requires recklessness or a higher culpable mental state like intent to injure, stating "[e]ven if the greater proof was necessary, the jury could permissibly infer such intent from [appellant's] extremely reckless conduct, which posed a high risk of injury to those around him. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[135] Under District law, voluntary intoxication cannot constitute a defense to a "general intent" crime. *Kyle v. United States*, 759 A.2d 192, 199-200 (D.C. 2000). In accordance with this rule, assault appears to be a general intent crime, to which an intoxication defense may not be raised. *Parker v. United States*, 359 F.2d 1009, 1013 n.4 (D.C. Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)); *see, e.g.*, *Smith v. United States*, 593 A.2d 205, 206–07 (D.C. 1991) (observing that assault is a general intent crime); *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011)

Second, use of the definition of "bodily injury" in the revised assault statute, defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition," clarifies the minimal harm that is required to constitute assault under the revised statute. Current District assault statutes do not address whether they cover any infliction of pain or causing illness or impairment of physical condition. District case law has established that any non-consensual touching, even without pain, is simple assault.[136] However, whether recklessly causing illness or impairment of someone's physical condition constitutes simple assault under current law is not established. Use of the defined term "bodily injury" clarifies that not only physical contacts that result in pain are criminal under the RCC assault statute, but also potentially painless harms such as sickness[137] or impaired physical conditions.[138] Physical contacts that do not meet the revised definition of "bodily injury" are criminalized under the RCC offensive physical contact offense (RCC § 22E-1205) or second degree nonconsensual sexual conduct (RCC § 22E-1307(b)).[139] This change clarifies the scope of the revised

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(same); *see also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime). The Revised Criminal Code does not recognize the distinction between general and specific intent crimes for purposes of the law of intoxication; instead, it employs an imputation approach under which the culpable mental state of recklessness, as defined under RCC § 22E-206(d), may be imputed—notwithstanding the absence of awareness of a substantial risk—based upon the self-induced intoxication of the actor. *See* RCC § 209(c) ("When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if: (1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and (2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists."). Under this new approach, application of a recklessness (or negligence) culpable mental state to a revised offense roughly approximates District law governing general intent crimes. *See* First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code—Mistake, Deliberate Ignorance, and Intoxication, at 27-31 (March 13, 2017).

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

[137] Recklessly engaging in nonconsensual physical contact that transmits a disease to another person may suffice for assault liability. However, particular care should be given to the clear blameworthiness standard incorporated into the RCC definition of recklessness, which requires that the person's conscious disregard of a substantial risk, given the "nature and degree" of the risk, as well as the "nature and purpose of the person's conduct and the circumstances known to the person," have been "clearly blameworthy." RCC § 22E-206(d). For example, a sneezy office worker who disregards a substantial risk that he will transmit a cold virus to others by working in proximity to them would not ordinarily satisfy the requirement of bodily injury, whereas, a sneezy surgeon who disregards a substantial risk that she will transmit a cold virus to a patient undergoing a procedure and having a compromised immune system may satisfy the requirement of bodily injury for assault liability. [Note that effective consent may be a defense in any of these examples, however, per RCC § 22E-409].

[138] For example, a person who surreptitiously adds alcohol to another's drink, consciously disregarding a substantial risk that the alcohol will alter the drinker's physical condition, such as their sense of balance, may satisfy the requirement of bodily injury for assault liability if the "clearly blameworthy" requirement in the definition of "recklessness," per RCC § 22E-206, is met.

[139] As is discussed in the commentary to the revised nonconsensual sexual conduct statute, second degree nonconsensual sexual conduct generally replaces liability for the non-violent sexual touching form of

assault offense and, to the extent it changes existing law, fills a gap insofar as the infliction of potentially serious but painless harms may not be subject to assault liability.

Third, the effective consent defense in RCC § 22E-409 limits liability under the revised assault statute. The District's assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[140] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[141] To resolve this ambiguity, the RCC effective consent defense clarifies when the complainant's "effective consent" or a person's belief that the complainant gave "effective consent" is a defense to RCC offenses against persons such as assault. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised assault statute clarifies the prohibition on justification or excuse defenses in the current assault on a police officer (APO) statute.[142] First, the RCC provision in subsection (g) codifies the requirements in the current APO statute, DCCA case law, and existing District practice[143] that the defendant actively oppose the use of force,[144] that the limitation extends to stops or other detention (not just arrest) for a legitimate police purpose,[145] that the arrest, stop, or detention need not be lawful,[146] and

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assault. RCC § 22E-1205, the offensive physical contact offense, provides general liability for offensive touching, regardless whether there is an intent to sexually degrade, arouse, or gratify.

[140] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

[142] D.C. Code § 22-405(d) ("It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.").

[143] D.C. Crim. Jur. Instr. § 4-114 ("A police officer may stop or detain someone for a legitimate police purpose. And the officer may use the amount of force that appears reasonably necessary to make or maintain the stop. This is the amount of force that an ordinarily careful and intelligent person in the officer's position would think necessary. If the officer uses only the force that appears reasonably necessary, the person stopped may not interfere with the officer, even if the stop later turns out to have been unlawful. If s/he does interfere, s/he acts without justification or excuse. If the officer uses more force than appears reasonably necessary, the person stopped may defend against the excessive force, using only the amount of force that appears reasonably necessary for his/her protection. If that person uses more force than is reasonably necessary for protection, s/he acts without justification.").

[144] *See, e.g.*, *Foster v. United States*, 136 A.3d 330, 332 (D.C. 2016) ("In this case, however, appellant was also found guilty of APO for resisting efforts by the police to handcuff him. We have held that in order to constitute such a violation, 'a person's conduct must go beyond speech and mere passive resistance or avoidance, and cross the line into active confrontation, obstruction or other action directed against an officer's performance in the line of duty[ ]' by 'actively interposing some obstacle that precluded the officer from questioning him or attempting to arrest him.'") (quoting *In re C.L.D.*, 739 A.2d 353, 357–58 (D.C.1999) (footnotes omitted)).

[145] *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989).

that the law enforcement officer's use of force appeared reasonably necessary.[147] Second, the RCC prohibition requires that the defendant is at least reckless as to the complainant's status as a law enforcement officer. The limitation in the District's current APO statute requires that the defendant "knew or should have known" that the complainant was a law enforcement officer.[148] Case law repeats this language,[149] without clarifying whether there is any requirement of subjective awareness on the defendant's part as to the complainant's status.[150] The revised assault statute requires that the defendant is reckless as to the fact that the person harmed is a law enforcement officer. A "reckless" culpable mental state makes the defense consistent with the assault gradations that have an enhancement for "protected persons" (which include law enforcement officers in the course of their duties as a category in the definition of "protected person."). Third, the language "there are no justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] for a person to actively oppose the use of physical force by a law enforcement officer when…" clarifies that there may be other circumstances where a person has a justification defense or excuse defense to assault against a LEO under future RCC justification and excuse defenses. Finally, through use of the phrase "in fact," paragraphs (g)(2) and (g)(3) clarify that there is no culpable mental state for whether the use of force occurs during a specified encounter or whether the law enforcement officer uses only the amount of force that appears reasonably necessary. These changes clarify the defense, using definitions and requirements consistent with the revised assault offense and existing District law.

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

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[146] *See, e.g.*, D.C. Code § 22-405(d) ("It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.").

[147] *Speed v. United States*, 562 A.2d 124, 127, 128 (D.C. 1989) (approving a jury instruction for assault on a police officer that stated "[i]n making and maintaining the arrest, the measure of reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary.").

[148] D.C. Code § 22-405 ("It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.").

[149] *See, e.g.*, *Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[150] *See Speed v. United States*, 562 A.2d 124, 129 (D.C.1989) (finding an exception to the defense where "the defendant did know or had reason to know that the complainant was a member of such force, and the officer was engaged in official police duties…"). The DCCA has held that similar language in the receiving stolen property offense, "knowing or having reason to believe that the property was stolen," requires a defendant's subjective awareness, not mere negligence. *Owens v. United States*, 90 A.3d 1118, 1122 (D.C. 2014). *But see* Dean v. United States, 938 A.2d 751, 762 (D.C. 2007) (holding that "reason to know" language in the murder of a law enforcement officer statute does not require actual knowledge that decedent was an officer).

First, the revised assault statute codifies the culpable mental state in the District's current aggravated assault statute as "recklessly, with extreme indifference to human life" (paragraphs (a)(3), (a)(4), and (b)(1)). The District's current aggravated assault statute lists two different culpable mental states: "knowingly or purposely causes serious bodily injury" in D.C. Code § 22-404(a)(1) and "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury" in D.C. Code § 22-404(a)(2). The DCCA, however, has stated that "[i]n order to give effect to the [aggravated assault] statute as a whole, subsection (a)(2) must be read as requiring a different type of mental element—gross recklessness."[151] The DCCA has also stated that the lower culpable mental state in the current aggravated assault statute "can be proven by evidence of 'conscious disregard of an extreme risk of death or serious bodily injury'"[152] and that it is "substantively indistinguishable from the minimum state of mind required for conviction of second-degree murder,"[153] in that it, too, requires "'extreme recklessness' regarding risk of death or serious bodily injury.'"[154] In the RCC it is only necessary to specify the latter culpable mental state because the higher culpable mental states "knowingly" or "purposely" satisfy the lower culpable mental state under RCC § 22E-206. This revision clarifies without changing[155] existing law on the "gross recklessness" standard in the current aggravated assault statute.

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[151] *Perry*, 36 A.3d at 817. The DCCA further explained that this mental state is "shown by 'intentionally or knowingly' engaging in conduct that, in fact, 'creates a grave risk of serious bodily injury,' and "doing so 'under circumstances manifesting extreme indifference to human life.'" *Id.*

[152] *Id.* at 818 (*quoting Coleman v. United States*, 948 A.2d 534, 553 (D.C. 2008). *See Perry*, 36 A.3d at 818 ("In this opinion, we have clarified that both prongs of the aggravated assault statute require an element of *mens rea:* either specific intent to cause serious bodily injury, or, as the plain terms of the statute provide, "extreme indifference to human life.") *See also Comber v. United States*, 584 A.2d 26, 38-39 (D.C. 1990) (*en banc*).

[153] *Perry*, 36 A.3d at 823 (Farrell, J. concurring).

[154] *Id.* at n.3 (quoting *Comber*, 584 A.2d at 39 n. 11).

[155] *See, e.g.*, *Perry v. United States*, 36 A.3d 799, 817, 818 (stating that the required mental state in subsection (a)(2) of the aggravated assault statute (D.C. Code § 22-404.01) was "gross recklessness" and that this mental state was "substantively indistinguishable" from the required mental state for second degree murder); *In re D.P.*, 122 A.3d 903, 908-910 (holding that evidence was insufficient to prove depraved heart malice as required for aggravated assault under D.C. Code § 22-404.01(a)(2) when appellant was unarmed, engaged in assaultive conduct for approximately fourteen seconds on a public bus, and ceased the assault when the complainant was no longer fighting back); *Vaughn v. United States*, 93 A.3d 1237, 1268, 1270 (D.C. 2014) (deeming the enhanced recklessness of aggravated assault to "set [such] a high bar" that a jury instruction which suggested the mens rea of the offense was only was one of normal recklessness—i.e. the "awareness of and disregard [of a risk]" at issue in felony assault—constituted plain error that was prejudicial, "affect[ed] the integrity of th[e] proceeding," and "impugn[ed] the public reputation of judicial proceedings in general.").

It should be noted that the revised second degree murder statute in RCC § 22E-1101(b) also requires the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," which will not change DCCA case law interpreting depraved heart murder. *See, e.g.*, *Comber v. United States*, 584 A.2d 26, 39 (D.C.1990) (en banc) (noting that "depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury, but engaged in that conduct nonetheless); *Powell v. United States*, 485 A.2d 596 (D.C.1984) (affirming second degree murder conviction on depraved heart malice theory when defendant led police in a high speed chase at speeds of up to ninety miles an hour); *Perez v. United States*, 968 A.2d 39, 102 (D.C.

Second, the revised assault statute, by the use of the phrase, "in fact," clarifies that no culpable mental state is required as to whether the object displayed or used to cause the specified types of bodily injury is a "dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-701, or a "firearm as defined in D.C. Code § 22-4501(2A)." As discussed above as a substantive change to current District law, the revised assault statute's weapons gradations replace the current offense of assault with a dangerous weapon (ADW), as well as the separate penalty enhancement for committing certain assault offenses "when armed with or having readily available" a deadly or dangerous weapon.[156] The current ADW statute is silent as to what culpable mental state applies to whether the object at issue is a dangerous weapon.[157] However, District case law provides that whether an object qualifies as a "dangerous weapon" hinges upon a purely objective analysis of the nature of the object rather than on the accused's understanding of the object.[158] District case law for the "while armed" enhancement in D.C. Code § 22-4502 similarly supports applying strict liability to whether the object at issue is a dangerous weapon.[159] Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[160] Notably, however, the revised assault offense requires at least recklessness as to causing specified bodily injury by the display or use of what is, in fact, a dangerous weapon or imitation dangerous weapon.[161] This change clarifies, and potentially fills a gap in, District law.

2009) (affirming second degree murder conviction on depraved heart malice theory when defendant handed a knife to co-defendant whom he knew wanted to harm the victim, and the co-defendant used the knife to fatally wound the victim).

[156] D.C. Code § 22-4502(a).

[157] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

The more stringent 10-year maximum penalty, as opposed to 180 days for simple assault in D.C. Code § 22-404(a)(1), is "imposed as 'a practical recognition of the additional risks posed by use of the weapon.'" *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (*quoting Parker v. United States*, 359 F.2d 1009, 1012 (D.C. Cir. 1966)).

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

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

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

[161] The revised assault statute requires that the object that a person recklessly displays or uses to cause the specified "bodily injury" be, in fact, a dangerous weapon or imitation dangerous weapon. So, for example, where a person believes that he or she is causing the complainant bodily injury by displaying or using only a heavy bag, the RCC assault statute requires that the heavy bag, be, in fact a dangerous weapon or

imitation dangerous weapon, and if it is not, there is no enhanced liability in the RCC assault statute. If the heavy bag contains a per se dangerous weapon, such as a firearm (which adds to its weight),this would not suffice for enhanced assault liability for displaying or using a dangerous weapon or imitation dangerous weapon if the actor did not know and should not have known that the heavy bag contained a firearm. One cannot conceptualize the assault as being by "displaying or using" a heavy bag, then analyze the assault with respect to a firearm which is one of the unknown contents of the bag. The causation requirement in RCC § 22E-204 may also preclude liability in such a situation to the extent that wielding a bag with an unknown firearm in it causes a bodily injury (e.g. by discharge) that is not reasonably foreseeable.

RCC § 22E-1203. Menacing.

Explanatory Note. *This section establishes the menacing offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes in-person efforts to inflict fear of immediate personal violence. The offense is graded according to the means of communicating a threat: by display or use of a weapon or imitation weapon (first degree) or otherwise (second degree). The revised criminal threats offense[1] and revised menacing offense replace the misdemeanor and felony threats statutes[2] in the current D.C. Code. The RCC menacing offense also replaces the intent-to-frighten form of simple assault[3] and the intent-to-frighten form of assault with a dangerous weapon[4] in the current D.C. Code.*

Paragraphs (a)(1) and (b)(1) state the prohibited conduct—that the defendant communicates to another person. Communication requires not only that the defendant take action to convey a message, but also that the message is received and understood by another person.[5] No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion.[6] The verb "communicates" is intended to be broadly construed, encompassing all speech[7] and other messages[8] that are received and understood by another person. The communication must be to a person "physically present" with the defendant and the content of the defendant's communication must be that he or she will immediately cause a criminal harm involving a bodily injury, a sexual act, a sexual contact, or confinement.[9] Whether particular words, gestures, symbols, or other conduct communicate such content is a question of fact that will often require judgment by a factfinder.[10]

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[1] RCC § 22E-1204.
[2] D.C. Code §§ 22-407, 22-1810.
[3] D.C. Code § 22-404.
[4] D.C. Code § 22-402.
[5] DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), and the RCC criminal threats statute (RCC § 22E-1204) recognizes, 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.
[6] *Griffin v. United States*, 861 A.2d 610, 616 (D.C. 2004) (citing *Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000)).
[7] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.
[8] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).
[9] "Cause" includes personally engaging in criminal conduct and soliciting or allowing an accomplice or innocent instrumentality to engage in criminal conduct.
[10] For example, a jury may evaluate whether the accused's gesture of drawing a finger across his throat communicated that the accused would kill the recipient of the communication.

Paragraphs (a)(1) and (b)(1) also require a culpable mental state of knowledge, a term defined at RCC § 22E-206. Applied to the elements here, the accused must at least be aware to a practical certainty that his or her conduct: 1) communicates to a complainant who is physically present; 2) that the actor immediately will cause a criminal harm; and 3) the criminal harm involves a bodily injury, a sexual act, a sexual contact, or confinement.

Paragraph (a)(2) limits first degree menacing liability to communication by displaying or using a dangerous weapon or an imitation dangerous weapon.[11] The phrase "by displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch.[12] However, referring to a weapon through language, symbols, or gestures alone is insufficient for first degree liability.[13] The word "by" before "displaying or using" indicates that the display or use of the weapon must be the means—though not necessarily the sole means[14]—of conveying the threatening message. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (a)(1) also applies to the elements in subparagraph (a)(1), requiring the accused to be practically certain that he is displaying or using a dangerous weapon or imitation dangerous weapon to convey a menacing message.

Paragraphs (a)(3) and (b)(2) require the defendant make the communication "with intent that" it be perceived as a serious expression of an intent to do harm.[15] "Intent" is a defined term in RCC § 22E-206 that here requires that the defendant was practically certain that his or her communication would be perceived as a serious expression of an intent to do harm. Per RCC § 22E-205, the object of the phrase "with intent that" 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 communication was perceived as a serious expression of an intent to do harm, only that the actor believed to a practical certainty that it would be so perceived.[16] Not all insulting, abusive, or violent language is threatening.[17] For example, a statement about

[11] The terms "dangerous weapon" and "imitation dangerous weapon" are defined in RCC § 22E-701.

[12] For example, assuming the other elements of the offense are proven, the following conduct may be sufficient for first degree liability: rearranging one's coat to provide a momentary glimpse of part of a knife; holding a sharp object to someone's back; audibly cocking a firearm; or shooting a firearm in the air.

[13] Consider, for example, a person who merely states, "I have a knife" or draws a finger across his throat in a slicing motion. That person's statement or gesture does not amount to displaying or using a dangerous weapon or imitation dangerous weapon.

[14] For example, a person may say "I'm going to cut off your nose," or "I am going to rape you," while brandishing a knife.

[15] *Virginia v. Black*, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.") (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) ("political hyperbole" is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

[16] The menacing offense requires that the listener receive and understand, at the most basic level, the *meaning* of the defendant's speech. *See Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001). 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. However, the offense does not require that the listener be certain about the *intent* behind the defendant's speech. So long as (1) the defendant intended that the victim perceive the threat as serious and (2) a reasonable person in the victim's circumstances would perceive the threat as serious, it is of no consequence that the listener does not actually believe that the defendant means what was said.

what a person believes ought to happen, may not be intended and understood as an expression that the declarant will cause it to happen.[18] Whether a particular communication amounts to a serious expression of intent to inflict harm is a question of fact that will often require judgment by a factfinder.

Paragraphs (a)(4) and (b)(3) require proof that the accused's communication is objectively threatening, under the circumstances. "In fact," a defined term,[19] is used to indicate that there is no culpable mental state requirement for paragraphs (a)(3) and (b)(3). Rather, the only proof required with respect to this element of the revised offense is that the defendant's message would cause a reasonable person in the complainant's circumstances to believe that the harm would occur.[20] This is an objective standard, but it is evaluated contextually, assuming awareness of the circumstances known to the parties in the case.[21] The relevant facts and circumstances in an individual case may include prior interactions between the declarant and the listener and the power dynamics between the declarant and the target of the threat.[22] Paragraphs (a)(4) and (b)(3) do not require that the defendant actually have the ability or apparent ability to carry out the threatened harm.[23] The offense also does not require proof that the defendant actually intended to eventually carry out the threat.

Subsection (c) specifies relevant penalties for each gradation of the offense. [*See* the Second Draft of Report #41.] Paragraph (c)(3) specifies that the gradation of the offense is increased by one class when it is proven[24] that the actor was reckless as to the complainant being a protected person. The term "reckless" is defined in RCC § 22E-206 and the terms "actor," "complainant," and "protected person" are defined in RCC § 22E-701.

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

Relation to current District law. *The RCC menacing statute changes current District law in five main ways.*

First, the revised second degree menacing statute uses the word "communicates," which includes all verbal and non-verbal conduct that conveys a message. The current

[18] *Compare State v. Draskovich*, 904 N.W.2d 759, 761 (S.D. 2017) (upholding a threats conviction where a defendant told a court employee, "Well, that deserves 180 pounds of lead between the eyes.") *with People v. Wood*, 2017 WL 5617926, at *3 (Ill. App. Ct. Nov. 20, 2017) (reversing a threats conviction where a defendant expressed a "dream for revenge," stating, "There is not a day that goes by since I was sentenced at that courthouse that I have not dreamed about revenge and the utter hate I feel for the judge," and "there's not a day that goes by that I don't pray for the death and destruction upon the judge.")

[19] RCC § 22E-207.

[20] *Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017). This objective element is also required for proof of attempted threats.

[21] *High v. United States*, 128 A.3d 1017, 1021 (D.C. 2015).

[22] *See, e.g., High v. United States*, 128 A.3d 1017 (D.C. 2015) (concluding that an ordinary hearer, in the circumstances of an on-duty law enforcement officer, would not reasonably fear imminent or future harm or injury based on the defendant's expression of exasperation or resignation, "Take that gun and badge off and I'll f*** you up.").

[23] Consider, for example, Person A approaches Person B threatening to "beat him up." Person B is unafraid because he has been specially trained as a fighter. Person A, nevertheless, may have committed menacing against Person B.

[24] RCC § 22E-605 requires that penalty enhancements be charged and proven beyond a reasonable doubt.

District assault statutes are silent as to the type of conduct that may constitute an "intent-to-frighten" form of assault. However, District case law holds that "mere words do not constitute an assault."[25] Under centuries-old common law, non-verbal conduct is required for intent-to-frighten assault,[26] although case law does not specify what conduct is required. The current District threats statutes are silent as to the type of conduct that may convey a threat, simply referring to a person who "threatens"[27] or issues a "threat."[28] However, in at least one case, the District of Columbia Court of Appeals ("DCCA") has stated that a threat "requires *words* to be communicated to another person" in contrast with intent-to-frighten assault which "requires threatening conduct."[29] Case law describes an element of threats as having "uttered words,"[30] which has been explicitly construed to cover not only oral but written threats.[31] In contrast, the RCC second degree[32] menacing offense punishes menacing words (written or oral), gestures, and symbols.[33] Assuming other elements of the offense are proven, the social harm at issue—the immediate, intentional infliction of fear upon a person—occurs whether the message is conveyed verbally or non-verbally.[34] This change eliminates an unnecessary gap in District law and improves the proportionality of the revised offense.

Second, the revised statute clarifies that both gradations require a threat of immediate criminal harm involving a bodily injury, a sexual act, a sexual contact, or confinement. The current District assault statutes are silent as to the type of conduct that

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[25] *Williamson v. United States*, 445 A.2d 975, 978 (D.C. 1982).

[26] One of the District's oldest cases, from the very first volume of Cranch's Reports, turns on this issue. In *United States v. Myers*, the defendant "doubled his fist and ran it towards the witness, saying, 'If you say so again, I will knock you down.'" 1 Cranch C.C. 310, 310 (D.C. 1806). The guilty verdict was upheld.

[27] D.C. Code § 22-1810.

[28] D.C. Code § 22-407.

[29] *Joiner-Die v. United States*, 899 A.2d 762, 766 (D.C. 2006) (emphasis in the original). However, although no reported threats case before the DCCA appear to have been based on gestures alone, symbolic or non-verbal threats have been considered by that Court in the broader context of threatening conduct. *See, e.g., Gray v. United States*, 100 A.3d 129, 136 (D.C. 2014) ("[T]he trial court found appellant guilty of threats based on Lowery's testimony that [the defendant] said 'I'm going to kill you,' and made 'a gun motion' with his fingers."). *See also*, D.C. Crim. Jur. Instr. § 4.130 (including gestures and symbols as means of completing the offense); *Ebron v. United States*, 838 A.2d 1140, 1150-53 (D.C. 2016) (in context of threats evidence admissibility, hand being dragged across the throat constituted a "threatening action").

[30] *United States v. Baish*, 460 A.2d 38, 42 (D.C. 1983) ("[A] person 'threatens' when she utters words[.]").

[31] *Tolentino v. United States*, 636 A.2d 433, 434-35 (D.C. 1994) (rejecting defendant's argument that the threats offense only covers oral communications, and upholding conviction based on written threats); *Andrews v. United States*, 125 A.3d 316, 325 (D.C. 2015) (upholding conviction on the basis of threatening text messages).

[32] While first degree menacing may also involve oral communications (perhaps in reference to a brandished weapon), oral communications alone would be insufficient to meet the requirement that the communication be by "displaying or using" a specified weapon.

[33] E.g., transmitting an image or sound to a recipient.

[34] *See, e.g., State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

may constitute an "intent-to-frighten" form of assault. However, District case law holds that intent-to-frighten assault covers a defendant's "conduct as could induce in the victim a well-founded apprehension of peril."[35] District case law concerning intent-to-frighten assault has upheld convictions for placing a person in fear of "immediate injury."[36] However, there is no District case law deciding whether placing someone in fear of an offensive physical contact, the lowest level of assault recognized under current District law,[37] suffices for intent-to-frighten assault liability.[38] Current District threats statutes refer to a few types of conduct: to "kidnap," "injure the person of another," "physically damage the property of any person," or "do bodily harm."[39] Neither the current statutes nor case law define the precise meaning of terms like "injure" or "do bodily harm," and it is unclear whether the phrases are equivalent to the harm described in case law for simple assault.[40] In contrast, the RCC menacing statute specifies the relevant harms that may be the basis for a menacing prosecution. This change narrows the scope of the offense by excluding non-sexual, merely offensive physical contacts (that fall short of inflicting bodily injury),[41] but broadens the offense to include kidnapping conduct that does not involve a bodily harm.[42] This change reduces an unnecessary gap in liability, and improves the clarity and proportionality of the offense.

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[35] *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986).

[36] *Joiner-Die*, 899 A.2d at 765; accord *Alfaro v. United States*, 859 A.2d 149, 156 (D.C. 2004) ("The essence of the common law offense of assault is the intentional infliction of bodily injury or the creation of fear thereof," and "[a]ll forms of assault share one common feature, namely, that they intrude upon bodily integrity and inflict bodily harm or the fear or threat thereof."). For purposes of instructing juries, the pattern jury instructions provide, "Injury means any physical injury, however small, including a touching offensive to a person of reasonable sensibility." D.C. Crim. Jur. Instr. § 4.100.

[37] *Ray v. United States*, 575 A.2d 1196, 1199 (D.C.1990).

[38] The holding in *Ray* is directed mainly at the attempted-battery form of simple assault. *Ray*, 575 at 1199. It is only by logical inference (admittedly, a small inference) that one can conclude that intent-to-frighten assault includes threatened offensive contact. But the Redbook does include the possibility of an intent-to-frighten assault premised on a threatened offensive contact. D.C. Crim. Jur. Instr. § 4.100. Notably, neither the Redbook nor any DCCA case law seems to address the possibility that intent-to-frighten assault can be based on a threatened non-violent sexual touching.

[39] D.C. Code §§ 22-407, 22-1810.

[40] D.C. Code § 22-404. *See Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001) ("[A]ssault is defined as the unlawful use of force causing injury to another…"). The DCCA has further held that "assault" includes "non-violent sexual touching assault as a distinct type of assault." *Id*. And in fact, even non-sexual but "offensive" touching can constitute assault. *Ray*, 575 A.2d at 1199. In at least one case, the DCCA has upheld a threats conviction where the threat consisted of saying, "I'm going to smack the s*** out of you." *Jones v. United States*, 124 A.3d 127, 131 (D.C. 2015). It is unclear whether slapping a person would constitute simple assault *qua* inflicting bodily harm, or simple assault *qua* engaging in an offensive touching.

[41] As noted above, there is no District case law on point as to whether placing someone in fear of an offensive physical contact, the lowest level of assault recognized under current District law, would suffice for intent-to-frighten assault liability. However, to the extent that an attempted offensive physical contact, even when actually inflicted, is the least or nearly the least severe form of offense against person in the RCC, a menacing that places another person in fear of an offensive physical contact would be less severe than even an attempted offensive physical contact.

[42] For example, a form of kidnapping that involves no physical contact, such as locking the door to a room someone is in, has been held to not constitute an assault. *Patterson v. Pillans*, 43 App. D.C. 505, 506-07 (C.C.D.C. 1915).

Third, the RCC menacing offense eliminates liability based on an "intent to injure." The current District assault statutes are silent as to the types of intent that may constitute an "intent-to-frighten" form of assault. However, District case law has indicated that, in addition to an intent to scare a victim, intent-to-frighten assault liability also may exist where there is an intent to cause bodily injury to the victim.[43] This "intent to cause injury" form of intent-to-frighten assault appears to be distinct from criminal liability for an attempted battery form of simple assault in District case law.[44] By contrast, the RCC menacing offense requires only that the defendant intend that communication be perceived as a threat. A person who engages in conduct with an intent to inflict bodily injury may be liable under the RCC assault statute,[45] but unless the person has an intent that the communication be perceived as a threat and meets the other offense elements, such a person is not liable under the revised menacing offense. This new division of criminal liability between the revised assault and revised menacing statutes may limit punishment for some conduct currently recognized as a completed form of intent-to-frighten assault to an attempted assault in the revised statute.[46] The change clarifies the revised offenses of assault and a menacing and eliminates unnecessary overlap in current District law between attempted battery forms of assault and intent-to-frighten forms of assault.

Fourth, the RCC menacing offense replaces penalty enhancements based on the victim's status as a minor, a senior citizen, a transportation worker, a District official or employee, or a citizen patrol member. Under current District statutes, certain penalty enhancements apply to simple assault (including intent-to-frighten assault)[47] and assault with a deadly weapon.[48] By contrast, under the RCC, it must be proven that the person was reckless as to the complainant being a "protected person" as defined in the RCC.[49] This change simplifies current law and improves the consistency and proportionality of the revised offenses.

Fifth, under the revised criminal menacing statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current intent-to-frighten form of assault statute is silent as to the

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[43] *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986).

[44] The attempted battery form of assault requires proof that the defendant committed an "actual attempt, with force or violence, to injure another." *Williamson*, 445 A.2d at 978; *accord Patterson v. Pillans*, 43 App. D.C. 505, 506-07 (C.C.D.C.) ("attempt to cause a physical injury, which may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person.").

[45] RCC § 22E-1202.

[46] I.e. to the extent that intent-to-frighten assault in current DCCA case law recognizes liability for an intent to cause bodily harm without an intent to frighten, there is no corresponding liability for a completed offense in the revised menacing statute—even though liability would exist in the revised assault statute.

[47] The enhancements are: D.C. Code § 22-851 (District official, employee or the family member thereof) and D.C. Code § 22-3602 (citizen patrol member). Note that there is also a slightly greater penalty for simple assault of a law enforcement officer (6 months versus 180 days) per D.C. Code § 22-405.

[48] The enhancements are: D.C. Code § 22-3611 (minor); D.C. Code § 22-3601 (senior citizen); D.C. Code §§ 22-3751, 22-3751.01, 22-3752 (transportation worker); D.C. Code § 22-851 (District official, employee or the family member thereof); or D.C. Code § 22-3602 (citizen patrol member).

[49] *See* RCC § 22E-701.

availability of an intoxication defense. However, because the offense has been characterized as a general intent crime,[50] defendants may be precluded from receiving a jury instruction on voluntary intoxication[51] or presenting evidence in support thereof.[52] Under the RCC menacing statute, a defendant will be able to raise and present relevant and admissible evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a menacing offense. Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[53] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these five substantive changes to current District law, four other aspects of the RCC menacing statute may be viewed as substantive changes of law.

First, the revised menacing statute clarifies that the defendant must act with intent—i.e. must believe to a practical certainty—that his or her communication will be perceived as a serious expression that the defendant would cause the harm. The District's current simple assault and assault with a deadly weapon statutes are silent as to the offenses' requisite culpable mental states. Current District case law has often indicated that recklessness may suffice for such assaults,[54] however, in some instances a higher

[50] *See, e.g., Smith v. United States*, 593 A.2d 205, 206-07 (D.C. 1991) and *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011). For District case law indicating that a voluntary intoxication defense may not be raised to an assault charge, see *Parker v. United States*, 359 F.2d 1009, 1013 n.4 (D.C. Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)). *See also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime).

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

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

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

[54] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams*, 106 A.3d at 1065 & n.5 (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."); D.C. Code § 22-404.01(a)(2) (aggravated assault statute requiring "under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury.").

level of intent has been required,[55] and the DCCA recently declined to hold that recklessness is sufficient.[56] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes, and knowledge as to the criminal nature of the harm is consistent with this case law.[57] The RCC menacing offense resolves these ambiguities by requiring a culpable mental state of knowledge in paragraphs (a)(1), (a)(2) and (b)(1) and intent for subsections (a)(3) and (b)(2).[58] Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[59] A knowledge culpable mental state requirement is also more appropriate given that the menacing offense requires only a communication, not a bodily injury or use of overpowering physical force,[60] which may be more easily misconstrued as a threat.[61] This change improves the clarity of the law, and is consistent with prevailing District law and the revised criminal threats offense.[62]

Second, the revising menacing statute includes an "objective element" in paragraphs (a)(4) and (b)(3), subject to strict liability.[63] The District's current assault

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[55] *See Buchanan v. United States*, 32 A.3d 990, 998 (D.C. 2011) (Ruiz, J., concurring) ("At the same time that we have labeled assault a general intent crime, however, we have also articulated additional showings of intent which would seem to go above and beyond the ordinary conception of general intent merely to do the act constituting the assault.").

[56] Recently, the DCCA explicitly declined to decide whether assault requires recklessness or a higher culpable mental state like intent to injure, stating "[e]ven if the greater proof was necessary, the jury could permissibly infer such intent from [appellant's] extremely reckless conduct, which posed a high risk of injury to those around him. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[57] *Carrell v. United States*, 165 A.3d 314, 323-24 (D.C. 2017) (rejecting an analysis of the threats statute in terms of "specific" or "general" intent and requiring proof of knowledge, or at least some subjective intent, on the part of the defendant as to whether his or her communication would be perceived as a threat). For further discussion, see commentary to RCC § 22E-1204.

[58] Per RCC § 22E-206(b), "with intent" is an inchoate form of a knowledge requirement. The complainant need not have actually perceived the communication as a threat, so long as the defendant believed to a practical certainty that his or her communication would be so perceived. District case law also holds that the complainant need not have actually perceived the communication as a threat. *Anthony v. United States*, 361 A.2d 202, 206 (D.C. 1976).

[59] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[60] Note, however, that the revised assault statute clearly establishes that recklessness is sufficient for grades of assault similar to the District's current simple assault and ADW statutes where there is a physical harm involved.

[61] *See*, e.g., *Furl J. Williams v. United States*, 113 A.3d 554, 561-62 (D.C. 2015) In *Furl J. Williams*, the alleged victim of robbery felt threatened by being approached by three African Americans late at night and handed them his wallet. *Id*. The DCCA reversed their convictions, stating that the victim's fear was not objectively reasonable. *Id*. at 564. *See also*, Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 Iowa L. Rev. 2235 (2017) (discussing how racial anxiety can influence behavior and perceptions); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 Iowa L. Rev. 293 (2012) (racial bias research, and specifically a phenomenon called "the suspicion heuristic" "demonstrates how easily honest—but mistaken—beliefs can occur when the person being judged fits a criminal stereotype.").

[62] RCC § 22E-1204.

[63] *See Anthony v. United States*, 361 A.2d 202, 206 (D.C. 1976*)* ("In our view the better position holds that although the question whether the defendant's conduct produced fear in the victim is relevant, the crucial

statutes are silent as to whether the communication must be one that would cause a reasonable recipient to believe that the threatened harm would take place. However, District case law on intent-to-frighten assault requires that the defendant had the "apparent present ability to injure" the complainant.[64] The DCCA further qualified that a reasonable person test is to be used to determine such an ability.[65] Although the District's current threats statutes are silent on the matter, longstanding District case law has required that for a defendant to be convicted of threats, there must be proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[66] longstanding District case law requires proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[67] Case law further specifies that this reference to an "ordinary hearer" takes into account all the context-specific factual circumstances of the case.[68] The DCCA's recent *en banc* opinion in *Carrell* reaffirmed that there must be proof of this "objective element,"[69] while adding the additional requirement "that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat."[70] However, the *Carrell* decision did not fully specify the relationship between the objective standard and the defendant's culpable mental state of knowledge that his communication be a threat.[71] In contrast, the RCC menacing offense clarifies that while the defendant must act with intent that the communication be perceived as a threat,[72] the objective elements in paragraphs (a)(4) and (b)(3) are additional, separate elements, independent of the defendant's own awareness of the threatening nature of the message. The RCC's use of "in fact" with the objective requirement in the threats statutes clarifies the state of the law and appears to be consistent with District practice[73] and the recent DCCA ruling in *Carrell.* This change improves the clarity of the law and is consistent with prevailing District law on criminal threats.

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inquiry remains whether the assailant acted in such a manner as would under the circumstances portend an immediate threat of danger to a person or reasonable sensibility.").

[64] *See Anthony v. United States*, 361 A.2d 202, 207 (D.C. 1976).

[65] *See id*. at 206 ("[T]he crucial inquiry remains whether the assailant acted in such a manner as would under the circumstances portend an immediate threat of danger to a person or reasonable sensibility.").

[66] *Carrell*, 165 A.3d at 320.

[67] *Id*.

[68] The DCCA has noted that "the factfinder must weigh not just the words uttered, but also the complete context in which they were used." *Gray v. United States*, 100 A.3d at 136. For example, words that on their face are innocuous or ambiguous can become threatening in the circumstances of the threat; the opposite is true, as well. *See Clark v. United States*, 755 A.2d at 1031; *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) ("Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening."). The DCCA has noted that words "often acquire significant meaning from context, facial expression, tone, stress, posture, inflection, and like manifestations of the speaker…" *Id*.

[69] *Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017).

[70] *Id*.

[71] For example, the opinion does not clearly address whether, in addition to believing to a practical certainty that the communication would be perceived as a threat, the defendant must also believe that a "reasonable recipient" would believe that the harm would take place.

[72] *Carrell v. United States*, 165 A.3d 314, 325 (D.C. 2017).

[73] *See* D.C. Crim. Jur. Instr. § 4.130.

Third, the RCC menacing offense clarifies that the defendant need not threaten to carry out the harm himself. The District's current simple assault and assault with a deadly weapon statutes do not address whether a threat to have another person harm someone is sufficient for liability.[74] Although the District's threats statutes are silent as to threats involving an accomplice committing a harm, at least one case suggests that it is sufficient for liability that a defendant communicates that another person will harm the victim,[75] but there is no case law directly on point. In contrast, paragraphs (a)(1) and (b)(1) of the revised statute prohibit threats that "the actor immediately will cause a criminal harm." This includes causing the harm personally, remotely, through an accomplice, through an innocent instrumentality, or otherwise. This change improves the clarity of the revised offense.

Fourth, the RCC first degree menacing offense explicitly prohibits menacing by displaying or using imitation dangerous weapons. The current District assault with a dangerous weapon statute is silent as to whether the offense may be completed using an imitation weapon.[76] The DCCA has held that imitation *firearms* are within the scope of the assault with a dangerous weapon statute[77] but has not yet explicitly addressed non-firearm imitation weapons (e.g., fake knives).[78] The current District threats statutes do not include the use of dangerous weapon as an element.[79] In contrast, the RCC menacing offense explicitly includes all imitation dangerous weapons, a term defined in RCC § 22E-701. Assuming other elements of the offense are proven, the social harm at issue—the immediate, intentional infliction of fear upon a person—occurs whether the weapon is real or an imitation that a reasonable person would believe is real. This change improves the clarity of the statute and may fill a gap in existing law.

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[74] This may reflect the fact that, as noted above, current District intent-to-frighten assault liability is only based on conduct (not words) and it presumably is more difficult to indicate to a stranger through gestures alone how an accomplice will accomplish the harm. In the RCC menacing statute, by contrast, the requisite communication may be oral or by any means.

[75] In *Clark v. United States*, the defendant was convicted of threats when, after his arrest, he told a police officer, "You won't work here again, wait until I tell the boys, they will take care of you." 755 A.2d 1026, 1028 (D.C. 2000), abrogated on other grounds by *Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017). Although the legal question was not presented, the DCCA upheld the defendant's conviction, despite the fact that the defendant's communication indicated "the boys" (and not the defendant) would harm the victim. *See also Aboye v. United States*, 121 A.3d 1245, 1251-52 (D.C. 2015) (defendant's conviction for threats upheld on basis that he said to victims, "I'm going to kill you with my dog. I'm going to have my dog kill you.").

[76] D.C. Code § 22-402.

[77] *Washington v. United States*, 135 A.3d 325, 329-30 (D.C. 2016).

[78] However, in another case on an imitation firearm, the DCCA has generally stated that it is the apparent ability of a weapon to inflict harm, not actual ability that matters. *See Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) ("However, present ability of the weapon to inflict great bodily injury is not required to prove an assault with a dangerous weapon. Only apparent ability through the eyes of the victim is required. *See United States v. Cooper*, 462 F.2d 1343, 1344 (5th Cir. 1972) (assault with dangerous weapon, i.e. imitation bomb); *Bass v. Stat*e, 232 So.2d 25, 27 (Fla.App.1970) (assault with deadly weapon, i.e. unloaded pistol); *State v. Johnston*, 207 La. 161, 20 So.2d 741 (1944) (assault with dangerous weapon, i.e. unloaded pistol). *See also* Annot., 79 A.L.R.2d 1412, 1424 (1961) and Later Case Service (1968).").

[79] D.C. Code §§ 22-407, 22-1810.

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

First, the revised offense clarifies that a threat to harm a third party is sufficient for criminal liability. The current District intent-to-frighten and assault with a deadly weapon statutes (as well as the District's threats statutes) are silent on this matter. This does not appear to have been addressed in District assault case law.[80] While the District's threats statutes also are silent as to a threat to harm a third party present, DCCA case law has long recognized that threats to harm a third party, other than the recipient of the communication, are sufficient for liability if other elements of the offense are met.[81]

Second, the revised menacing statute specifies that the offense is complete only when the message is communicated to another person. Thus, a person is not guilty of a completed menacing if the communication does not reach a person other than the defendant.[82] This requirement is well established in District threats case law.[83] Of course, a failed attempt to deliver a message to another person could constitute attempted menacing, as could a message that is transmitted but "garbled and not understood."[84] This, too, is well established in District case law.[85]

Third, the revised menacing clarifies that there is no gradation distinction based on whether harm did or did not result from the defendant's communication. Current District law provides more severe penalties for causing assaults that result in more severe physical harms—for example, the felony assault statute punishes anyone who "unlawfully assaults…[and] causes significant bodily injury to another," thus creating the offense of "felony assault."[86] Consequently, it may be possible under current District law for a person whose conduct amounts to an intent-to-frighten form of assault to be liable for felony punishment if that frightening conduct results in significant or serious bodily injury. No DCCA case law has addressed such felony-level liability based on intent-to-

[80] The Redbook, however, includes an instruction on the same element with an alternative including threats to someone other than the recipient. D.C. Crim. Jur. Instr. § 4.100 ("S/he intended to cause injury or to create fear in [name of complainant] [another person]…"). However, there is case law holding that there cannot be more than one ADW conviction for directing a threat at a group of people. *See, e.g., Smith v. United States*, 295 A.2d 60, 61 (D.C.1972) (holding, where the defendant patted his pocket and told two men he had a gun, that "a single threat directed to more than one person constitutes but a single unit of prosecution"); *United States v. Alexander*, 471 F.2d 923, 932–34 (D.C.Cir.1972) (holding, in case where defendant pointed his gun at a group of four individuals, that "where by a single act or course of action a defendant has put in fear different members of a group towards which the action is collectively directed, he is guilty of but one offense") *Graure v. United States*, 18 A.3d 743, 763 (D.C. 2011). The RCC menacing statute does not change this law regarding the appropriate unit of prosecution.

[81] *Gurley v. United States*, 308 A.2d 785, 786 (D.C. 1973) ("It is obvious that this statute does not expressly require that the threats be communicated directly to the threatened individual."); *see also Beard v. United States*, 535 A.2d 1373, 1378 (D.C. 1988) ("The crime was complete as soon as the threat was communicated to a third party, regardless of whether the intended victim ever knew of the plot.").

[82] For example, a person who makes a silent punching gesture toward another person is not liable for a completed menacing if the other person is blind or otherwise does not notice the gesture.

[83] *United States v. Baish*, 460 A.2d 38, 42 (D.C. 1983) ("[A] person making threats does not commit a crime until the threat is heard by one other than the speaker.").

[84] *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001).

[85] *Id.* ("[I]f a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense.").

[86] D.C. Code § 22-404(a)(2).

frighten conduct versus battery. The fact patterns that would give rise to such liability are unlikely,[87] though arguably possible.[88] District threats statutes do not grade on the basis of the infliction of a bodily harm.[89] While the revised menacing statute does not grade based on whether there are any resulting physical harms, conduct that causes such a harm may be punishable under the RCC assault statute.[90]

Fourth, the RCC menacing statute requires that the defendant's conduct be directed at a person physically present with the defendant, and that the harm threatened must be immediate. The current District simple assault and assault with a dangerous weapon statutes are silent as to physical presence and immediacy. However, District case law on intent-to-frighten assault and assault with a dangerous weapon implicitly require immediacy, particularly through requirements that the defendant have the "apparent present ability to injure" the complainant.[91] As noted above, the DCCA held "that at the time of the assault the surrounding circumstances must connote the intention and present ability to do immediate violence."[92] Although the District's threats statutes are silent on the matter, District case law has affirmed liability for threats regardless of physical presence or the immediacy of harm.[93] The revised menacing statute clarifies these immediacy and physical presence requirements in existing law.

[87] The pattern jury instructions acknowledge the possibility of intent-to-frighten conduct triggering a felony assault charge and includes an instruction. *See* D.C. Crim. Jur. Instr. § 4.102. But the Commentary states frankly that "it is unlikely that [felony assault] will be based on facts indicating only threatening acts…"

[88] For example, a person who intentionally menaces a person who is using a knife for carving might cause that person to cut themselves badly, requiring stitches. However, while such fact patterns may be unusual, the more relevant point may be that such fact patterns also could be prosecuted under a battery-type assault theory in current District law and the RCC assault statute. The person who recklessly engages in conduct of any kind that results in a significant bodily injury is liable for assault.

[89] D.C. Code §§ 22-407, 22-1810.

[90] RCC § 22E-1202. Under the revised assault statute, the *means* of causing the harms specified in the gradations is irrelevant. For example, a person who satisfies the requirements of recklessly causing bodily injury to another is liable whether the predicate conduct was menacing someone with a gesture, punching them with a fist, or poking them with a fork.

[91] *See Anthony v. United States*, 361 A.2d 202, 207 (D.C. 1976).

[92] *Id*. at 205.

[93] See commentary to RCC § 22E-204.

RCC § 22E-1204. Criminal Threats.

Explanatory Note. *This section establishes the criminal threats offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes efforts to inflict fear of a future or conditional criminal harm. The offense is graded according to the type of criminal harm the defendant threatens: a bodily injury, a sexual act, a sexual contact, or confinement (first degree) or $500 or more loss or damage to property (second degree). The revised criminal threats offense and revised menacing offense[1] together replace the misdemeanor and felony threats statutes[2] in the current D.C. Code.*

Paragraphs (a)(1) and (b)(1) state the prohibited conduct—that the defendant communicates to another person. Communication requires not only that the defendant take action to convey a message, but also that the message is received and understood by another person.[3] No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion.[4] The verb "communicates" is intended to be broadly construed, encompassing all speech[5] and other messages[6] that are received and understood by another person. The communication must be that the defendant, at any time in the future or if any condition is met,[7] will cause a criminal harm.[8] First degree criminal threats, paragraph (a)(1), requires the defendant communicate that he or she will cause a criminal harm involving a bodily injury, a sexual act, a sexual contact, or confinement, to any person. Second degree criminal threats, paragraph (b)(1), requires the defendant indicate that he or she will cause a criminal harm involving $500 or more loss or damage to property of any natural person.[9] Whether particular words, gestures,

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[1] RCC § 22E-1203.

[2] D.C. Code §§ 22-407, 22-1810.

[3] DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), and the RCC criminal threats statute recognizes, 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.

[4] *Griffin v. United States*, 861 A.2d 610, 616 (D.C. 2004) (citing *Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000)).

[5] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.

[6] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[7] By this language, the offense is intended to punish both "conditional" and "unconditional" threats. *See Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971).

[8] "Cause" includes personally engaging in criminal conduct and soliciting or allowing an accomplice or innocent instrumentality to engage in criminal conduct.

[9] *See Ruffin v. United States*, 76 A.3d 845, 855 (D.C. 2013) (holding that "the contextual features suggest that 'person' is limited to natural persons" in threats, and therefore, threatening to destroy District of Columbia government property does not constitute an offense).

symbols, or other conduct communicate such content is a question of fact that will often require judgment by a factfinder.[10]

Paragraphs (a)(1) and (b)(1) also require a culpable mental state of knowledge, a term defined at RCC § 22E-206. Applied to the elements here, the accused must at least be aware to a practical certainty that his or her conduct: 1) communicates to a complainant[11] that, anytime in the future or if any condition is met; 2) that the actor will cause a criminal harm; and 3) the criminal harm involves a bodily injury, a sexual act, a sexual contact, or confinement (first degree) or a $500 or more loss or damage to property of any natural person (second degree).

Paragraphs (a)(2) and (b)(2) require the defendant make the communication "with intent that" it be perceived as a serious expression of an intent to do harm.[12] "Intent" is a defined term in RCC § 22E-206 that here requires that the defendant was practically certain that his or her communication would be perceived as a serious expression of an intent to do harm. Per RCC § 22E-205, the object of the phrase "with intent that" 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 communication was perceived as a serious expression of an intent to do harm, only that the actor believed to a practical certainty that it would be so perceived. Not all insulting, abusive, or violent language is threatening.[13] For example, a statement about what a person believes ought to happen, may not be intended and understood as an expression that the declarant will cause it to happen.[14] Whether a particular communication amounts to a serious expression of intent to inflict harm is a question of fact that will often require judgment by a factfinder. "Intent" is a defined term in RCC § 22E-206 and requires the

[10] For example, a jury may evaluate whether the accused's gesture of drawing a finger across his throat communicated that the accused would kill the recipient of the communication. A jury may also evaluate whether texting a photograph of someone's car communicated that the accused would damage the car. *See Roberts v. United States*, 216 A.3d 870, 886 (D.C. 2019) (citing *Gray v. United States*, 100 A.3d 129, 134, 136 (D.C. 2014) (jury assessing how ordinary hearer would interpret statements must consider the "full context in which the words are spoken," including "the relationship between the speaker and hearer, and their shared knowledge and history") (internal quotation marks omitted); *Andrews v. United States*, 125 A.3d 316, 325 (D.C. 2015) ("There may be all the more reason to construe an ambiguous statement as threatening when it is made in the context of a volatile or hostile relationship")).

[11] For example, a person who writes threatening messages in his or her own personal diary or journal, expecting that no other person will read it, does not commit criminal threats.

[12] *Virginia v. Black*, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.") (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) ("political hyberbole" is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

[13] *See Lewis v. United States*, 95 A.3d 1289, 1290 (D.C. 2014) (reversing a conviction where the appellant was expressing frustration over his arrest by yelling derogatory names at the officers and yelling that the officer was "lucky" that appellant had not had a gun on him because he would have "blown [the officer's] partner's god-damned head off.")

[14] *Compare State v. Draskovich*, 904 N.W.2d 759, 761 (S.D. 2017) (upholding a threats conviction where a defendant told a court employee, "Well, that deserves 180 pounds of lead between the eyes,") *with People v. Wood*, 2017 WL 5617926, at *3 (Ill. App. Ct. Nov. 20, 2017) (reversing a threats conviction where a defendant expressed a "dream for revenge," stating, "There is not a day that goes by since I was sentenced at that courthouse that I have not dreamed about revenge and the utter hate I feel for the judge," and "there's not a day that goes by that I don't pray for the death and destruction upon the judge.")

defendant believe his or her communication is practically certain to be perceived as a serious expression of an intent to do harm.[15]

Paragraphs (a)(3) and (b)(3) require proof that the accused's communication is objectively threatening, under the circumstances.[16] "In fact," a defined term,[17] is used to indicate that there is no culpable mental state requirement for paragraphs (a)(3) and (b)(3). Rather, the only proof required with respect to this element of the revised offense is that the defendant's message would cause a reasonable person in the complainant's circumstances to believe that the harm would occur.[18] This is an objective standard, but it is evaluated contextually, assuming awareness of the circumstances known to the parties in the case.[19] The relevant facts and circumstances in an individual case may include prior interactions between the declarant and the listener,[20] the power dynamics between the declarant and the target of the threat,[21] and the conditional nature of the threat.[22] Paragraphs (a)(3) and (b)(3) do not require that the defendant actually have the ability or apparent ability to carry out the threatened harm.[23] The offense also does not require proof that the defendant actually intended to eventually carry out the threat.

Subsection (c) specifies relevant penalties for each gradation of the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised criminal threats statute changes current District law in four main ways.*

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[15] The criminal threats offense requires that the listener receive and understand, at the most basic level, the *meaning* of the defendant's speech. *See Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001). 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. However, the offense does not require that the listener be certain about the *intent* behind the defendant's speech. So long as (1) the defendant intended that the victim perceive the threat as serious and (2) a reasonable person in the victim's circumstances would perceive the threat as serious, it is of no consequence that the listener does not actually believe that the defendant means what was said.

[16] The government must prove a conduct element and a result element: that the defendant (1) "uttered words to another person" (2) with a result that "the ordinary hearer [would] reasonably…believe that the threatened harm would take place." *In re S.W.*, 45 A.3d 151, 155 (D.C. 2012); *see also Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000) (acknowledging these two actus reus elements).

[17] RCC § 22E-207.

[18] *Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017).

[19] *High v. United States*, 128 A.3d 1017, 1021 (D.C. 2015).

[20] For example, a complainant who testifies, "I knew that the defendant would not ever actually try to hit me," has not suffered a criminal threat, even if the defendant intended the puffery to be taken seriously.

[21] *See, e.g., High v. United States*, 128 A.3d 1017 (D.C. 2015) (concluding that an ordinary hearer, in the circumstances of an on-duty law enforcement officer, would not reasonably fear imminent or future harm or injury based on the defendant's expression of exasperation or resignation, "Take that gun and badge off and I'll f*** you up.").

[22] A threat on a condition that victim believes will never occur does not amount to a criminal threat. *Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971). Additionally, a statement that a person will defend themselves or another person from criminal harm does not amount to a criminal threat. Consider, for example, a parent who warns, "If you touch my child, you are going to regret it!"

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

First, the revised criminal threats statute establishes two gradations based on the nature of the threatened harm. Under current District law, a felony threats offense punishes threats to kidnap, injure, or damage property, whereas a misdemeanor threats offense punishes infliction of bodily harm only.[24] Consequently, although there are two penalty gradations under current law, the gradations do not limit liability for less severe threats.[25] In contrast, the RCC criminal threats offenses grades according to the severity of the harm threatened. First degree liability requires a threat to inflict a bodily injury, a sexual act, a sexual contact, or confinement. Second degree liability requires a threat to cause $500 or more in property loss or damage. These changes bring the threats offenses into conformity with the approach to penalty gradations used through most of the current D.C. Code and the RCC[26] and improve the proportionality of the revised offense.

Second, the revised criminal threats statute uses the word "communicates," which includes all verbal and non-verbal conduct that conveys a message, expanding the means by which a threat may be issued. The current District threats statutes are silent as to the type of conduct that may convey a threat, simply referring to a person who "threatens"[27] or issues a "threat."[28] However, in at least one case, District of Columbia Court of Appeals ("DCCA") has stated that a threat "requires *words* to be communicated to another person" in contrast with intent-to-frighten assault which "requires threatening conduct."[29] Case law describes an element of threats as having "uttered words,"[30] which has been explicitly construed to cover not only oral but written threats.[31] In contrast, the RCC criminal threats statute punishes threatening words (written or oral), gestures, and

[24] D.C. Code §§ 22-407, 22-1810.
[25] The current statutory structure provides no lesser-included offenses for threats of kidnapping or threats to property.
[26] Virtually all criminal offenses that have penalty gradations in the current D.C. Code, or in the RCC, are structured such that the more severe penalty is for more harmful conduct that is a subset of the broader set of conduct covered by the less severe gradation. The District's current threats statutes reverse the usual approach to statutory drafting, making the least harmful conduct a subset of the broader set of conduct covered by the more severe gradation. Interestingly, the DCCA has noted that the legislative history behind the District's felony threats offense is somewhat muddled, and actually suggests that the offense was intended to cover extortionate conduct, not merely threatening conduct in the abstract. See *United States v. Young*, 376 A.2d 809, 814-16 (D.C. 1977) (discussing legislative history). The relatively harsh penalty associated with felony threats has been explained by reference to this history. *Id*.
[27] D.C. Code § 22-1810.
[28] D.C. Code § 22-407.
[29] *Joiner-Die v. United States*, 899 A.2d 762, 766 (D.C. 2006) (emphasis in the original). However, although no reported threats case before the DCCA appear to have been based on gestures alone, symbolic or non-verbal threats have been considered by that Court in the broader context of threatening conduct. *See, e.g., Gray v. United States*, 100 A.3d 129, 136 (D.C. 2014) ("[T]he trial court found appellant guilty of threats based on Lowery's testimony that [the defendant] said 'I'm going to kill you,' and made 'a gun motion' with his fingers."). *See also*, D.C. Crim. Jur. Instr. § 4.130 (including gestures and symbols as means of completing the offense); *Ebron v. United States*, 838 A.2d 1140, 1150-53 (D.C. 2016) (in context of threats evidence admissibility, hand being dragged across the throat constituted a "threatening action").
[30] *United States v. Baish*, 460 A.2d 38, 42 (D.C. 1983) ("[A] person 'threatens' when she utters words[.]").
[31] *Tolentino v. United States*, 636 A.2d 433, 434-35 (D.C. 1994) (rejecting defendant's argument that the threats offense only covers oral communications, and upholding conviction based on written threats); *Andrews v. United States*, 125 A.3d 316, 325 (D.C. 2015) (upholding conviction on the basis of threatening text messages).

symbols,[32] as well as conduct. Assuming other elements of the offense are proven, the social harm at issue—the intentional infliction of fear upon a person—occurs whether the message is conveyed verbally or non-verbally.[33] This change improves the consistency and proportionality of the revised offense.

Third, the second degree of the revised statute includes only threats to cause property loss or damage amounting to more than $500. One current District threats statute refers to a threat to "physically damage the property of any person."[34] Neither the current statutory language nor case law defines the precise meaning of terms like "damage," or "property," and it is unclear whether the terms are equivalent to the harm described in the malicious destruction of property statute.[35] There is no apparent limitation on the value of the damage to property under current law, however. In contrast, the RCC criminal threats statute specifies the relevant harm for second degree threats as "criminal harm involving $500 or more loss or damage to property of any natural person." This change broadens the offense to include threats of theft-type conduct that involve loss to the complainant (but not damage to the property) and non-physical harms.[36] This is consistent with the RCC and current D.C. Code which do not recognize a significant distinction between the harms of stealing and destroying property. This change also narrows the scope of the current D.C. Code offense by excluding minor (based on the value of the property) property loss or damage.[37] This change clarifies the offense, improves the consistency of RCC property offenses, and improves the proportionality of the offense.

Fourth, the revised statute does not expressly authorize the issuance of a bond to keep the peace for one year. Current D.C. Code § 22-407 specifies that a person who commits threats to do bodily harm "may be required to give bond to keep the peace for a period not exceeding 1 year." The RCC specifies a maximum term of imprisonment and a maximum fine for each revised offense, but it does not address what, if any, terms of probation may be appropriate or desirable for a given offense. Nor does it limit a period of probation or a condition of probation to a term of one year. A court may, in its discretion, suspend the imposition of a period of incarceration and place an offender on supervised or unsupervised probation on the condition that the person not reoffend for up

[32] E.g., transmitting an image or sound to a recipient.

[33] *See, e.g., State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[34] D.C. Code § 22-1810.

[35] *See* D.C. Code § 22-303. Malicious destruction of property covers damage to property of *any value* and punishes such damage with a penalty of 180 days if the value of the object damaged does not reach $1,000.

[36] For example, a threat to put a hold on a person's bank account access before a commercial real estate purchase such that they are subject to liquidated damages may, depending on the facts of the case, constitute a threat to engage in conduct constituting second degree criminal damage to property.

[37] For example, under the plain language of the current District statute, it would appear to be a criminal threat—subject to a 20-year imprisonment penalty—for a person to threaten to crush another person's plastic drinking cup, or to scratch or blemish a cheap movie poster.

to five years, under D.C. Code § 16-710(b). This change improves the consistency of the revised offenses.

Beyond these four substantive changes to current District law, four other aspects of the revised criminal threats statute may constitute a substantive change of law.

First, the revised criminal threats statute clarifies the content of the threats required for each gradation, specifically including conduct that would cause "criminal harm involving a bodily injury, a sexual act, a sexual contact, or confinement." Current District threats statutes refer to a few types of conduct harming persons: to "kidnap," "injure the person of another," or "do bodily harm."[38] Neither current statutes nor case law define the precise meaning of terms like "injure," or "do bodily harm," and it is unclear if the phrases are equivalent to the harm described in case law for simple assault.[39] To clarify, the RCC criminal threat statute specifies the relevant harms for first-degree threats as "criminal harm involving a bodily injury, a sexual act, a sexual contact, or confinement." It may be that the additional conduct described in the RCC (e.g. a threat to commit a sexual act) is already subject to liability in the current statutes insofar as those statutes all appear to involve a threat to "injure the person of another."[40] Also, it may be that the conduct clearly excluded in the RCC (i.e. a threat to commit a non-sexual, merely offensive physical contact that does not cause bodily injury) would also be excluded under the current District statutes as not "injur[ing] the person of another." However, the RCC clarifies the content of the most serious threats that provide for heightened punishment through the use of the defined terms "bodily injury," "sexual act," and "sexual contact," consistent with the RCC assault and other statutes.[41] These changes improve the clarity and consistency of the offense.

Second, the revised criminal threats statute clarifies that the defendant must act with intent—i.e. must believe to a practical certainty—that his or her communication will be perceived as a serious expression that the defendant would cause a criminal harm. The District's current threats statutes are silent as to the offense's requisite culpable mental states, and recent DCCA case law has addressed but not entirely resolved the culpable mental state as to whether the communication will be understood as a threat. In 2017, an *en banc* DCCA decision, *Carrell v. United States*, held that something more than negligence, but less than purpose, is necessary.[42] The DCCA, following recent Supreme Court precedent,[43] said that acting with intent that the communication be perceived as a

[38] D.C. Code §§ 22-407, 22-1810.
[39] D.C. Code § 22-404. *See Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001) ("[A]ssault is defined as the unlawful use of force causing injury to another…"). The DCCA has further held that "assault" includes "non-violent sexual touching assault as a distinct type of assault." *Id*. And in fact, even non-sexual but "offensive" touchings can constitute assault. *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990). In at least one case, the DCCA has upheld a threats conviction where the threat consisted of saying, "I'm going to smack the s*** out of you." *Jones v. United States*, 124 A.3d 127, 131 (D.C. 2015). It's unclear whether slapping a person would constitute simple assault *qua* inflicting bodily harm, or simple assault *qua* engaging in an offensive touching.
[40] D.C. Code § 22-1810.
[41] The revised statute's use of "criminal harm involving…confinement" provides an ordinary language approach to specifying the harm commonly involved in kidnapping.
[42] *Carrell v. United States*, 165 A.3d 314, 324-25 (D.C. 2017).
[43] *Elonis v. United States*, 135 S. Ct. 2001 (2015).

threat is sufficient for liability, but did not decide whether recklessness is also sufficient and acknowledged that it was leaving the law unsettled.[44] To resolve this ambiguity, the revised statute clarifies that the defendant must act with intent, not mere recklessness, as to whether the communication is perceived as a threat. Applying an intent culpable mental state requirement (an inchoate form of a knowledge requirement, as defined in the RCC[45]) to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[46] Requiring an intent culpable mental state in the revised threats offense also appears to be consistent with existing District practice.[47] These changes improve the clarity and consistency of the offense.

Third, the revised criminal threats statute includes an "objective element" in paragraphs (a)(3) and (b)(3), subject to strict liability.[48] The District's current threats statutes are silent as to whether the communication must be one that would cause a reasonable recipient to believe that the threatened harm would take place. However, longstanding District case law requires proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[49] Case law further specifies that this reference to an "ordinary hearer" takes into account all the context-specific factual circumstances of the case.[50] The DCCA's recent *en banc* opinion in *Carrell* reaffirmed that there must be proof of this "objective element,"[51] while adding the additional requirement "that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat."[52] However, the *Carrell* decision did not fully specify the relationship between the objective standard and the defendant's culpable mental state of knowledge that his communication be a threat.[53] In contrast, the RCC criminal threats offense specifies that while the defendant must act

[44] 165 A.3d 314, 323-24 (D.C. 2017) ("[W]e decline to decide whether a lesser threshold mens rea for the second element of the crime of threats—recklessness—would suffice.").
[45] RCC § 22E-206(b).
[46] *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)").
[47] *See* D.C. Crim. Jur. Instr. § 4.130 (applying knowledge). The DCCA also noted that "the United States Attorney's Office [ ] disclaims reliance on recklessness…and states that it does not intend to prosecute future threats cases on a recklessness theory." *Carrell v. United States*, 165 A.3d 314, 325 (D.C. 2017). Of course, other parties, including the Office of the Attorney General, may rely on the threats statute as well.
[48] *See Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017).
[49] *Id*.
[50] The DCCA has noted that "the factfinder must weigh not just the words uttered, but also the complete context in which they were used." *Gray v. United States*, 100 A.3d at 136. For example, words that on their face are innocuous or ambiguous can become threatening in the circumstances of the threat; the opposite is true, as well. *See Clark v. United States*, 755 A.2d at 1031; *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) ("Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening."). The DCCA has noted that words "often acquire significant meaning from context, facial expression, tone, stress, posture, inflection, and like manifestations of the speaker…" *Id*.
[51] *Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017).
[52] *Id*.
[53] For example, the opinion does not address whether, in addition to believing to a practical certainty that the communication would be perceived as a threat, the defendant must also believe that a "reasonable recipient" would believe that the harm would take place.

with intent that the communication be perceived as a threat,[54] the objective elements in paragraphs (a)(3) and (b)(3) are additional, separate elements,[55] independent of the defendant's own awareness of the threatening nature of the message. The RCC's use of "in fact" with the objective requirement in the threats statutes clarifies the state of the law and appears to be consistent with District practice[56] and the recent DCCA ruling in *Carrell.* This change improves the clarity of the law and is consistent with prevailing District law on criminal threats.

Fourth, the revised criminal threats statute specifies that the defendant must know that the communication conveys that the defendant will cause a criminal harm, and have intent that the communication be perceived as a serious expression that the actor would cause the harm. The District's current threats statutes are silent as to whether the harm that is threatened is criminal, and case law has not directly addressed the issue. However, a knowledge requirement as to the nature of the communication as a threat is consistent with the DCCA's recent *en banc* opinion in *Carrell*.[57] Moreover, in other contexts, District case law has recognized that consent may be a valid general defense to harms that otherwise would be criminal, [58] and that a parent or other person in a custodial relationship is not liable for committing some harms that are in fulfillment of the duties of that relationship.[59] The RCC criminal threats statute clarifies that the actor must know and have intent that the harm he or she communicates to another is a criminal harm. The requirement that the harm be "criminal" clarifies that there is no liability for a communication of a harm to which there is an effective consent[60] or other general defense, or other harms that do not rise to the level of criminality. Moreover, District practice[61] has long recognized the general existence of a consent defense that is consistent with the RCC criminal threat requirement that the harm be criminal. This change improves the clarity of the law and, to the extent it may result in a change,

[54] *Carrell v. United States*, 165 A.3d 314, 325 (D.C. 2017).

[55] Even though paragraphs (a)(3) and (b)(3) provide for an objective assessment, the factfinder may take into account, among other factors, the subjective reactions of the recipients of the communication. *See Gray*, 100 A.3d at 134-35 ("[W]hether an ordinary hearer would understand words to be in the nature of a threat of serious bodily harm is a highly context-sensitive question.").

[56] *See* D.C. Crim. Jur. Instr. § 4.130.

[57] *Carrell v. United States*, 165 A.3d 314, 323-24 (D.C. 2017) (rejecting an analysis of the threats statute in terms of "specific" or "general" intent and requiring proof of knowledge, or at least some subjective intent, on the part of the defendant as to whether his or her communication would be perceived as a threat).

[58] *See Guarro v. United States*, 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

[59] *See, e.g., Faunteroy v. United States*, 413 A.2d 1294, 1300 (D.C. 1980) (Parents have common law duty of care to provide medical care for minor dependent children.)

[60] For example, but for the requirement that the harm be "criminal," a surgeon describing the procedure he is intends to carry out on a patient would appear to be liable under the plain language of the statute. Similarly, threats made as part of sports, acting, sexual interactions, and other activity not forbidden by law would appear to fall within the scope of the criminal threat offense.

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

improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

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

First, the revised offense clarifies that a threat to harm a third party is sufficient for criminal liability. The current District threats statutes are silent on this matter. However, DCCA case law has long recognized that threats to harm a third party, other than the recipient of the communication, are sufficient for liability if other elements of the offense are met.[62] Additionally, although the current statutes do not explicitly note that the offenses only apply to natural persons, the revised statute incorporates current DCCA case law holding that business and government entities are not protected by the threats statutes.[63]

Second, the revised criminal threats statute specifies that the offense is complete only when the message is communicated to another person. Thus, a person is not guilty of a completed criminal threat if the communication does not reach a person other than the defendant. This requirement is well established in District case law.[64] Of course, a failed attempt to deliver a message to another person could constitute attempted criminal threats, as could a message that is transmitted but "garbled and not understood."[65] This, too, is well established in District case law.[66]

Third, under the revised criminal threats statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current threats statutes are silent as to the availability of an intoxication defense, and case law has not addressed the matter since the DCCA's recent *en banc* opinion in *Carrell* found that knowledge or some subjective intent is required for liability.[67] Under the RCC criminal threats statute, a defendant will be able to raise and present relevant and admissible evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a criminal threat. Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[68]

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[62] *Gurley v. United States*, 308 A.2d 785, 786 (D.C. 1973) ("It is obvious that this statute does not expressly require that the threats be communicated directly to the threatened individual."); *see also Beard v. United States*, 535 A.2d 1373, 1378 (D.C. 1988) ("The crime was complete as soon as the threat was communicated to a third party, regardless of whether the intended victim ever knew of the plot.").

[63] *See Ruffin v. United States*, 76 A.3d 845, 855 (D.C. 2013) (holding that "the contextual features suggest that 'person' is limited to natural persons" in threats, and therefore, threatening to destroy District of Columbia government property does not constitute an offense).

[64] *United States v. Baish*, 460 A.2d 38, 42 (D.C. 1983) ("[A] person making threats does not commit a crime until the threat is heard by one other than the speaker.").

[65] *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001).

[66] *Id.* ("[I]f a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense.").

[67] *Id.* at 324.

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

Fourth, the revised criminal threats offense clarifies that the defendant need not threaten to carry out the harm himself. The District's current threats statutes do not address whether a threat to have another person harm someone is sufficient for liability.[69] At least one case suggests that it is sufficient for liability that a defendant communicates that another person will harm the victim,[70] but there is no case law directly on point. In contrast, paragraphs (a)(2) and (b)(2) of the revised statute prohibit threats that "the actor will cause a criminal harm." This includes causing the harm personally, remotely, through an accomplice, through an innocent instrumentality, or otherwise. This change improves the clarity of the revised offense.

[69] Arguably, however, the current statutory language suggests that the utterer of the threat must directly inflict the harm. *See, e.g.*, D.C. Code § 22-1810: "Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part…"

[70] In *Clark v. United States*, the defendant was convicted of threats when, after his arrest, he told a police officer, "You won't work here again, wait until I tell the boys, they will take care of you." 755 A.2d 1026, 1028 (D.C. 2000), abrogated on other grounds by *Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017). Although the legal question was not presented, the DCCA upheld the defendant's conviction, despite the fact that the defendant's communication indicated "the boys" (and not the defendant) would harm the victim. *See also Aboye v. United States*, 121 A.3d 1245, 1251-52 (D.C. 2015) (defendant's conviction for threats upheld on basis that he said to victims, "I'm going to kill you with my dog. I'm going to have my dog kill you.").

RCC § 22E-1205. Offensive Physical Contact.

Explanatory Note. *This section establishes the offensive physical contact offense and penalty for the Revised Criminal Code (RCC). The offense proscribes conduct in which the accused knowingly causes offensive physical contact with another person. Offensive physical contact includes behavior that does not rise to the level of causing bodily injury as the revised assault offense requires.*[1] *The penalty gradations are primarily based on the type of offensive physical contact, with enhancements in the gradations for harms to special categories of persons. Along with the assault offense,*[2] *the offensive physical contact offense replaces eighteen distinct offenses in the current D.C. Code: assault with intent to kill,*[3] *assault with intent to commit first degree sexual abuse,*[4] *assault with intent to commit second degree sexual abuse,*[5] *assault with intent to commit child sexual abuse,*[6] *and assault with intent to commit robbery;*[7] *willfully poisoning any well, spring, or cistern of water;*[8] *assault with intent to commit mayhem;*[9] *assault with a dangerous weapon;*[10] *assault with intent to commit any other felony;*[11] *simple assault;*[12] *assault with significant bodily injury;*[13] *aggravated assault;*[14] *assault on a public vehicle inspection officer*[15] *and aggravated assault on a public vehicle inspection officer;*[16] *assault on a law enforcement officer*[17] *and assault with significant bodily injury to a law enforcement officer;*[18] *mayhem*[19] *and maliciously disfiguring.*[20] *Insofar as they are applicable to current assault-type offenses, the revised offensive physical contact offense also replaces the protection of District public officials statute,*[21] *certain minimum statutory penalties for assault-type offenses,*[22] *and five penalty*

[1] RCC § 22E-1202.
[2] RCC § 22E-1202.
[3] D.C. Code § 22-401.
[4] D.C. Code § 22-401.
[5] D.C. Code § 22-401.
[6] D.C. Code § 22-401.
[7] D.C. Code § 22-401.
[8] D.C. Code § 22-401.
[9] D.C. Code § 22-401.
[10] D.C. Code § 22-402.
[11] D.C. Code § 22-403.
[12] D.C. Code § 22-404(a)(1).
[13] D.C. Code § 22-401(a)(2).
[14] D.C. Code § 22-404.01.
[15] D.C. Code § 22-404.02.
[16] D.C. Code § 22-404.03.
[17] D.C. Code § 22-405.
[18] D.C. Code § 22-405.
[19] D.C. Code § 22-406.
[20] D.C. Code § 22-406.
[21] D.C. Code § 22-851.
[22] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f)(1) ("The sentence imposed under this section shall not be less than 1 year for a

enhancements: the enhancement for senior citizens;[23] *the enhancement for citizen patrols;*[24] *the enhancement for minors;*[25] *the enhancement for taxicab drivers;*[26] *and the enhancement for transit operators and Metrorail station managers.*[27]

Paragraph (a)(1) specifies the prohibited conduct for first degree offensive physical contact, the most serious gradation of the offense—causing the complainant to come into physical contact with bodily fluid or excrement. Paragraph (a)(1) specifies that the required culpable mental state is "knowingly." Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (a)(1) applies to each element in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that he or she will cause physical contact between the complainant and bodily fluid or excrement.

Subparagraphs (a)(2)(A) and (a)(2)(B) specify two alternative bases of liability for first degree offensive physical contact. In subparagraph (a)(2)(A), the complainant must be one of the categories in the definition of a "protected person" in RCC § 22E-701, such as being a law enforcement officer in the course of his or her duties. The culpable mental state of "recklessly" applies in subparagraph (a)(2)(A) to the fact that the complainant is a "protected person." "Recklessly," a term defined at RCC § 22E-206, here means the accused must disregard a substantial risk that the complainant is a "protected person." In subparagraph (a)(2)(B), the actor must cause physical contact with bodily fluid or excrement "with the purpose" of harming the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official." This alternative requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a "law enforcement officer," "public safety employee," or "District official."[28] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes. "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" 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. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

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person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[23] D.C. Code § 22-3601.

[24] D.C. Code § 22-3602.

[25] D.C. Code § 22-3611.

[26] D.C. Code §§ 22-3751; 22-3752.

[27] D.C. Code §§ 22-3751.01; 22-3752.

[28] For example, a defendant who commits aggravated assault an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing aggravated assault with the purpose of harming the decedent due to his status as a law enforcement officer.

Paragraph (a)(2) further requires that the accused act "with intent that" the physical contact be offensive to the complainant. "Intent" is a defined term in RCC § 22E-206 meaning here that the accused was practically certain that the physical contact was offensive to the complainant. Per RCC § 22E-205, the object of the phrase "with intent that" 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 physical contact actually offended the complainant, only that the actor believed to a practical certainty that it would do so. Paragraph (a)(3) requires that a reasonable person in the situation of the complainant would regard the physical contact as offensive. "In fact," a defined term in § 22E-207, here is used to indicate that there is no culpable mental state requirement as to whether a reasonable person in the situation of the complainant would regard the physical contact as offensive.

Subsection (b) establishes the second degree offensive physical contact offense. There are two alternative bases of liability. First, under subparagraph (b)(1)(A), the actor must cause any complainant to come into physical contact with bodily fluid or excrement, and must also meet the requirements for liability in paragraphs (b)(2) and (b)(3). The requirements in subparagraph (b)(1)(A), paragraph (b)(2), and paragraph (b)(3) are identical to the requirements in paragraphs (a)(1), (a)(3), and (a)(4) in first degree offensive physical contact.

The second alternative basis of liability is under subparagraph (b)(1)(B). Under subparagraph (b)(1)(B), the actor must cause physical contact with the complainant. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (b)(1) applies to the elements in subparagraph (b)(1)(B). "Knowingly" is a defined term in RCC § 22E-206 that here means that the accused must be practically certain that he or she causes physical contact with the complainant. The requirements in paragraphs (b)(2) and (b)(3) must also be met and are identical to the requirements in paragraphs (a)(3) and (a)(4) in first degree offensive physical contact. However, for liability under subparagraph (b)(1)(B), the accused must also either be reckless as to the fact that the complainant is a "protected person" (sub-subparagraph (b)(1)(B)(i)) or have the purpose of harming the complainant because of the complainant's status as a "law enforcement officer," "public safety employee," or "District official" (sub-subparagraph (b)(1)(B)(ii)). The requirements for liability in sub-subparagraphs (b)(1)(B)(i) and (b)(1)(B)(ii) are the same as those in subparagraphs (a)(2)(A) and (a)(2)(B) in first degree offensive physical contact.

Subsection (c) establishes the prohibited conduct for third degree offensive physical contact, the lowest gradation of the offense. Paragraph (c)(1) specifies the prohibited conduct—causing physical contact with the complainant. Paragraph (c)(1) specifies that the required culpable mental state is "knowingly." Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (c)(1) applies to each element in paragraph (c)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that he or she will cause physical contact with the complainant. The requirements in paragraph (c)(2) and (c)(3) are identical to the requirements in paragraphs (a)(3) and (a)(4) and in paragraphs (b)(2) and (b)(3).

Subsection (d) prohibits justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] when an individual actively opposes a use of physical force by a law

enforcement officer and, in doing so, allegedly commits offensive physical contact against the law enforcement officer. The limitation applies to all gradations of the revised offensive physical contact statute, whether or not the gradation provides a penalty enhancement for the status of the complainant. There are three requirements for this limitation. Per paragraph (d)(1), the accused must be "reckless" as to the fact that the complainant is a "law enforcement officer." "Reckless," a defined term in RCC § 22E-206, means here that the accused was aware of a substantial risk that the complainant was a "law enforcement officer," as that term is defined in RCC § 22E-701. Per paragraph (d)(2), "in fact," the use of force must occur during an arrest, stop, or detention for a legitimate police purpose, regardless of whether the arrest, stop, or detention is lawful. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the use of force occurred during one of the specified situations, such as an arrest, whether lawful or unlawful. Finally, per paragraph (g)(3), the law enforcement officer uses only the amount of force that appears reasonably necessary. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (d)(2) applies to paragraph (d)(3). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the law enforcement officer used only the amount of force that appears physically necessary.

Subsection (e) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The offensive physical contact statute changes current District law in nine main ways.*

First, the RCC offensive physical contact offense punishes as a separate offense, with a distinct name, low-level conduct that is part of assaultive conduct in current law. Current District assault statutes are silent as to whether offensive physical contacts are sufficient for liability,[29] but DCCA case law establishes that a simple assault includes: 1) non-violent sexual touching[30] that causes no pain or impairment to the complainant's body; and 2) any completed battery where the accused inflicts an unwanted touching on

[29] D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults . . . another . . . shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted). For discussion of non-violent sexual touching assault, see the commentary to the RCC nonconsensual sexual conduct offense (RCC § 22E-1307).

the complainant that causes no pain or impairment to the complainant's body.[31] However, a recent DCCA case that is in active litigation may ultimately call into question whether an unwanted touching on the complainant that causes no pain or impairment is sufficient.[32] In contrast, in the RCC, the revised assault statute (RCC § 22E-1201) criminalizes physical contacts that result in "bodily injury," as that term is defined in RCC § 22E-701, as well as more severe forms of bodily injury. The RCC offensive physical contact statute criminalizes offensive physical contacts that fall short of inflicting "bodily injury." The RCC second degree nonconsensual sexual conduct offense (RCC § 22E-1307(b)) criminalizes offensive sexual touching. This change improves the organization and proportionality of the District's current law on assaults, by distinguishing harms of different severity.

Second, the RCC offensive physical contact statute is not subject to a penalty enhancement for the involvement of a dangerous weapon. The District's current assault with a dangerous weapon (ADW) statute is a separate offense with a ten-year maximum penalty.[33] Although the statute is silent as to what level of conduct suffices as a predicate for liability, District case law specifies that engaging in any conduct that constitutes a simple assault is sufficient.[34] In contrast, the RCC offensive physical contact offense does not have an enhancement due to the use of a "dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-70. The use[35] or display

[31] *See, e.g.*, *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Dunn v. United States*, 976 A.2d 217, 218-19, 220, 221 (D.C. 2009) (stating that the injury resulting from an assault "may be extremely slight," requiring "no physical pain, no bruises, no breaking of the skin, no loss of blood, no medical treatment" and finding the evidence sufficient for assault when appellant "shoved" the complainant because the contact was "offensive.").

[32] A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[33] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

The more stringent 10-year maximum penalty, as opposed to 180 days for simple assault in D.C. Code § 22-404(a)(1), is "imposed as 'a practical recognition of the additional risks posed by use of the weapon.'" *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (*quoting Parker v. United States*, 359 F.2d 1009, 1012 (D.C. Cir. 1966)).

[34] *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011) ("Because there was no crime of "assault with a dangerous weapon" at common law, we have interpreted the statute to require no more than is required to prove the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon . . . ."). However, as this commentary noted elsewhere, a recent DCCA case that is in active litigation may ultimately call into question whether an unwanted touching on the complainant that causes no pain or impairment is sufficient. If an individual merely possesses a dangerous weapon during offensive physical contact, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of offensive physical contact per RCC § 22E-4104) or other RCC weapons offenses.

[35] The term "use" is intended to include making physical contact with the weapon and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon. The commentary to the RCC menacing statute (RCC § 22E-1203) further discusses the meaning of "use."

of a dangerous weapon or imitation dangerous weapon that falls short of the requirements of the RCC offensive physical contact or RCC assault statutes may have liability under first degree menacing (RCC § 22E-1203). In addition, simple possession of a dangerous weapon during offensive physical contact may also entail liability.[36] This change improves the law's clarity and proportionality by distinguishing harms of different severity.

Third, the conduct in the RCC offensive physical contact offense no longer is a predicate for liability when an assault occurs with intent to commit another crime. Current District law recognizes as separate offenses assault with intent to kill,[37] assault with intent to commit first degree sexual abuse,[38] assault with intent to commit second degree sexual abuse,[39] assault with intent to commit child sexual abuse,[40] assault with intent to commit robbery,[41] assault with intent to commit mayhem,[42] and assault with intent to commit any other felony,[43] collectively referred to as the "assault with intent to" or "AWI" offenses. Current District case law generally indicates that conduct constituting a simple assault, with the appropriate intent, is sufficient for liability for the AWI offenses[44]—and insofar as the conduct in the RCC offensive physical contact offense constitutes simple assault in current law, such conduct also would be a predicate for liability under existing AWI offenses. In contrast, in the RCC, the AWI offenses no longer exist and liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[45] The RCC general attempt provision provides for liability that is *at least as expansive* as that afforded by AWI offenses.[46] The change improves the clarity of the revised offensive physical contact statute, and eliminates unnecessary overlap between the AWI offenses and general attempt liability for assault-type offenses.

Fourth, under the revised offensive physical contact statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current assault statute from which the offense of offensive physical contact is derived is silent as to the effect of intoxication. However, District law seems to

[36] If an individual merely possesses a dangerous weapon during offensive physical contact, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of offensive physical contact per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an imitation firearm under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon."
[37] D.C. Code § 22-401.
[38] D.C. Code § 22-401.
[39] D.C. Code § 22-401.
[40] D.C. Code § 22-401.
[41] D.C. Code § 22-401.
[42] D.C. Code § 22-402.
[43] D.C. Code § 22-403.
[44] *See, e.g.*, *Anthony v. United States*, 361 A.2d 202, 204 (D.C. 1976) ("The assault which comprises an essential element of the offense of assault with intent to commit robbery is common law assault.").
[45] For example, rather than having a separate offense of assault with intent to kill, as is codified in current D.C. Code § 22-401, the RCC criminalizes that conduct as an attempt to commit an offense such as murder or aggravated assault.
[46] For more details, see Commentary to the revised assault statute (RCC § 22E-1202).

have established that assault is a general intent offense,[47] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[48] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[49]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess the knowledge or intent required for any element of offensive physical contact.[50] In contrast, under the revised offensive physical contact offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove offensive physical contact. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue in offensive physical contact.[51] This change improves the clarity, consistency, and proportionality of the offense.

Fifth, to the extent that certain statutory minimum penalties[52] apply to the current assault statute and related assault offenses, the RCC offensive physical contact offense

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[47] For District case law establishing that assault is a general intent crime, see, for example, *Smith v. United States*, 593 A.2d 205, 206–07 (D.C. 1991) and *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011). For District case law indicating that a voluntary intoxication defense may not be raised to an assault charge, see *Parker v. United States*, 359 F.2d 1009, 1013 n.4 (D.C. Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)). *See also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime).

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

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

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

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

[52] D.C. Code §§ 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been

partially replaces them. The statute is silent as to whether the penalties are intended to apply to low-level assaultive conduct and there is no DCCA case law on the issue. In contrast, in the RCC, low-level assaultive conduct is no longer subject to these statutory minimum penalties. For the RCC offensive physical contact offense specifically, offensive physical contacts that fall short of "bodily injury" required in the revised assault statute are no longer subject to these penalties.[53] This change improves the proportionality of the revised offense.[54]

Sixth, together with the RCC assault offense (RCC § 22E-1202) and RCC menacing offense (RCC § 22E-1203), the revised offensive physical contact statute's enhanced penalties for harming a law enforcement officer (LEO) replace the separate assault on a police officer (APO) offenses. Under current District law, a simple assault against a LEO "on account of, or while that law enforcement officer is engaged in the performance of his or her official duties"[55] is a misdemeanor, with a maximum term of imprisonment of 6 months,[56] and an assault that causes "significant bodily injury" or "a violent act that creates a grave risk of causing significant bodily injury" carries a maximum penalty of ten years imprisonment.[57] In contrast, the revised offensive physical contact statute provides enhanced penalties for offensive physical contact with LEOs that falls short of the "bodily injury" requirements in the RCC assault statute (RCC § 22E-1202).[58]

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convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[53] As discussed in this commentary, in addition to unwanted touchings that do not cause pain or impairment to the complainant, current District law generally includes in assault: 1) non-violent sexual touching that causes no pain or impairment to the complainant's body; and 2) intent-to-frighten assaults that do not result in physical contact with the complainant's body. In the RCC, this conduct is no longer covered by the revised assault statute, but may be covered by attempted assault under the general attempt provision (RCC § 22E-301), or by menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), or second degree nonconsensual sexual conduct (RCC § 22E-1307(b)). As with the RCC offensive physical contact offense, menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), and second degree nonconsensual sexual conduct (RCC § 22E-1307(b)) are no longer subject to these statutory minimums, which is discussed further in the commentaries to these RCC statutes.

[54] For further discussion of how these enhancements and provisions apply to the District's current assault statutes, see the commentary to the revised assault statute (RCC § 22E-1202).

[55] D.C. Code § 22-405(b), (c).

[56] D.C. Code § 22-405(b).

[57] D.C. Code § 22-405(c).

[58] Codifying enhanced penalties for causing offensive physical contact with a LEO is consistent with recent District legislation that amended the APO statute. Prior to June 30, 2016, in addition to an assault, the APO statute prohibited "resist[ing], oppos[ing], imped[ing], intimidate[ingt], or interfer[ing] with a law enforcement officer" in the course of his or her official duties or on account of those duties. D.C. Code § 22-405(b), (c) (repl.). On January 28, 2016, the Office of the District of Columbia Auditor issued a report titled "The Durability of Police Reform: The Metropolitan Police Department and Use of Force, 2008-2015," available at http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf (Office of the District of Columbia Auditor Report). The report recommended that the APO misdemeanor statute "be amended so that the elements of the offense require an actual assault rather than mere resistance or interference with a [Metropolitan Police Department] officer." Office of the District of Columbia Auditor Report at 107.
The Neighborhood Engagement Achieves Results Amendment Act of 2016 ("NEAR Act") amended the current APO statute by limiting it to "assault[s]" and created a new statute for resisting arrest (D.C. Code § 22-405.01). The Committee Report for this legislation cited the Office of the District of Columbia Auditor

Codifying the LEO enhancement in the revised offensive physical contact statute results in several changes to current District law. First, the enhanced gradations of the revised offensive physical contact offense require recklessness as to whether the LEO is a "protected person," rather than negligence.[59] A culpable mental state of recklessness makes the enhanced LEO gradations of the revised offensive physical contact statute consistent with the other enhancements in the revised offense that are based on the complainant's status. Second, the revised definition of "law enforcement officer" in RCC § 22E-701 excludes certain members of fire departments, investigators, and code inspectors[60] that are included in the current APO statute,[61] but also expands the definition with a broad catch-all provision. Third, the revised offensive physical contact statute does not enhance offensive physical contact against family members of LEOs due to their relation to a LEO, which is part of the repeal of the general provision prohibiting targeting family members of District officials and employees in D.C. Code § 22-851.[62] Collectively, these changes partially replace the APO offenses in current law with enhanced penalties in the gradations of the revised offensive physical contact statute, improve the clarity of existing statutes, and generally provide for consistent treatment of LEOs and other specially protected complainants. The changes reduce unnecessary gaps and overlap between offenses, and improve the proportionality of the statutes as well.

Seventh, together with the RCC assault offense (RCC § 22E-1202) and RCC menacing offense (RCC § 22E-1203), the revised offensive physical contact statute

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Report. Committee on the Judiciary, *Report on Bill 21-0360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016)* (January 27, 2016).

[59] The current APO statute does not specify a culpable mental state for the fact that the complainant is a LEO in the course of his or her official duties. D.C. Code § 22-405(b), (c). However, DCCA case law suggests that a culpable mental state akin to negligence applies to this element. *See, e.g.*, *Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[60] It should be noted that these excluded categories of complainants are instead covered by the revised definition of "public safety employee," also defined in RCC § 22E-701. As such, they still receive enhanced protection as a category of "protected person" and as a category of complainant when the assault is "caused with the purpose of harming the complainant" due to the complainant's status.

[61] D.C. Code § 22-405(a) (defining "law enforcement officer.").

[62] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee" on account of the District official or employee's performance of official duties. "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d). Many law enforcement officers, as "LEO" is defined in the current APO statute, are District employees and therefore D.C. Code § 22-851 criminalizes targeting their families because of their relation to a LEO. However, there is no provision in current law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

replaces the current offenses of assault and aggravated assault on a public vehicle inspection officer. Under current District law, "assault[ing]" a "public vehicle inspection officer" or "imped[ing], intimidate[ing], or interfer[ing] with" that officer while that officer "is engaged in or on account of the performance of his or her official duties" is a misdemeanor with a maximum term of imprisonment of 180 days.[63] If the accused causes "serious bodily injury," the offense is a felony with a maximum penalty of ten years imprisonment.[64] In contrast, in the revised offensive physical contact statute, offensive physical contact against a "vehicle inspection officer"[65] receives enhanced penalties, but is no longer a separate offense. A "vehicle inspection" officer is included in the definition of "protected person" in RCC § 22E-701 as a "public safety employee," also defined in RCC § 22E-701. Since they are included in the definition of "public safety employee," vehicle inspection officers are also included in the enhanced gradations for offensive physical contact "caused with the purpose of harming the complainant" due to the complainant's status. Conduct that falls short of offensive physical contact may receive an enhanced penalty elsewhere in the RCC,[66] but conduct that consists merely of "imped[ing], intimidat[ing], or interfer[ing] with" a public vehicle inspection officer does not.

Replacing the offenses of assault and aggravated assault on a public vehicle inspection officer with the revised offensive physical contact statute results in several additional changes to District law. First, under the revised offensive physical contact statute, unlike current law,[67] there is no longer an automatic civil penalty of loss of a

[63] D.C. Code § 22-404.02.

[64] D.C. Code § 22-404.03(a)(1), (a)(2) (subsection (a)(1) requires "knowingly or purposely causes serious bodily injury to the public vehicle inspection officer" and subsection (a)(2) requires "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury."). The term "serious bodily injury" is not statutorily defined and it is unclear whether the DCCA would apply the definition of "serious bodily injury" from the sexual abuse statutes to the offenses like it has with aggravated assault.

[65] Although the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 state that the term "public vehicle inspection officer shall have the same meaning as provided in § 50-303(19)," the term "public vehicle inspection officer" no longer exists in Title 50 of the D.C. Code. The definition of "public vehicle inspection officer" was repealed with the passage of the Vehicle-For-Hire Innovation Amendment Act of 2014 ("VFHIAA") (Mar. 10, 2015, D.C. Law 20-197, § 2(a), 61 DCR 12430). However, the VFHIAA included a substantially similar, new definition for a "vehicle inspection officer" and that RCC uses that term instead. D.C. Code § 50-301.03(30B) ("'Vehicle inspection officer' means a District employee trained in the laws, rules, and regulations governing public and private vehicle-for-hire service to ensure the proper provision of service and to support safety through street enforcement efforts, including traffic stops of public and private vehicles-for-hire, pursuant to protocol prescribed under this act and by regulation."). The VFHIAA legislative history does not appear to include reference to the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 or discuss how those offenses might be affected by the elimination of the term "public vehicle inspection officer."

[66] Depending on the facts of the case, intent-to-frighten assaults and incomplete batteries against vehicle inspection officers may be punishable under the revised criminal threats statute (RCC § 22E-1204) or the menacing (RCC § 22E-1203) statute, which has a "protected person" penalty enhancement, or attempted assault or attempted physical contact under the RCC general attempt provision in RCC § 22E-301.

[67] D.C. Code §§ 22-404.02(b)(2), 22-404.03(b)(2) (stating that upon conviction for assault or aggravated assault of a public vehicle inspection officer, an individual "shall" "have his or her license or licenses for

license to operate public vehicles-for-hire upon conviction of offensive physical contact of a vehicle inspection officer. Second, the revised offensive physical contact statute does not enhance offensive physical contact against family members of vehicle inspection officers because of their relation to the public vehicle inspection officers, which is part of the repeal of the general provision regarding targeting family members of District officials and employees in D.C. Code § 22-851.[68] Third, the revised offensive physical contact statute does not bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority.[69] This change clarifies the revised offensive physical contact statute and reduces unnecessary overlap with other provisions that specially penalize assaults on District officials.

Eighth, the RCC definition of "protected person," discussed in the commentary to RCC § 22E-701, results in several changes to the scope of enhanced offensive physical contact. First, through the definition of "protected person," offensive physical contact against complainants under the age of 18 years or against complainants 65 years of age or older receive enhanced penalties in the revised offensive physical contact offense, but only if certain age requirements are met. Current District law enhances various assault offenses against complainants under the age of 18 years if there is at least a two year age gap between the complainant and an actor that is 18 years of age or older,[70] and against all complainants 65 years of age or older.[71] In contrast, the "protected person" gradations

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operating a public vehicle-for-hire, as required by the Commission pursuant to subchapter I of Chapter 3 of Title 50, revoked without further administrative action by the Commission.").

[68] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee" on account of the District official or employee's performance of official duties. "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d). Vehicle inspection officers, as defined in D.C. Code § 50-301.03(30B), are District employees and therefore D.C. Code § 22-851 criminalizes targeting their families because of their relationship.

[69] The current assault on a public vehicle inspection officer statutes bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority. D.C. Code §§ 22-404.02(c), 22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such enforcement action is lawful."). Subsection (d) of the revised offensive physical contact statute contains such a prohibition, but it is limited to a "law enforcement officer," as that term is defined in RCC § 22E-701, which excludes vehicle inspection officers.

[70] D.C. Code § 22-3611(a) ("Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both."); 22-3611(c)(1), (c)(3) (defining "adult" as "a person 18 years of age or older at the time of the offense" and a "minor" as "a person under 18 years of age at the time of the offense.").

[71] D.C. Code § 22-3601(a) ("Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

of the revised offensive physical contact statute require at least a four year age gap between a complainant under 18 years of age and an actor that is 18 years of age or older, and require that the actor be under the age of 65 years and at least 10 years younger than a complainant that is 65 years of age or older. With respect to minors, these age requirements are consistent with other offenses in current District law[72] and the age gap for seniors,[73] while new to District law, reserve the enhanced penalties for predatory behavior. Second, offensive physical contact against a driver of a private vehicle-for-hire, a "vulnerable adult," and a "public safety employee" receive new enhanced penalties in the revised offensive physical contact statute through the definition of a "protected person." A driver of a private vehicle-for-hire does not receive any enhanced penalties under current District law, and a vulnerable adult[74] or "public safety employee"[75] receives enhanced penalties in a few non-assault offenses. In contrast, the "protected person" gradations of the revised offensive physical contact statute recognize the prevalence of drivers of private vehicles-for-hire and the special status elsewhere under current District law for vulnerable adults and public safety employees. Third, offensive physical contact against a "citizen patrol member"[76] or a "District employee" no longer receive enhanced penalties in the revised offensive physical contact offense as they do under current District law.[77] The breadth of these current enhancements is inconsistent as compared to other penalty enhancements in current District law.

The RCC definition of "protected person" also makes broader changes to the revised offensive physical contact statute. First, the "protected person" enhanced gradation applies to each type of offensive physical contact, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[78] the "assault

[72] Many of the District's offenses against complainants under the age of 18 years require at least a four year age gap between the actor and the complainant. *See, e.g.*, D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (child sexual abuse statutes and defining "child" as "a person who has not yet attained the age of 16 years."); 22-3010, 22-3001(3) (enticing a child statute and defining "child" as "a person who has not yet attained the age of 16 years."); 22-3010.02 (arranging for a sexual contact with a real or fictitious child and defining "child" as "a person who has not yet attained the age of 16 years."); 22-811(a), (f)(1), (f)(2) (contributing to the delinquency of a minor statute and defining "adult" as "a person 18 years of age or older at the time of the offense" and "minor" as "a person under 18 years of age at the time of the offense.").

[73] None of the District's offenses targeting harms against complainants that are over the age of 65 years require any age gap between the actor and the complainant. See D.C. Code §§ 22-932, 22-933, 22-933.01, 22-934. However, requiring at least a ten year age gap between the actor and a complainant that is 65 years of age is consistent with requiring an age gap in the offenses against complainants that are under 18 years of age. The 10 year age gap recognizes that both the complainant and the actor are adults, as opposed to teenagers.

[74] D.C. Code §§ 22-933 (criminal abuse of a vulnerable adult statute); 22-933.01 (financial exploitation of a vulnerable adult statute); 22-934 (criminal neglect of a vulnerable adult statute).

[75] D.C. Code § 22-2016 (murder of a law enforcement officer statute).

[76] D.C. Code § 22-3602.

[77] D.C. Code § 22-851(d).

[78] Only one of the separate penalty enhancements under current District law applies to simple assault—the enhancement for crimes against citizen patrol members. D.C. Code § 22-3602(c). Assaulting or injury a District "official or employee" also receives an enhanced penalty under the protection of District public officials statute. D.C. Code § 22-851(c).

with intent to" offenses,[79] and the various felony assault offenses,[80] resulting in disproportionate penalties for similar conduct. Second, the revised offensive physical contact statute applies a mental state of "recklessness" to whether the complainant is a "protected person." None of the separate penalty enhancements under current District law specify a culpable mental state, but the penalty enhancements for senior citizens[81] and minors[82] have affirmative defenses for a reasonable mistake of age. The "reckless" culpable mental state[83] in the protected person gradations preserves the substance of these affirmative defenses[84] and establishes a consistent culpable mental state requirement for

[79] Of the separate penalty enhancements under current District law, only the separate enhancements for crimes against senior citizens and crimes against minors apply to all the AWI offenses. D.C. Code §§ 22-3601(b); 22-3611(c)(2). No AWI offenses are covered in the separate enhancements for crimes against taxicab drives or crimes against transit operators and Metrorail station managers. D.C. Code § 22-3752. The separate enhancement for crimes against citizen patrol members, D.C. Code § 22-3602, only applies to assault with intent to commit "forcible rape," which is an offense that no longer exists after the District's sexual abuse laws were revised in 1995. D.C. Code § 22-4801 (repl.). It is unclear whether assault with intent to commit an offense such as first degree sexual abuse would be covered by the enhancement. The protection of District public officials statute does not specifically mention AWI offenses, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

[80] All the separate penalty enhancements under current District law apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but they do not consistently apply to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate penalty enhancements also apply inconsistently to malicious disfigurement and mayhem, with the citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602, and the other penalty enhancements applying to both offenses. D.C. Code §§ 22-3601(b); 22-3611(b)(2); 22-3752. The protection of District public officials statute does not specifically mention any felony assault offenses or mayhem or disfigurement, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for enhancement for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

[81] 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.").

[82] D.C. Code § 22-3611(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.").

[83] In subsection (A) and subsection (B) of the RCC definition of "protected person," the revised definition, by use of the phrase "in fact," requires strict liability for the age of the actor and any required age gap. It is unclear whether requiring strict liability for these elements changes District law given that the penalty enhancement statutes do not specify any culpable mental states. There is no DCCA case law on the issue.

[84] The current enhancement for crimes against senior citizens makes it a defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). In the RCC, it must be proven that an actor was reckless that the complainant was 65 years or older or under 18 years of age. The actor must disregard a substantial risk that a circumstance (here the fact that the complainant is over 65 or under 18) exists. Per RCC § 22E-206, a

each category of complainant in the RCC definition of "protected person." Finally, the RCC offensive physical contact statute prohibits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the use of a weapon.[85]

Collectively, these changes provide a consistent enhanced penalty for offensive physical contact against categories of individuals included in the definition of "protected person," removing gaps in the current patchwork of separate enhancements, clarifying the law, and improving the proportionality of offenses.

Ninth, the revised offensive physical contact statute enhances the penalty for offensive physical contact committed against LEOs, public safety employees, or District officials when the assault is committed "with the purpose of harming the complainant because of the complainant's status." Current District law has separate penalty enhancements or enhanced penalties for committing assault-type offenses because of the complainant's status as a LEO,[86] a member of a citizen patrol,[87] a District "official or employee,"[88] or a "family member" of a District "official or employee."[89] Current

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reasonable mistake as to the complainant's age would negate the recklessness required for an age-based gradation enhancement for assault. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element. However, given the inherent difficulty in judging the age of another person, an actor who assesses a person's age based on appearance alone likely would be reckless as to the person being over 65 or under 18 if the actor judges a person to be very close in age to the 65 and 18 year old thresholds. For example, if an actor assessed the complainant's age to be in their early 60s based on appearance alone, the actor is likely aware of a substantial risk that the complainant is actually 65 years or older. Whether the actor's disregard of such risk is blameworthy will depend on why the risk was ignored. For example, an assault based on the actor's allegedly knocking down and harming a complainant, reckless that they were 67 year old might reach different conclusions as to blameworthiness depending on whether the actor was running to a hospital to see a family member versus an actor who was running to the front of a line to see a sports star. Ultimately it is up to the factfinder to determine whether an actor's alleged mistake as to age of the complainant is reasonable given the facts of the case.

[85] Current District statutory law does not prevent stacking of such enhancements, and case law has not addressed the stacking of enhancements based on the categories covered in the RCC definition of protected person. However, convictions have been upheld applying both a "while armed" enhancement under D.C. Code § 22-4502 and an enhancement based on the victim's status as a senior or minor.

[86] D.C. Code § 22-405(b), (c) (prohibiting assaulting a LEO, assaulting a LEO with significant bodily injury, or committing a "violent act that creates a grave risk of causing significant bodily injury" to the LEO "on account of . . . the performance of his or her official duties.").

[87] D.C. Code § 22-3602(b) (prohibiting committing specified offenses against a member of a citizen patrol "because of the member's participation in a citizen patrol."); 22-3602(a) (defining "citizen patrol" as "a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for certain District of Columbia neighborhoods with the goal of crime prevention. The term shall include, but is not limited to, Orange Hat Patrols, Red Hat Patrols, Blue Hat Patrols, or Neighborhood Watch Associations.").

[88] Current D.C. Code § 22-851(c) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any District "official or employee," broadly defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(c), (a)(2).

[89] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee." "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or

District law also enhances the penalty for the murder of a "public safety employee"[90] on account of the complainant's status. In contrast, the revised offensive physical contact statute limits this type of enhanced penalty to a "law enforcement officer" and a "District official," and extends it to a "public safety employee," resulting in several changes to current District law. First, as is discussed in the commentary to RCC § 22E-§ 22E-701, the revised definitions of "law enforcement officer," "District official," and "public safety employee" change the scope of the revised enhancements as compared to current District law. Second, offensive physical contact committed against a citizen patrol member, a District "employee," or the "family member" of a District "official or employee" because of the complainant's status no longer receive an enhanced penalty. These provisions raise a number of difficult definitional issues[91] and current sentencing practices in the District indicate that these penalty enhancements rarely, if ever, are necessary to proportionate sentences. Third, the enhancement applies consistently to offensive physical contact, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[92] the "assault with intent to" offenses,[93] and the various felony assault offenses,[94] resulting in disproportionate penalties for similar

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the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d).

[90] D.C. Code § 22-2106(a) ("Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties . . . .").

[91] For example, the enhancement for District employees in D.C. Code § 22-851(b) states that it applies "while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties." However, District case law has held, in construing other statutes, that a law enforcement officer may be considered always on duty, *Mattis v. United States*, 995 A.2d 223, 225 (D.C. 2010). There follows an ambiguity whether any offensive physical contact of a law enforcement officer is subject to heightened liability—regardless whether the offensive physical contact was part of a domestic dispute or the officer was off-duty and not known to the assailant as an officer. The RCC, instead, through a separate reference to law enforcement officers as protected persons, provides heightened penalties where an officer is subjected to offensive physical contact while in the performance of his or her duties.

[92] Only one of the separate penalty enhancements under current District law applies to simple assault—the enhancement for crimes against citizen patrol members. D.C. Code § 22-3602(c). Assaulting or injury a District "official or employee" also receives an enhanced penalty under the protection of District public officials statute. D.C. Code § 22-851(c).

[93] Of the separate penalty enhancements under current District law, only the separate enhancements for crimes against senior citizens and crimes against minors apply to all the AWI offenses. D.C. Code §§ 22-3601(b); 22-3611(c)(2). No AWI offenses are covered in the separate enhancements for crimes against taxicab drives or crimes against transit operators and Metrorail station managers. D.C. Code § 22-3752. The separate enhancement for crimes against citizen patrol members, D.C. Code § 22-3602, only applies to assault with intent to commit "forcible rape," which is an offense that no longer exists after the District's sexual abuse laws were revised in 1995. D.C. Code § 22-4801 (repl.). It is unclear whether assault with intent to commit an offense such as first degree sexual abuse would be covered by the enhancement. The protection of District public officials statute does not specifically mention AWI offenses, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

[94] All the separate penalty enhancements under current District law apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but they do not consistently apply to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to

conduct. Codifying enhanced protection for assaulting individuals based on their status as LEOs, public safety employees, or District officials clarifies the law and improves the proportionality of offenses.

Beyond these nine substantive changes to current District law, four other aspects of the offensive physical contact statute may be viewed as substantive changes of law.

First, the RCC offensive physical contact statute limits liability to contacts that are intended to be, and objectively are, "offensive." Current District assault statutes are silent as to whether physical contacts that are merely offensive to another person are sufficient for liability.[95] DCCA case law generally establishes that a simple assault includes any completed battery where the accused inflicts an unwanted touching on the complainant,[96] but contains conflicting statements as to whether there is any requirement that the battery be objectively "offensive."[97] In addition, under DCCA case law, a simple

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assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate penalty enhancements also apply inconsistently to malicious disfigurement and mayhem, with the citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602, and the other penalty enhancements applying to both offenses. D.C. Code §§ 22-3601(b); 22-3611(b)(2); 22-3752. The protection of District public officials statute does not specifically mention any felony assault offenses or mayhem or disfigurement, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

[95] D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults . . . another . . . shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[96] *See, e.g.*, *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Dunn v. United States*, 976 A.2d 217, 218-19, 220, 221 (D.C. 2009) (stating that the injury resulting from an assault "may be extremely slight," requiring "no physical pain, no bruises, no breaking of the skin, no loss of blood, no medical treatment" and finding the evidence sufficient for assault when appellant "shoved" the complainant because the contact was "offensive."). However, a panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[97] *Compare, e.g., Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990) *with* Ray v. United States, 575 A.2d 1196, 1198–99 (D.C. 1990) ("What we distill from these cases, particularly *Harris*, is that an assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no actual physical harm to the victim.") *and Comber v. United States*, 584 A.2d 26, 50 (D.C. 1990) ("Although some misdemeanors, at least when viewed in the abstract, prohibit activity which seems inherently dangerous, they may also reach conduct which might not pose such danger. A special difficulty arises in the case of simple assault, as presented here, because that misdemeanor is designed to protect not only against physical injury, but against all forms of offensive touching….").

assault consisting of conduct undertaken with intent to frighten another person has been held to require proof that the defendant's conduct would induce fear in "a person of reasonable sensibility."[98] Following this case law, District practice appears to require that for assault liability, physical contact must be "offensive to a person of reasonable sensibility."[99] Resolving this ambiguity, the RCC offensive physical contact statute clearly establishes that the contact in question must be "offensive" as evaluated from the perspective of a reasonable person in the complainant's position, and that the accused must have at least believed to a practical certainty that the contact was "offensive." This change improves the clarity of the law by specifying the requisite culpable mental state, and improves the proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[100]

Second, the RCC offensive physical contact statute requires a culpable mental state of "knowingly" as to causing the physical contact and the fact that bodily fluid or excrement is used, and "intent" as to the offensive nature of the contact. The current D.C. Code is silent as to the culpable mental states required for simple assault.[101] Current District case law suggests that recklessness may suffice for simple assault,[102] but the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient.[103] Resolving this ambiguity, the RCC offensive physical contact statute clearly establishes that knowledge is required as to causing the physical contact

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However, a panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[98] *Antony v. United States*, 361 A.2d 202, 206 (D.C. 1976).

[99] D.C. Crim. Jur. Instr. § 4.100. See also, *id.*, cmt. 4-5 ("The instruction explains that 'injury' includes an offensive touching. [citations omitted] To ensure the jury uses an objective standard of judging "offensive," the Committee borrowed the "reasonable sensibility" standard from *Anthony v. U.S.*, [citation omitted], where it was used in a related context.").

[100] Without requiring that a non-consensual physical contact be "offensive," even the most casual touching of another person—e.g., brushing elbows on a bus or a pat on a colleague's back—could be potentially be subject to criminal liability.

[101] D.C. Code § 22-404(a)(1).

[102] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."); 22-404.01(a)(2) (aggravated assault statute requiring "under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury.").

[103] Recently, the DCCA explicitly declined to decide whether assault requires recklessness or a higher culpable mental state like intent to injure, stating "[e]ven if the greater proof was necessary, the jury could permissibly infer such intent from [appellant's] extremely reckless conduct, which posed a high risk of injury to those around him. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

and the fact that bodily fluid or excrement is used, and "intent" as to the offensive quality of the contact. This change improves the clarity of the law by specifying the requisite culpable mental states, and improves the proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[104]

Third, the effective consent defense in RCC § 22E-409 applies to the RCC offensive physical contact statute. The District's assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[105] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[106] The RCC effective consent defense clarifies when the complainant's "effective consent" or a person's belief that the complainant gave "effective consent" is a defense to RCC offenses against persons such as offensive physical contact. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised offensive physical contact statute clarifies the prohibition on justification or excuse defenses in the current assault on a police officer (APO) statute.[107] First, the RCC provision in subsection (d) codifies the requirements in the current APO statute, DCCA case law, and existing District practice[108] that the defendant actively oppose the use of force,[109] that the limitation extends to stops or other detention (not just

[104] A culpable mental state of recklessness as to the physical contact and its offensive nature may, for instance, criminalize a person's efforts to pass through a crowded Metro car in which it is likely the person will brush against other passengers in a way they would find offensive. While such conduct may be rude, it is not ordinarily considered criminal absent some intent to cause offense by such action.

[105] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

[107] D.C. Code § 22-405(d) ("It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.").

[108] D.C. Crim. Jur. Instr. § 4-114 ("A police officer may stop or detain someone for a legitimate police purpose. And the officer may use the amount of force that appears reasonably necessary to make or maintain the stop. This is the amount of force that an ordinarily careful and intelligent person in the officer's position would think necessary. If the officer uses only the force that appears reasonably necessary, the person stopped may not interfere with the officer, even if the stop later turns out to have been unlawful. If s/he does interfere, s/he acts without justification or excuse. If the officer uses more force than appears reasonably necessary, the person stopped may defend against the excessive force, using only the amount of force that appears reasonably necessary for his/her protection. If that person uses more force than is reasonably necessary for protection, s/he acts without justification.").

[109] *See, e.g.*, *Foster v. United States*, 136 A.3d 330, 332 (D.C. 2016) ("In this case, however, appellant was also found guilty of APO for resisting efforts by the police to handcuff him. We have held that in order to constitute such a violation, 'a person's conduct must go beyond speech and mere passive resistance or avoidance, and cross the line into active confrontation, obstruction or other action directed against an officer's performance in the line of duty[ ]' by 'actively interposing some obstacle that precluded the officer

arrest) for a legitimate police purpose,[110] that the arrest, stop, or detention need not be lawful,[111] and that the law enforcement officer's use of force appeared reasonably necessary.[112] Second, the RCC prohibition requires that the defendant is at least reckless as to the complainant's status as a law enforcement officer. The limitation in the District's current APO statute requires that the defendant "knew or should have known" that the complainant was a law enforcement officer.[113] Case law repeats this language,[114] without clarifying whether there is any requirement of subjective awareness on the defendant's part as to the complainant's status.[115] The revised assault statute requires that the defendant is reckless as to the fact that the person harmed is a law enforcement officer. A "reckless" culpable mental state makes the defense consistent with the offensive physical contact gradations that have an enhancement for "protected persons" (which include law enforcement officers in the course of their duties as a category in the definition of "protected person."). Third, the language "there are no justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] for a person to actively oppose the use of physical force by a law enforcement officer when…" clarifies that there may be other circumstances where a person has a justification defense or excuse defense to assault against a LEO under future RCC justification and excuse defenses. Finally, through use of the phrase "in fact," paragraphs (d)(2) and (d)(3) clarify that there is no culpable mental state for whether the use of force occurs during a specified encounter or whether the law enforcement officer uses only the amount of force that appears reasonably necessary. These changes clarify the defense, using definitions and requirements consistent with the revised assault offense and existing District law.

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from questioning him or attempting to arrest him.'") (quoting *In re C.L.D.*, 739 A.2d 353, 357–58 (D.C.1999) (footnotes omitted)).

[110] *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989).

[111] *See, e.g.*, D.C. Code § 22-405(d) ("It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.").

[112] *Speed v. United States*, 562 A.2d 124, 127, 128 (D.C. 1989) (approving a jury instruction for assault on a police officer that stated "[i]n making and maintaining the arrest, the measure of reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary.").

[113] D.C. Code § 22-405 ("It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.").

[114] *See, e.g.*, *Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[115] *See Speed v. United States*, 562 A.2d 124, 129 (D.C.1989) (finding an exception to the defense where "the defendant did know or had reason to know that the complainant was a member of such force, and the officer was engaged in official police duties…"). The DCCA has held that similar language in the receiving stolen property offense, "knowing or having reason to believe that the property was stolen," requires a defendant's subjective awareness, not mere negligence. *Owens v. United States*, 90 A.3d 1118, 1122 (D.C. 2014). *But see* Dean v. United States, 938 A.2d 751, 762 (D.C. 2007) (holding that "reason to know" language in the murder of a law enforcement officer statute does not require actual knowledge that decedent was an officer).

RCC § 22E-1301. Sexual Assault.

Explanatory Note. *The RCC sexual assault offense prohibits engaging in a sexual act or sexual contact with a complainant or causing a complainant to engage in or submit to specified acts of sexual penetration or sexual touching by means of physical force, threats, nonconsensual intoxication of the complainant, or when the complainant is physically or mentally impaired. The penalty gradations are based on the nature of the sexual conduct, as well as the means by which the actor engages in the sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to the sexual conduct. The revised sexual assault offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse,[1] second degree sexual abuse,[2] third degree sexual abuse,[3] and fourth degree sexual abuse.[4] The revised sexual assault offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the consent defense,[5] the attempt statute,[6] and the aggravating sentencing factors.[7] Insofar as they are applicable to first degree through fourth degree sexual abuse, the revised sexual assault offense also replaces the penalty enhancement for committing an offense "while armed,"[8] the penalty enhancement for committing an offense against minors,[9] the penalty enhancement for committing an offense against senior citizens,[10] certain minimum statutory penalties,[11] and the heightened penalties and aggravating circumstances in D.C. Code § 24-403.01(b-2).*

Subsection (a) specifies the various types of prohibited conduct in first degree sexual assault, the highest gradation of the revised sexual assault offense. Paragraph (a)(1) specifies part of the prohibited conduct—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. Paragraph (a)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she will engage in a sexual act with the complainant or cause the complainant to engage in or submit to a sexual act. Paragraph (a)(2) and subparagraphs (a)(2)(A), (a)(2)(B), and (a)(2)(C) specify the prohibited means by which the actor must engage in a sexual act with the complainant or cause the complainant to engage in or submit to the sexual act. Per the rules of interpretation in

[1] D.C. Code § 22-3002.
[2] D.C. Code § 22-3003.
[3] D.C. Code § 22-3004.
[4] D.C. Code § 22-3005.
[5] D.C. Code § 22-3007.
[6] D.C. Code § 22-3018.
[7] D.C. Code § 22-3020.
[8] D.C. Code § 22-4502.
[9] D.C. Code § 22-3611.
[10] D.C. Code § 22-3601.
[11] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to paragraph (a)(2) and each type of prohibited conduct in subparagraphs (a)(2)(A), (a)(2)(B), and (a)(2)(C). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual with the complainant in a prohibited manner or that he or she causes the complainant to engage in or submit to a sexual act in a prohibited manner.

For paragraph (a)(2) and subparagraph (a)(2)(A), the actor must be "practically certain" that he or she engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act by using physical force that causes "bodily injury" to, overcomes, or retrains any person. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition." For paragraph (a)(2) and subparagraph (a)(2)(B), the actor must be "practically certain" that he or she engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act by threatening, explicitly or implicitly, to kill, kidnap, or cause "bodily injury" to any person or threatening to commit a "sexual act" against any person. "Bodily injury" and "sexual act" are defined terms in RCC § 22E-701.

For paragraph (a)(2) and subparagraph (a)(2)(C), the actor must be "practically certain" that he or she engages in a sexual act or causes the complainant to engage in or submit to a sexual act by administering or causing to be administered to the complainant an intoxicant or other substance without the complainant's "effective consent." "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." In addition, the actor must administer the intoxicant or other substance "with intent" to impair the complainant's ability to express unwillingness to engage in the sexual act (sub-subparagraph (a)(2)(D)(i)). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that administering the intoxicant or other substance would impair the complainant's unwillingness to engage in the sexual act. 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 drug or intoxicant "impaired the complainant's ability to express unwillingness to engage in the sexual act," only that the defendant believed to a practical certainty that it would. However, sub-subparagraph (a)(2)(D)(ii) does require that the intoxicant or other substance have a specified effect on the complainant. The intoxicant or other substance must, "in fact," render the complainant asleep, unconscious, substantially paralyzed, or passing in and out of consciousness (sub-subparagraph (a)(2)(D)(ii)(I)), "substantially incapable of appraising the nature of the sexual act" (sub-subparagraph (a)(2)(D)(ii)(II)), or "substantially incapable of communicating unwillingness to engage in the sexual act (sub-subparagraph (a)(2)(D)(ii)(III)). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to a given element, here the required effect of the intoxicant or other substance on the complainant.

Subsection (b) specifies the various types of prohibited conduct in second degree sexual assault. Like first degree sexual assault, second degree sexual assault requires the actor to "knowingly" engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act," but the prohibited means of doing

so differ. Paragraph (b)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she engages in a sexual act or causes the complainant to engage in or submit to a sexual act. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (b)(1) applies to each of the prohibited means of engaging in a sexual act with the complainant or causing the complainant to engage or submit to the "sexual act" in paragraph (b)(2), subparagraph (b)(2)(A), subparagraph (b)(2)(B), and sub-subparagraphs (b)(2)(B)(i), (b)(2)(B)(ii), and (b)(2)(B)(iii). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual act or causes the complainant to engage in or submit to a sexual act in the prohibited manner. For subparagraph (b)(2)(A), the actor must be "practically certain" that he or she engages in a sexual act with the complainant or causes the complainant to engage in or submit to the sexual act by an express or implied "coercive threat." "Coercive threat" is a defined term in RCC § 22E-701 that prohibits specific threats such as accusing someone of a criminal offense, as well as sufficiently serious threats that would cause a reasonable person to comply.

Under subparagraph (b)(2)(B) and sub-subparagraph (b)(2)(B)(i), the actor must be "practically certain" that the complainant is asleep, unconscious, paralyzed, or passing in and out of consciousness. Under subparagraph (b)(2)(B) and sub-subparagraph (b)(2)(B)(ii), the actor must be "practically certain" that the complainant is "incapable of appraising the nature of the sexual act" or of understanding the right to give or withhold consent to the sexual act. In addition, the actor must be "practically certain" that the complainant's inability is either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Under subparagraph (b)(2)(B) and sub-subparagraph (b)(2)(B)(iii), the actor must be "practically certain" that he the complainant is incapable of communicating unwillingness to engage in the sexual act.

Subsection (c) specifies the various types of prohibited conduct in third degree sexual assault. Paragraph (c)(1) specifies part of the prohibited conduct—engaging in a "sexual contact" with the complainant or causing the complainant to engage in or submit to "sexual contact." "Sexual contact" is a defined term in RCC § 22E-701 that means touching specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (c)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she engages in a sexual contact with the complainant or causes the complainant to engage in or submit to sexual contact. Paragraph (c)(2) and subparagraphs (c)(2)(A), (c)(2)(B), and (c)(2)(C) specify the prohibited the means by which the actor must engage in a sexual contact with the complainant or cause the complainant to engage in or submit to the sexual contact. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (c)(1) applies to each type of prohibited conduct in paragraph (c)(2) and subparagraphs (c)(2)(A), (c)(2)(B), and (c)(2)(C). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual contact with the complainant or causes the complainant to engage in or submit to sexual contact in a prohibited manner. The prohibited means are the same as they are for first degree sexual assault.

Paragraph (d) specifies the various types of prohibited conduct in fourth degree sexual assault. Like third degree sexual assault, fourth degree sexual assault requires the actor to "knowingly" engage in a "sexual contact" with the complainant or cause the complainant to engage in or submit to "sexual contact," but the prohibited means of doing so differ. Paragraph (d)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (d)(1) applies to each of the prohibited means of engaging in a sexual contact with the complainant or causing the complainant to engage or submit to the sexual contact in paragraph (d)(2), subparagraph (d)(2)(A), subparagraph (d)(2)(B), and sub-subparagraphs (d)(2)(B)(i), (d)(2)(B)(ii), and (d)(2)(B)(iii). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual contact or causes the complainant to engage in or submit to sexual contact in the prohibited manner. The prohibited means are the same as they are for second degree sexual assault.

Subsection (e) codifies an affirmative defense to the sexual assault offense. The general provision in RCC § 22E-XX establishes the burdens of proof and production for all affirmative defenses in the RCC. Paragraph (e)(1) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to paragraphs (e)(1), (e)(2), (e)(3), and (e)(4), and there is no culpable mental state requirement for any of the elements in these paragraphs. Paragraph (e)(1) requires that the actor have the complainant's effective consent to the actor's conduct, or the actor reasonably believes that the actor has the complainant's effective consent. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. Paragraph (e)(2) requires that the actor's conduct does not inflict "significant bodily injury" or "serious bodily injury" or involve the use of a "dangerous weapon," as those terms are defined in RCC § 22E-701. Paragraph (e)(3) establishes that the affirmative defense does not apply if the actor is at least four years older than a complainant that is under the age of 16 years. Paragraph (e)(4) establishes that the affirmative defense does not apply if the actor is in a "position of trust with or authority over" a complainant that is under 18 years of age and the actor is at least 18 years of age and at least four years older than the complainant.

Subparagraphs (f)(1) through (f)(4) specify relevant penalties for the offense. [*See* Second Draft of Report #41.]

Subparagraph (f)(5) codifies several penalty enhancements for the revised sexual assault offense and specifies that these penalty enhancements are in addition to the general penalty enhancements under title 22E. If one or more of the penalty

enhancements in subparagraph (f)(5) is proven, the penalty classification for the offense is increased by one class. Subparagraph (f)(5)(A) codifies a penalty enhancement for recklessly causing the sexual act or sexual contact by displaying or using what, in fact, is a "dangerous weapon" or "imitation dangerous weapon." "By displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[12] Per the rules of interpretation in RCC § 22E-207, the culpable mental state of recklessly applies to both causing serious bodily injury and causing such injury by displaying or using an object. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused the sexual conduct by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the object is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subparagraph (f)(5)(B) codifies a penalty enhancement if the actor "knowingly" acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. Subparagraph (f)(5)(C) codifies a penalty enhancement if the actor "recklessly" caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness.

Subparagraph (f)(5)(D) and sub-subparagraphs (f)(5)(D)(i), (f)(5)(D)(ii), (f)(5)(D)(iii), (f)(5)(D)(iv), and (f)(5)(D)(v) codify penalty enhancements based on the age of the complainant or whether the complainant is a "vulnerable adult." These penalty enhancements use the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element, and the culpable mental state of "reckless." "Reckless" is a defined term in RCC § 22E-206 that means the actor was aware of a substantial risk of a given element.

For the penalty enhancement in sub-subparagraphs (f)(5)(D)(i), the complainant must be "in fact" under the age of 12 years and the actor must be "in fact" at least four years older the complainant. There is no culpable mental state requirement for either the age of the complainant or the required age gap. For the penalty enhancement in sub-subparagraphs (f)(5)(D)(ii), the actor must be "reckless" as to the fact that the complainant was under 16 years of age and the actor must be, "in fact," at least four years older than the complainant. The actor must be aware of a substantial risk that the complainant was under the age of 16 years, but there is no mental state requirement for the required age gap. For the penalty enhancement in sub-subparagraphs (f)(5)(D)(iii), the actor must be "reckless" as to the fact that the complainant was under 18 years of age

[12] *See* Commentary to RCC menacing statute (RCC § 22E-1203).

and that the actor was in a "position of trust with or authority over" the complainant, and the actor must be, "in fact," at least four years older than the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. The actor must be aware of a substantial risk that the complainant is under the age of 18 years and that the actor is in a "position of trust with or authority over" the complainant, but there is no mental state requirement for the required age gap. For the penalty enhancement in sub-subparagraphs (f)(5)(D)(iv), the actor must be "reckless" as to the fact that the complainant was 65 years of age or older and the actor was, "in fact," be under the age of 65 years and at least ten years younger than the complainant. The actor must be aware of a substantial risk that the complainant was 65 years of age or older, but there is no culpable mental state requirement for the required age gap. Finally, the penalty enhancement in sub-subparagraphs (f)(5)(D)(v) requires that the actor be "reckless" as to the fact that the complainant was a "vulnerable adult." The actor must be aware of a substantial risk that the complainant was a "vulnerable adult" as that term is defined in RCC § 22E-701.

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

Relation to Current District Law. *The revised sexual assault statute changes current District law in fourteen main ways.*

First, first degree and third degree of the revised sexual assault statute prohibit threats of "bodily injury," as that term is defined in RCC § 22E-701, as well as threats of a "sexual act." The current first degree[13] and third degree[14] sexual abuse statutes prohibit threats of "bodily injury," currently defined for the sexual abuse statutes as an "injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain."[15] There is no DCCA case law interpreting the definition of "bodily injury" for the current sexual abuse statutes. In contrast, first degree and third degree of the revised sexual assault statute prohibit threats of "bodily injury," as that term is defined in RCC § 22E-701, and threats to commit a sexual act. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition." The revised definition of "bodily injury" leads to two changes in the scope of first degree and third degree of the RCC sexual assault as compared to first degree and third degree of the current sexual abuse statutes.[16] First, first degree and third degree of the revised

[13] D.C. Code § 22-3002(a)(2).
[14] D.C. Code § 22-3004(2).
[15] D.C. Code § 22-3001(2).
[16] Other than the two substantive changes discussed in this commentary, the RCC definition of "bodily injury" should not change the scope of first degree and third degree sexual assault as compared to the current definition of "bodily injury" for the first degree and third degree sexual abuse statutes. The current definition of "bodily injury" includes "loss or impairment of the function of a bodily member [or] organ" or "physical disfigurement." It is unclear what level of physical harm is required for this part of the current definition and there is no DCCA case law on this issue. Thus, it is unclear how this language differs, if at all, from the level of physical harm required for the RCC definition of "bodily injury"—either "physical injury" or "impairment of physical condition." Similarly, the current D.C. Code sexual offense definition of "bodily injury" includes "disease" or "sickness," which the RCC definition simplifies by referring to "illness."

sexual assault statute no longer include threats of impairment of a "mental faculty," unless the threatened harms otherwise satisfy the RCC definition of "bodily injury." It is unclear whether "mental faculty" in the current D.C. Code definition of "bodily injury" refers to the physical condition of the brain or more generally to psychological distress. Second, first degree and third degree of the revised sexual assault statute include threats of *any* physical pain, as opposed to threats of "an injury involving significant pain," as required by the current definition of "bodily injury." It is difficult, if not impossible, to assess whether a threat is a threat of "significant physical pain," as opposed to a threat of any physical pain. First degree and third degree of the current D.C. Code sexual abuse statutes purport to make this distinction,[17] but the definition of "force" that applies to first degree and third degree of the current sexual abuse statutes appears to include threats of *any* physical pain sufficient to cause the complainant to submit.[18] In the RCC sex assault offense, a threat of "bodily injury" that involves any physical pain must still satisfy the causation requirement and the "knowingly" culpable mental state in first degree and third degree of the RCC sexual assault statute—i.e., the threat must cause the complainant to engage in the sexual conduct and the actor must be "practically certain" of this fact. Threats to commit a sexual act are included in first degree and third degree of the revised sexual assault statute because an unwanted sexual act is a serious harm that may fall outside the definition "bodily injury." This change improves the clarity, completeness, and consistency of the revised statutes.

Second, as applied to first degree and third degree of the revised sexual assault statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow an actor to claim that he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication. The current first degree and third degree sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[19] and similar logic would appear to apply to third degree sexual abuse. This case law precludes an actor from receiving a jury instruction on whether intoxication prevented the actor from forming the necessary culpable mental state requirement for the crime.[20] This DCCA case law would also likely mean that an actor would be precluded

[17] D.C. Code §§ 22-3002(a)(1), (a)(2) (" (a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person; (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping."); 22-3004(1), (2) ("A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person; (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.").

[18] D.C. Code § 22-3001(5) (defining "force" in part as "the use of a threat of harm sufficient to coerce or compel submission by the victim.").

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

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

from directly raising—though not necessarily presenting evidence in support of[21]—the claim that, due to his or her self-induced intoxicated state, the actor did not possess any knowledge or intent required for any element of first degree or third degree sexual abuse.[22] In contrast, under the revised sexual assault statute, an actor would both have a basis for, and would be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the actor from forming the knowledge or intent required to prove the offense. Likewise, where appropriate, the actor would be entitled to an instruction which clarifies that a not guilty verdict is necessary if the actor's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue the revised sexual assault statute.[23] This change improves the clarity, consistency, and proportionality of the offense.

Third, second degree and fourth degree of the RCC sexual assault statute specify as a discrete basis of liability that the complainant's incapacitation is due to "an intellectual, developmental, or mental disability or mental illness," which excludes age as the sole cause of a complainant's inability. The current second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[24] The language is not statutorily defined, but the DCCA has held that the current fourth degree sexual abuse statute categorically merges into the current second degree child sexual abuse statute,[25] in part because "once the government proves in a sexual assault case that the defendant was four or more years older than the [complainant under the age of 16 years], there is a conclusive presumption that the defendant knew or should have known that the [complainant under the age of 16 years] was incapable of appraising the nature of the sexual conduct."[26] However, such a conclusive presumption categorically convicts defendants of sexual assault that are themselves under the age of 16 years even if they, due to their young age, are also incapable of appraising the nature of the sexual activity. This is inconsistent with the protected status of persons under the age of 16 years in the current sexual abuse statutes. In contrast, in the RCC, a defendant cannot be found guilty of second degree or fourth degree sexual assault based solely on the complainant's age. If the complainant is under

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[name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

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

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

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

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

[25] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017) ("[W]e hold that it is impossible to commit second-degree child sexual *166 abuse without also committing fourth-degree sexual abuse. Therefore, appellant's fourth-degree sexual abuse adjudications merge into his second-degree child sexual abuse adjudications.").

[26] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017).

16 years of age and the defendant is at least four years older, there is no longer a conclusive presumption that the complainant is incapable of appraising the nature of the sexual activity. In the case of any complainant under the age of 18 years, the complainant's young age is no longer the sole basis for determining whether that complainant is incapable of appraising the nature of the sexual activity.[27] A defendant of any age that engages in sexual activity with a complainant under the age of 18 years may still have liability under other provisions of the RCC sexual assault statute, and the young age of the complainant remains a basis for liability under the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). Age remains the basis of liability for the RCC sexual abuse of a minor statute (RCC § 22E-1302), which would entirely overlap with the second and fourth degree sexual assault statutes without this change. This change improves the clarity, consistency, and proportionality of the revised sexual assault and sexual abuse of a minor statutes, and reduces unnecessary overlap.

Fourth, the revised sexual assault statute specifies one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Some or all of the current sex offenses[28] are subject to general penalty enhancements based on the age of the complainant,[29] a general "while armed" penalty enhancement in D.C. Code § 22-4502,[30] and the enhancements in the current sex offense aggravators in D.C. Code § 22-

[27] A complainant's young age may be relevant in assessing whether the complainant has an intellectual, developmental, or mental disability or mental illness that makes the complainant incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact. In addition, although this commentary focuses on the young age of a complainant, the age of an older complainant may not be the sole basis of determining whether that complainant is incapable of appraising the nature of the sexual conduct or of understanding the right to give or withhold consent to the sexual conduct. It may, however, be relevant in determining whether an older complainant has an intellectual, developmental, or mental disability or mental illness and otherwise meets the requirements of this provision.

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

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

[30] The current "while armed" enhancement prohibits committing, attempting, soliciting, or conspiring to commit specified offenses, including child sexual abuse and first degree, second degree, and third degree sexual abuse, "while armed" with or "having readily available" any "pistol, or other firearm (or imitation thereof) or other dangerous or deadly weapon." For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant

3020.[31] The D.C. Code is silent as to whether or how these different penalty enhancements can be stacked, although case law suggests stacking at least some penalty enhancements is permitted.[32] In contrast, the revised sexual assault statute specifies a single set of enhancements, including age-based and weapon enhancements, that is capped at a penalty increase of one class.[33] Because the revised statute incorporates multiple enhancements in the offense, the statute clarifies that it is not possible to enhance a sexual assault with, for example, both a weapon enhancement and an enhancement based on the identity of the complainant, or to double-stack different weapon penalties[34] and offenses. In addition, the scope of the revised weapons aggravator is slightly narrower than the current "while armed" enhancement as it pertains to mere possession[35] and excludes objects the complainant incorrectly perceives as being

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committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

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

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

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

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

[35] The current "while armed" enhancement applies if the actor merely has "readily available" a dangerous weapon. D.C. Code § 22-4502(a). Having a dangerous weapon "readily available" is insufficient for the revised weapon aggravator in the sexual assault statute. However, possessing a dangerous weapon or a

a dangerous weapon or imitation dangerous weapon.[36] Consolidating the multiple penalty enhancements improves the consistency and proportionality of the revised sexual assault offense.

Fifth, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and the complainant when the complainant is under the age of 12 years, and, by the use of the phrase "in fact," require strict liability for the age gap. The current sex offense aggravators include an aggravator for when the "victim was under the age of 12 at the time of the offense."[37] The aggravator does not require an age gap between the complainant and the actor, unlike the current child sexual abuse statutes, which require at least a four year age gap between the actor and a person under the age of 16.[38] In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and a complainant under the age of 12 years. A four year age gap ensures that the enhancement is reserved for predatory behavior targeting very young complainants. An actor with less than a four year age gap that commits a sexual assault against a complainant under the age of 12 years continues to face criminal liability, but the penalty would not be enhanced. The revised enhancement also uses the phrase "in fact" to require strict liability for the age gap, which is consistent with strict liability for the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

Sixth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant was under the age of 16 years when the actor, in fact, was at least four years older. The current sex offense aggravators include a penalty aggravator for when "the victim was under the age of 12 years"[39] and when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[40] There is no aggravator for a complainant under the age of 16 years. However, the current first degree and second degree sexual abuse of a child statutes punish sexual acts and sexual contacts when the complainant was under the age of 16 years and the actor was at least four years older.[41] In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor recklessly disregarding the fact that the complainant is under the age of 16 years when the actor is at

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firearm during sexual assault, without using or displaying it, may have liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[36] The current "while armed" enhancement in D.C. Code § 22-4502 includes the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon. *See, e.g.*, *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."). The definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 exclude these objects.

[37] D.C. Code § 22-3020(a)(1).

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

[39] D.C. Code § 22-3020(a)(1).

[40] D.C. Code § 22-3020(a)(2).

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

least four years older than the complainant. A four year age gap ensures that the enhancement is reserved for predatory behavior targeting young complainants. An actor with less than a four year age gap that commits sexual assault against a complainant under the age of 16 years continues to face criminal liability, but the penalty would not be enhanced. The "recklessly" culpable mental state for the complainant's age is consistent with this element in the other revised age-based penalty enhancements. Using "in fact" to require strict liability for the age gap is consistent with the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

Seventh, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and a complainant under the age of 18 years when the actor is in a position of trust with our authority over the complainant, and, by use of the phrase "in fact," require strict liability for the age gap. The current sex offense aggravators include an aggravator for when the "victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[42] The current aggravator does not specify any culpable mental states and there is no DCCA case law on this issue. In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and the complainant and, by use of the phrase "in fact," specifies that there is no culpable mental state for this element. A four year age gap ensures that the revised enhancement is reserved for predatory behavior targeting complainants under the age of 18 years. Strict liability for the age gap is consistent with the age gap in the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the consistency and proportionality of the revised sexual assault offense.

Eighth, the current D.C. Code penalty enhancement for crimes committed against minors no longer applies to the revised sexual assault statute. Current D.C. Code § 22-3611 codifies a general penalty enhancement for specified crimes, including first degree, second degree, and third degree sexual abuse, when the actor is 18 years of age or older, the complainant is under 18 years of age, and the actor is at least two years older than the complainant.[43] In contrast, the revised sexual assault statute limits the age-based penalty enhancements when the complainant is a minor to situations that mirror the requirements for liability in the RCC sexual abuse of minor statute (RCC § 22E-1302): 1) the complainant is under the age of 12 years and the actor is at least four year older; 2) the complainant is under the age of 16 years and the actor is at least four years older; and 3) the complainant is under the age of 18 years and the actor is at least four years older, and in a position of trust with or authority over the complainant. This change improves the consistency of the RCC sexual assault and sexual abuse of a minor statutes and improves the proportionality of the penalties.

Ninth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant is 65 years of age or older when the actor is, in fact, under the age of 65 years and at least 10 years younger than the complainant. Current D.C. Code § 22-3601 provides a general penalty enhancement for

[42] D.C. Code § 22-3020(a)(2).
[43] D.C. Code §§ 22-3611(a), (c).

any actor, regardless of age, committing specified crimes against complainants 65 years of age or older, including first degree, second degree, or third degree sexual abuse.[44] The penalty enhancement does not specify any culpable mental states, but there is an affirmative defense if the actor "knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed."[45] There is no DCCA case law on this issue. In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor that was reckless as to the fact that the complainant was 65 years of age or older when the actor, in fact, is under the age of 65 years and at least 10 years younger than the complainant. The revised penalty enhancement applies to all gradations of the revised sexual assault statute, including fourth degree sexual assault. The "reckless" culpable mental state preserves the substance of the current affirmative defense for the senior citizen enhancement[46] and is consistent with the culpable mental states in several of the other revised age-based penalty enhancements. Requiring at least a ten year age gap between the actor and the complainant reserves the enhancement for predatory behavior targeting the elderly, rather than violence between elderly persons. Strict liability for the age of the actor is consistent with several of the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). The revised penalty enhancement improves the consistency and proportionality of the revised offense.

Tenth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant is a "vulnerable adult." The current sexual abuse statutes do not have specific offenses or enhanced penalties for complainants that are "vulnerable adult[s]," as that term is defined in RCC § 22E-701, although some current District statutes prohibit the abuse[47] or neglect[48] of a "vulnerable adult" without specifically addressing sexual violence against these complainants. In contrast, the revised sexual assault statutes codify a penalty enhancement for an actor recklessly disregarding the fact that the complainant was a vulnerable adult, as that term is defined in RCC § 22E-701. The "recklessly" culpable mental state matches the culpable mental state required for several of the other sexual assault penalty enhancements. This change improves the consistency and proportionality of the revised statute.

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[44] D.C. Code § 22-3601(a), (b).

[45] D.C. Code § 22-3601(c).

[46] In the RCC, an actor that knew or reasonably believed that the complainant was not 65 years or older or an actor that could not have known or determined the age of the complainant, as is required in the current affirmative defense, would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial that the complainant was 65 years of age or older. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

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

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

Eleventh, the revised sexual assault penalty enhancement for weapons requires that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" an object that, in fact, is a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[49] No culpable mental state is specified, and there is no DCCA case law interpreting the current weapons aggravator.[50] In addition to the sex offense weapons aggravator, current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit first degree, second degree, and third degree sexual abuse[51] "while armed" or "having readily available" a dangerous weapon.[52] In contrast, the revised sexual assault penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" an object that, in fact, is a dangerous weapon or imitation weapon.[53] The term "use" is intended to include making physical contact with the weapon and conduct other speech—i.e. other than oral or written language, symbols,

[49] D.C. Code § 22-3020(a)(6).

[50] However, there is DCCA case law interpreting the repealed armed rape offense that may inform how the DCCA would interpret the current armed aggravator. The previous armed rape offense required that the defendant commit rape "when armed with or [when] having readily available any . . . dangerous or deadly weapon," which is the same language in the current armed aggravator. *Johnson v. United States*, 613 A.2d 888, 897 (D.C. 1992) (quoting D.C. Code § 22-3202(a) (1989 & 1991 Suppl.)). In *Johnson v. United States*, the appellant did not actually use the dangerous weapon during the sexual assault, but used the dangerous weapon prior to the sexual assault to injure the complainant and the weapon was present in the room at the time of the sexual assault. *Johnson v. United States*, 613 A.2d 888, 891, 898 (D.C. 1992). The DCCA held that "the government satisfied its burden of proving the 'armed' element by demonstrating that the coercive element of the sexual assault arose directly from appellant's use of a dangerous weapon." *Johnson*, 613 A.2d at 898. Although the armed rape offense has been repealed, *Johnson* may support requiring a causation element in the current armed aggravator for the sexual abuse statutes because of the identical "while armed" language.

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

[52] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

[53] The current sexual abuse weapons aggravators refers to "a pistol or any other firearm (or imitation thereof). D.C. Code § 22-3020(a)(6). The revised enhancement does not, however, because the revised definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 specifically include firearms and imitation firearms.

or gestures—that indicates the presence of a weapon.[54] The revised enhancement is narrower than the current sex offense aggravator because it requires the use or display of the weapon, and also requires that the use or display of the weapon caused the sexual activity. An actor that is merely "armed with" or "had readily available" a dangerous weapon or imitation dangerous weapon may still face liability under the RCC weapons offenses as well as liability for second degree or fourth degree of the revised sexual assault statute for a "coercive threat." The "recklessly" culpable mental state is consistent with weapons gradations in other RCC offenses against persons. The revised enhancement includes imitation dangerous weapons because in the context of sexual assault, an imitation dangerous weapon can be as coercive as a real dangerous weapon. This change improves the proportionality of the revised sexual assault statute.

Twelfth, the revised sexual assault penalty enhancement for causing serious bodily injury, due to the revised definition of "serious bodily injury," no longer includes rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current sex offense aggravator for causing serious bodily injury[55] incorporates the current definition of "serious bodily injury" for the sex offenses, which includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[56] As is discussed in the commentary to the revised definition of "serious bodily injury" in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that otherwise fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised penalty enhancement using that term, are limited to a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ, or a protracted loss of consciousness. This change improves the consistency and proportionality of the revised sex offenses.

Thirteenth, first degree sexual assault[57] is no longer subject to the heightened penalties and aggravating circumstances in current D.C. Code § 24-403.01(b-2). Current D.C. Code § 24-403.01(b-2) establishes heightened penalties for first degree sexual abuse and first degree sexual abuse while armed if specified procedural requirements are met[58]

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[54] The commentary to the RCC menacing statute (RCC § 22E-1203) further discusses the meaning of "use."

[55] D.C. Code § 22-3020(a)(3).

[56] D.C. Code § 22-3001(7).

[57] As will be discussed, current D.C. Code § 24-403.01(b-2) authorizes enhanced penalties for first degree sexual abuse and first degree sexual abuse while armed, and the RCC replaces those enhanced penalties. In the RCC, however, there is no longer a sexual assault "while armed" offense. Depending on the facts of the case, the equivalent offense would be first degree sexual assault with a weapons enhancement under subsection (g) of the revised sexual assault statute or first degree sexual assault with additional liability under RCC §§ 22E-4104, possession of a dangerous weapon during a crime. For clarity, the commentary for this entry refers only to first degree sexual assault when discussing the relevant RCC statute, even though the various forms of liability for first degree sexual assault committed with the use or presence of a weapon are also affected by the revision.

[58] D.C. Code § 24-403.01(b-2) ("(1) The court may impose a sentence in excess of 60 years for first degree murder or first degree murder while armed, 40 years for second degree murder or second degree murder while armed, or 30 years for armed carjacking, first degree sexual abuse, first degree sexual abuse while armed, first degree child sexual abuse or first degree child sexual abuse while armed, only if: (A) Thirty-

and "one or more aggravating circumstances exist beyond a reasonable doubt."[59] In contrast, the revised sexual assault statute is subject to a single set of aggravators in subsection (f) of the revised statute, as well as the general enhancements in the RCC for repeat offenders (RCC § 22E-606), hate crimes (RCC § 22E-607), and pretrial release (RCC § 22E-608). As a result, the general aggravating circumstances in D.C. Code § 24-403.01(b-2) no longer apply to first degree sexual assault, although several of them are covered by other provisions in the RCC.[60] The special procedures in D.C. Code § 24-

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days prior to trial or the entry of a plea of guilty, the prosecutor files an indictment or information with the clerk of the court and a copy of such indictment or information is served on the person or counsel for the person, stating in writing one or more aggravating circumstances to be relied upon; and (B) One or more aggravating circumstances exist beyond a reasonable doubt.").

[59] The aggravating circumstances that apply to first degree sexual abuse are unclear. D.C. Code § 24-403.01(b-2)(2) establishes that the "[a]ggravating circumstances for first degree sexual abuse . . . are set forth in § 22-3020," but the statute also codifies an additional set of aggravating circumstances that apply to "all offenses." It is unclear whether first degree sexual abuse is included in "all offenses" and is subject to the additional set of aggravating circumstances, or if "all offenses" is limited to the offenses for which D.C. Code § 24-403.01(b-2) authorizes an enhanced penalty that do not have offense-specific aggravating circumstances. The aggravating circumstances that apply for first degree sexual abuse while armed are similarly unclear. D.C. Code § 24-403.01(b-2)(2) does not specify whether first degree sexual abuse while armed is included in the reference to first degree sexual abuse and the aggravating circumstances in D.C. Code § 22-3020, or if it is subject only to the additional set of aggravating circumstances for "all offenses." Regardless, the revised sexual assault statute replaces the aggravating circumstances in D.C. Code § 24-403.01(b-2) insofar as they are applicable to first degree sexual abuse and first degree sexual abuse while armed. The revised sexual assault statute also replaces the aggravating circumstances in D.C. Code § 22-3020, which is discussed elsewhere in this commentary as a substantive change in law.

[60] The general aggravating circumstances in D.C. Code § 24-403.01(b-2)(2) are: "(A) The offense was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression (as defined in § 2-1401.02(12A); (B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning; (G) The victim was less than 12 years old or more than 60 years old or vulnerable because of mental or physical infirmity; [and] (H) Except where death or serious bodily injury is an element of the offense, the victim sustained serious bodily injury as a result of the offense." D.C. Code § 24-403.01(b-2)(2).

In the RCC, none of these aggravating circumstances apply to the revised first degree sexual assault offense. However, the offense is subject to several penalty enhancements that are substantially similar to several of the aggravating circumstances—the general penalty enhancement for hate crimes in RCC § 22E-607, the sexual assault penalty enhancement for recklessly disregarding that the complainant was a "vulnerable adult" (RCC § 22E-1303(g)(4)(F)), and the sexual assault penalty enhancement for recklessly causing serious bodily injury to the complainant (RCC § 22E-1303(g)(3)). In addition, the revised sexual assault statute continues to enhance penalties for complainants under the age of 12 years (RCC § 22E-1303(g)(4)(A)) and for an elderly complainant (RCC § 22E-1303(g)(4)(E)), but has additional requirements for these enhancements that differ from D.C. Code § 24-403.01(b-2)(2).

The remaining aggravators in D.C. Code § 24-403.01(b-2)(2) appear better suited for the homicide offenses that are subject to enhanced penalties in the statute: "(B) The offense was serious because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning." To the extent that these aggravators would apply to

403.01(b-2) to give notice to a defendant are unnecessary because aggravating circumstances must be charged in the criminal indictment per Supreme Court case law decided after passage of the District statute.[61] This revision improves the consistency and proportionality of the revised sexual assault statute.

Fourteenth, the revised sexual assault statute replaces certain minimum statutory penalties for first degree sexual abuse, second degree sexual abuse, and child sexual abuse in D.C. Code § 24-403.01(e).[62] These minimum statutory penalties require specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code[63] apply, if at all, to these provisions. In contrast, the revised sexual assault statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. This change improves the consistency and proportionality of the revised offense.

Beyond these fourteen substantive changes to current District law, twenty-one other aspects of the revised sexual assault statute may be viewed as a substantive change of law.

First, the revised sexual assault statute consistently requires that the actor engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[64] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that

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the revised first degree sexual assault offense, other offenses in the RCC may cover the conduct, such as [RCC §§ 22E-XXX obstruction of justice] or are more appropriate for consideration at sentencing.

[61] The D.C. Council approved D.C. Code § 24-403(b-2) well before *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) was decided, and the statute became law shortly before *Apprendi* was decided. D.C. Code § 24-403(b-2) was approved on August 2, 2000, and became effective on June 8, 2001. The Sentencing Reform Amendment Act of 2000, 2000 District of Columbia Laws 13-302 (Act 13–406). *Apprendi* was decided on June 26, 2000. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[62] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

[63] D.C. Code §§ 22-1804; 22-1804a.

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

the DCCA may not construe such language variations as legally significant.[65] In addition to case law, District practice does not appear to follow the variations in statutory language.[66] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, first degree and third degree of the revised sexual assault statute prohibit using physical force that causes bodily injury to, overcomes, or restrains "any person." The current first degree and third degree sexual abuse statutes require either the use of "force" against "that other person"[67] or certain threats against "any person."[68] Despite the apparent distinction between the complainant and "any person" in these specific provisions, the current definition of "force" includes "the use of a threat of harm sufficient to coerce or compel submission by the victim."[69] This definition would include within the scope of first degree and third degree sexual abuse as the use of "force" causing bodily injury to, overcoming, or restraining any person, not just the complainant. Resolving this ambiguity, first degree and third degree of the revised sexual assault statute prohibit the use of physical force that causes bodily injury to, overcomes, or restrains "any person." This revision makes it clear that physical harms to any individual that the actor knows cause the complainant to engage in or submit to the sexual act or sexual contact are sufficient for first degree and third degree sexual assault. All other

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

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

[67] D.C. Code §§ 22-3002(a)(1); 22-3004(1).

[68] D.C. Code §§ 22-3002(a)(2); 22-3004(2).

[69] D.C. Code § 22-3001(5)

threats not pertaining to physical harm are potentially sufficient for second degree and fourth degree sexual assault if they meet the RCC definition of "coercive threat." This change improves the clarity, consistency, and proportionality of the revised statute.

Third, first and third degree of the revised sexual assault statute prohibit causing the complainant to engage in or submit to sexual activity "by" causing the nonconsensual intoxication of the complainant. The current first degree[70] and third degree[71] sexual abuse statutes prohibit a sexual act or sexual contact "after" the actor involuntarily intoxicates the complainant. There is no DCCA case law interpreting the current intoxication provision. It is unclear whether a causal connection is required between the sexual conduct and the involuntary intoxication of the complainant, although the legislative history suggests that such a causation requirement may have been intended.[72] Resolving this ambiguity, the revised sexual assault statute clarifies that involuntary intoxication of the complainant must be causally related (a "but for" condition) to the sexual conduct. The causation requirement, in addition to the culpable mental states in the revised intoxication provision discussed elsewhere in this commentary, ensures that the intoxication provision applies only to actors that knowingly cause a sexual act or sexual contact by administering an intoxicant or causing an intoxicant to be administered.[73] This change improves the clarity and consistency of the revised sexual assault offense.

Fourth, the revised intoxication provision in first and third degree of the revised sexual assault statute specifies the required effect of the intoxicant. The current intoxication provision in first degree and third degree sexual abuse requires that the intoxicant "substantially impairs the ability of that other person to appraise or control his or her conduct."[74] This language is not further statutorily defined and there is no DCCA case law interpreting it. The language is similar to one basis of liability in the current D.C. Code second degree and fourth degree sexual abuse statutes for sexual conduct with a complainant that is "incapable of appraising the nature of the conduct,"[75] but the current D.C. Code intoxication provision does not mirror the other types of incapacitation

[70] D.C. Code § 22-3002(a)(4).
[71] D.C. Code §§ 22-3004(4).
[72] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").
[73] The revised intoxication provision ensures the proper scope of liability when the actor does not directly administer the intoxicant to the complainant, such as when the actor sets out a generally available bowl of punch that is spiked with alcohol. In such a situation, the actor may be "practically certain" that the complainant will consume the punch, satisfying the "knowingly" culpable mental state for administering or causing to be administered an intoxicant to the complainant without the complainant's consent. However, there is only liability for first degree or third degree sexual assault if the actor is "practically certain" that the sexual activity occurs as a result of administering the intoxicant. In addition, there can be no liability for first degree or third degree sexual assault unless the actor set out the punch bowl "with intent to impair the complainant's ability to express unwillingness." If an actor fails to satisfy the requirements of the revised intoxication provision, there may still be liability under second degree or fourth degree of the revised sexual assault statute for engaging in sexual activity with an impaired complainant.
[74] D.C. Code §§ 22-3002(a)(4); 22-3004(4)
[75] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

referenced in second degree and fourth degree sexual abuse—"incapable of declining participation in" the sexual act or sexual contact[76] and "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.[77] Resolving these ambiguities, the revised intoxication provision in first and third degree of the revised sexual assault statute makes two changes to the current intoxication provision to clarify its scope. First, the revised intoxication provision specifies that an intoxicant that renders the complainant "[a]sleep, unconscious, substantially paralyzed, or passing in and out of consciousness" is sufficient. These conditions mirror the required physical incapacitation in second degree and fourth degree of the revised sexual assault statute and satisfy the current intoxication provision's requirement that the intoxicant "substantially impairs the ability" of the complainant to "appraise or control his or her conduct." Second, the revised intoxicant includes an intoxicant that renders the complainant "[s]ubstantially incapable of appraising the nature of" the sexual act or sexual contact or "[s]ubstantially incapable of communicating unwillingness to engage in" the sexual act or sexual contact. This language is similar to the language in second degree and fourth degree of the revised sexual assault statute and establishes other types of incapacitation that may not fall within the conditions specified elsewhere in the intoxication provision, e.g., asleep, unconscious, etc. This change improves the clarity and consistency of the revised statute and removes possible gaps in liability.

Fifth, first degree and third degree of the RCC sexual assault statute delete "after rendering [the complainant] unconscious" as a discrete form of liability. The current first degree[78] and third degree[79] sexual abuse statutes prohibit a sexual act or sexual contact "after" the actor "render[s] that other person unconscious."[80] There is no DCCA case law interpreting this provision. It is unclear whether a causal connection is required between the actor rendering the complainant unconscious and the sexual conduct. Requiring a causal connection would render the provision surplusage because the current first degree and third degree sexual abuse statutes separately prohibit "[b]y" using force against the complainant,[81] which would include rendering the complainant unconscious.[82] Without a causual connection, however, the provision overlaps with second degree and fourth degree sexual abuse, which prohibit a sexual act or sexual contact with an incapacitated complainant.[83] Resolving this ambiguity, first degree and third degree of the RCC sexual assault statute include engaging in or causing a complainant to engage in or submit to a sexual act "by using physical force that causes bodily injury to the complainant." The RCC definition of "bodily injury" in RCC § 22E-701 would extend to unconsciousness ("physical pain, physical injury, illness, or any impairment of physical condition."). If the actor renders the complainant unconscious and then later decides to sexually assault the complainant, without the causal connection that first degree and third

[76] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).
[77] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).
[78] D.C. Code § 22-3002(a)(4).
[79] D.C. Code §§ 22-3004(4).
[80] D.C. Code §§ 22-3002(a)(3); 22-3004(3).
[81] D.C. Code §§ 22-3002(a)(1); 22-3004(1)
[82] D.C. Code § 22-3001(5) (defining "force" to include "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure" the complainant).
[83] D.C. Code §§ 22-3003; 22-3005.

degree require, there is liability in second degree and fourth degree sexual assault for engaging in a sexual act or sexual contact with an "unconscious" complainant. This change improves the clarity, consistency, and proportionality of the revised statute.

Sixth, first degree and third degree of the revised sexual assault offense require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by a specified use of physical force, specified threats, or involuntary intoxication of the complainant. The current first degree[84] and third degree[85] sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[86] and similarly logic would appear to apply to third degree sexual abuse. However, it is unclear what general intent means in terms of required culpable mental states.[87] Resolving this ambiguity, first degree and third degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by the specified use of physical force, specified threats, or involuntary intoxication of the complainant. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[88] A "knowingly" culpable mental state is consistent with current District law for threats[89] and the RCC criminal threats statute (RCC § 22E-1204) and also may clarify that second degree and fourth degree sexual assault are lesser included offenses, which is an unresolved issued in current DCCA case law.[90] This change improves the clarity and consistency of the revised offense.

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[84] D.C. Code § 22-3002.

[85] D.C. Code § 22-3004.

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

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

[88] *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)").

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

[90] 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).

Seventh, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by "a coercive threat" or with a physically or mentally impaired complainant. The current second degree[91] and fourth degree[92] sexual abuse statutes do not specify any culpable mental states. However, DCCA case law appears to have required specific intent for second degree sexual abuse in one recent case,[93] and the DCCA also has been clear that the statutory definition of "sexual contact" requires specific intent.[94] Instead of this ambiguity, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[95] A "knowingly" culpable mental state is consistent with current District law for threats[96] and the RCC criminal threats statute (RCC § 22E-1204) and may also clarify that second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree, which is an unresolved issue in current DCCA case law.[97] This change improves the clarity and consistency of the revised offense.

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

[91] D.C. Code § 22-3003.

[92] D.C. Code §§ 22-3006.

[93] *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) ("There was also evidence from which a reasonable fact-finder could conclude that appellant had the specific intent to obtain sex by placing [the complainant] in fear of arrest."). Older District case law predating the 1994 Anti-Sexual Abuse Act that enacted first degree through fourth degree sexual abuse, characterized rape as a general intent offense. *See, e.g., United States v. Thornton*, 498 F.2d 749, 753 (D.C. Cir. 1974) (internal quotations omitted).

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

[95] *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)").

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

[97] 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).

Eighth, the revised first degree and third degree sexual assault statutes no longer include "use of a threat of harm sufficient to coerce or compel submission by the victim." The current first degree[98] and third degree[99] sexual abuse offenses prohibit the use of "force" against the complainant, and the current definition of "force" includes "the use of a threat of harm sufficient to coerce or compel submission by the victim."[100] The DCCA has never interpreted the threats part of the current definition of "force." However, inclusion of any type of threat in the first and third degree statutes appears to render moot the overall statutory framework in the current felony sexual abuse statutes, which purports to differentiate threats by the severity of harm involved.[101] To ensure that the revised statute effectively grades on the severity of threats, the revised first and third degree sexual assault statutes are limited to threats to kill, kidnap, or cause bodily injury to any person, or to commit a sexual act against any person. This change improves the consistency and proportionality of the revised statutes.

Ninth, first degree and third degree of the revised sexual assault statute include liability for the use of "physical force" that "causes bodily injury to the complainant," as "bodily injury" is defined in RCC § 22E-701. The current first degree[102] and third degree[103] sexual abuse statutes prohibit the use of "force" against the complainant. The current D.C. Code definition of "force" in the sex offenses chapter requires, in part, "the use of such physical strength or violence as is sufficient to . . . injure a person." It is unclear whether the injury referenced in the definition of "force" is the same as "bodily

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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). The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense," but "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

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

[98] D.C. Code § 22-3002(a)(1).

[99] D.C. Code §§ 22-300(1).

[100] D.C. Code § 22-3001(5).

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

[102] D.C. Code § 22-3002(a)(1).

[103] D.C. Code §§ 22-300(1).

injury,"[104] a defined term in the current sex offenses. There is no DCCA case law interpreting the current definition of "force." Resolving this ambiguity, first degree and third degree of the revised sexual assault statute prohibit causing "bodily injury," a defined term in RCC § 22E-701 that means "physical pain, physical injury, illness, or any impairment of physical condition." This change improves the clarity and consistency of the revised sexual assault statute.

Tenth, first degree and third degree of the revised sexual assault statute no longer include "the use or threatened use of a weapon" as a discrete basis of liability. The current definition of "force" in the sexual abuse statutes prohibits "the use or threatened use of a weapon,"[105] but "weapon" is not defined statutorily and there is no DCCA case law interpreting it. It is unclear how a "weapon" in the current definition of "force" differs from a "deadly or dangerous weapon" in the current sexual abuse aggravators.[106] Resolving this ambiguity, the RCC sexual assault statute deletes "the use or threatened use of a weapon." To the extent that a "weapon" is an item that does or may cause a comparatively less serious bodily injury than a deadly or dangerous weapon, first degree and third degree of the RCC sexual assault statute prohibit the use or threatened use of such an item in subparagraphs (a)(2)(A) and (c)(2)(A) (the use of force that causes bodily injury to, overcomes, or restrains the complainant) and subparagraphs (a)(2)(B) and (c)(2)(B) (prohibiting threats of "bodily injury."). This change improves the clarity of the revised statute.

Eleventh, the intoxication provision in first degree and third degree of the revised sexual assault statute specifies several culpable mental states. The current intoxication provision does not specify any culpable mental states,[107] although the legislative history references a specific intent to engage in the sexual activity.[108] DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[109] and similar logic would appear to apply to third degree sexual abuse. It is unclear what general intent means in terms of required culpable mental states, but the DCCA has defined "general intent" in different ways, including that a "defendant cannot possess the requisite general intent to commit a crime without 'be[ing] aware of

[104] D.C. Code § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").
[105] D.C. Code § 22-3001(5) (defining "force" as "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").
[106] D.C. Code § 22-3001(6) ("The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").
[107] D.C. Code §§ 22-3002(a)(4); 22-3004(4).
[108] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").
[109] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

all those facts which make his or her conduct criminal.'"[110] Resolving this ambiguity, the revised intoxication provision specifies several culpable mental states. First, a "knowingly" culpable mental state applies to administering or causing to be administered an intoxicant, doing so without the complainant's "effective consent," and the fact that the substance is an intoxicant. The "knowingly" culpable mental state also applies to the required causation between administering the intoxicant and the sexual conduct. Second, the actor must act "with intent to impair the complainant's ability to express unwillingness" to engage in the sexual act or sexual contact. Finally, the revised intoxication provision, by the use of "in fact," requires strict liability for the effects of the intoxicant because administering an intoxicant without the complainant's "effective consent" is an assault. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[111] However, an actor may be held strictly liable for elements of an offense that aggravate what is already illegal conduct.[112] If an actor fails to satisfy any of the culpable mental states in the revised intoxication provision, there may still be liability for sexual activity with a physically or mentally impaired person in second degree or fourth degree of the revised sexual assault statute. This change improves the clarity and consistency of the revised sexual assault statute.[113]

Twelfth, second degree and fourth degree of the revised sexual assault statute prohibit sexual assault by a "coercive threat," as that term is defined in RCC § 22E-701. The current second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact by "threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping)."[114] There is no apparent statutory limit to the type of threats or fear, and the legislative history generally notes that the offenses

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

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

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

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

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

"encompass other types of coercion."[115] The DCCA has sustained convictions for second degree sexual abuse for placing a complainant in reasonable fear of arrest[116] and reasonable fear of being fired from employment.[117] Instead of a general reference to threats, second degree and fourth degree of the revised sexual assault statute prohibit a "coercive threat," a defined term in RCC § 22E-701 that is used consistently in the RCC. The RCC definition specifies certain common types of coercive threats, but also has a broad catch-all provision for threats of a harm that is "sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." This change improves the clarity and consistency of the revised offense.

Thirteenth, the revised sexual assault statute details the meaning and limitations of an effective consent defense to the revised sexual assault statute. The current consent defense to the general sexual abuse statutes simply states that "[c]onsent by the victim is a defense to a prosecution" for first degree through fourth degree sexual abuse, as well as misdemeanor sexual abuse, without discussion as to any limitations on the defense.[118] The statutory definition of "consent"[119] further specifies that such consent must be "freely given," a critical limitation, but the meaning of this language is unclear in the statute. DCCA case law recognizes two situations where consent is an appropriate defense to the use of force in a sexual encounter—when the complainant gave consent despite the use of force[120] or the defendant reasonably believed that the complainant consented.[121] Under current case law, if the actor raises a consent defense, "evidence of

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

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

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

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

[119] D.C. Code § 22-3001(4).

[120] *Hatch v. United States*, 35 A.3d 1115, 1116 (D.C. 2011) ("[I]f the government proves the sexual encounter was forcible, the defendant then may attempt to prove that the victim effectively consented *despite* whatever force was involved. Such consent is rare; mere submission by the victim to the use of force is not the equivalent of consent.") (emphasis in original). The DCCA has stated generally that "it is both constitutionally impermissible and logically incoherent to place the burden of persuasion with respect to consent on the defendant if the claim of consensual participation is nothing more than a denial of the use of force, an element of the offense that the government has the burden of proving." *Id.* at 1121-22.

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

consent may be relevant to the issue of whether the defendant did in fact use force to engage the complainant in sexual activity."[122] However, the DCCA has not discussed the government's burden of disproving the consent defense under the current consent defense statute.[123] With respect to limitations on the consent defense, the DCCA, relying on various indications of legislative intent, has held that persons under 16 years of age categorically cannot consent to the use of force by an adult that is at least four years older in a sexual encounter.[124] Although no case law is on point, case law on the District's assault statute[125] and dicta in one sexual abuse case[126] suggest that a person may not be able to consent to more severe harms and threats of harm.

The revised sexual assault offense's effective consent affirmative defense is generally consistent with the current consent defense and existing case law. However, the RCC definition of "effective consent" clarifies the meaning of the phrase "freely given" in the current definition of "consent" to mean consent other than consent induced by physical force, an express or implied coercive threat, or deception. The effective

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than a denial of the use of force, an element of the offense that the government has the burden of proving." *Id.* at 1121-22.

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

[123] The original consent defense in the Anti-Sexual Abuse Act of 1994 required that the actor establish the complainant's consent by a preponderance of the evidence. D.C. Code § 22-3007 (1995). In 2009, due to concerns that the preponderance requirement was creating confusion allowing impermissible burden shifting, the preponderance requirement was deleted. In 1997, in *Russell v. United States*, the DCCA discussed in dicta the government's burden after the actor proved consent by a preponderance of the evidence. In *Russell*, the trial court instructed the jury that if the defendant proved consent by a preponderance of the evidence, the government must prove beyond a reasonable doubt that the complainant's consent was voluntary. *Russell v. United States*, 698 A.2d 1007, 1011 (D.C. 1997). The DCCA noted in dicta that the trial court misstated the law because voluntariness is not the standard for consent. *Russell*, 698 A.2d 1016 n.12. The court stated that the "correct standard under the new statute is whether a reasonable person would think that the complainant's 'words or overt actions indicate[d] a freely given agreement to the sexual act or sexual contact in question.'" *Id.* The court did not discuss the source of the reasonable person standard.

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

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

[125] The DCCA recently held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances. *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).

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

consent affirmative defense is limited to the two situations recognized in DCCA case law—when the actor has the complainant's effective consent to the actor's conduct despite the use of force or when the actor reasonably believes that the complainant gives effective consent to the actor's conduct despite the use of force. With respect to limitations on the affirmative defense, the RCC effective consent defense does not apply if the conduct inflicts "significant bodily injury" or "serious bodily injury," as those terms are defined in RCC § 22E-701, or if the conduct involved the use of a "dangerous weapon" as that term is defined in RCC § 22E-701. In addition, the effective consent affirmative defense does not apply when a complainant is under the age of 16 years and the actor is at least four years older (reflecting current case law), or for certain complainants under the age of 18 years.[127] Lastly, the RCC effective consent affirmative defense deletes now unnecessary language "prosecuted alone or in conjunction with charges under § 22-3018 [attempt statute for sex offenses] or §§ 22-401 [assault with intent to commit specified offenses] and 22-403 [assault with intent to commit specified offenses]."[128] The general provision in RCC § 22E-XX establishes the burdens of proof and production for all affirmative defenses in the RCC. This change improves the clarity and consistency of the revised sexual assault statute.

Fourteenth, the revised sexual assault penalty enhancements require that accomplices be "physically present at the time of the sexual act or sexual contact." The current accomplice aggravator for the sexual abuse statutes requires that the "defendant was aided or abetted by 1 or more accomplices."[129] There is no DCCA case law interpreting this aggravator.[130] It is unclear whether the aggravator would apply if an accomplice was not physically present. It is also unclear if the required aiding and abetting is limited to the sexual act or sexual contact, or encompasses the totality of the actor's conduct leading to the sexual act or sexual contact. Resolving this ambiguity, the revised sexual assault penalty enhancement requires that the accomplices must be "physically present at the time of the sexual act or sexual contact." Accomplices that are physically present at the time of the sexual act or sexual contact potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do

[127] In addition to the specific limitations in the effective consent defense, the RCC definitions of "consent" and "effective consent" require that the complainant be generally competent to give consent. RCC § 22E-701 defines "effective consent" as "consent other than consent induced by physical force, an express or implied coercive threat, or deception." RCC § 22E-701 defines "consent," in relevant part, as an agreement that "[i]s not given by a person who: (1) Is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof; or (2) Because of youth, mental illness or disorder, or intoxication, is known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof."

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

[129] D.C. Code § 22-3020(a)(4).

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

not. Limiting the enhancement to accomplices that are present at the time of the offense improves the proportionality of the revised offense.

Fifteenth, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for the actor acting with one or more accomplices. The current accomplice aggravator for the sex offenses requires that the "defendant was aided or abetted by 1 or more accomplices."[131] The current statute does not specify any culpable mental states and there is no DCCA case law for this issue. Resolving this ambiguity, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for acting with "one or more accomplices that are physically present at the time of the sexual act or sexual contact."[132] The "knowingly" culpable mental state improves the clarity and consistency of the revised sexual assault statute.

Sixteenth, the revised sexual assault statute is subject to the RCC general provision enhancement for repeat offenders. The current sex offense aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories."[133] The plain language of the enhancement is unclear[134] and there is no case law clarifying the issue. In addition, current District law has general recidivist penalty enhancements applicable to sex offenses.[135] It is unclear how the multiple recidivist enhancements apply to the sex offenses, and there is no case law. Instead of overlapping recidivist enhancements, the revised sexual assault statute is subject to the RCC general recidivist penalty enhancement (RCC § 22E-606). By eliminating overlapping recidivist penalty enhancements, the RCC improves the consistency and proportionality of the revised sexual assault statutes.

Seventeenth, by use of the phrase "in fact," the revised sexual assault penalty enhancements apply strict liability to the age of a complainant when the complainant is under 12 years or age. The current sex offense aggravators include when the "victim was under the age of 12 at the time of the offense."[136] The statute does not specify any culpable mental states and there is no DCCA case law on this issue. However, the current child sexual abuse statutes require strict liability for the age of the complainant.[137]

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[131] D.C. Code § 22-3020(a)(4).

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

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

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

[135] D.C. Code §§ 22-1805; 22-1805a.

[136] D.C. Code § 22-3020(a)(1).

[137] D.C. Code §§ 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."); 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges

Resolving this ambiguity, the revised penalty enhancement, by use of the phrase "in fact," applies strict liability to the age of a complainant under the age of 12 years. Strict liability for these ages and age gaps is consistent with the strict liability requirement in first degree and third degree of the revised sexual abuse of a minor statute (RCC § 22E-1302) for the age of a complainant that is under the age of 12 years.[138] This change improves the consistency and proportionality of the revised statutes.

Eighteenth, the revised sexual assault penalty enhancements require that the actor "recklessly disregard" the fact that the complainant was under the age of 18 years and that the actor was in a "position of trust with or authority over the complainant." One of the current sex offense aggravators applies when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[139] The current sex offense aggravators statute does not specify any culpable mental states and there is no DCCA case law on this issue. However, the current sexual abuse of a minor statutes require strict liability for the age of the complainant.[140] Resolving this ambiguity, the revised penalty enhancement requires that the actor was reckless as to the fact that the complainant was under the age of 18 years, and the fact that the actor is in a "position of trust with or authority over" the complainant. The RCC definition of "position of trust with or authority over" may differ in scope from the current definition of "significant relationship" and is discussed further in the commentary to RCC § 22E-701. Given that the RCC definition of a "position of trust with or authority over" the complainant includes positions where the actor may not have any prior knowledge or interaction with the complainant,[141] and that sixteen and seventeen year olds generally are able to consent to sexual encounters under current law and the RCC, requiring some degree of subjective awareness as to the special relationship is appropriate. An actor who is not at least reckless as to being in a position of trust with or authority over the complainant would still be subject to liability for sexual assault, but not this penalty enhancement. These changes improve the consistency and proportionality of the revised statutes.

Nineteenth, the revised serious bodily injury penalty enhancement requires a "recklessly" culpable mental state and requires that the defendant cause serious bodily injury "immediately before, during, or immediately after" the sexual act or sexual contact. The current sex offense aggravators include when the "victim sustained serious bodily injury as a result of the offense."[142] The current sex offense aggravators statute does not specify any culpable mental states and the scope of "as a result of the offense" is

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under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child.").

[138] The revised sexual abuse of a minor statute does not have an affirmative defense for mistake of age for complainants under the age of 12 years, unlike the remaining gradations for complainants under the age of 16 years and under the age of 18 years. RCC § 22E-1305.

[139] D.C. Code § 22-3020(a)(2).

[140] D.C. Code §§ 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.").

[141] For example, a nineteen year old youth leader may be in a "position of trust with or authority over" the complainant, a participant in a large youth program, even though the youth leader and complainant have not met and are not aware of the other's involvement in the program.

[142] D.C. Code § 22-3020(a)(3).

unclear.[143] There is no DCCA case law for these issues. Resolving this ambiguity, the revised penalty enhancement requires a "recklessly" culpable mental state for causing serious bodily injury immediately before, during, or immediately after the sexual act or sexual contact. The "recklessly" culpable mental state consistent with several gradations of the revised assault statute (RCC § 22E-1202). An actor who is not at least reckless as to causing serious bodily injury would still be subject to liability for sexual assault, but not this penalty enhancement. This change improves the consistency and proportionality of the revised offense.

Twentieth, the revised statute specifies how penalty enhancements in the revised statute interact with other, general penalty enhancements in the RCC. Neither the current sex offense aggravators in D.C. Code § 22-3020 nor other general penalty enhancements defined in the D.C. Code specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the sex offense aggravators in D.C. Code § 22-3020 , and the D.C. Code provisions concerning repeat offender enhancements,[144] hate crime enhancements,[145] and pretrial release penalty enhancements.[146] Resolving this ambiguity, the revised statute specifies that the revised sexual assault statute's penalty enhancements apply "in addition to the general penalty enhancements under this title." This change improves the clarity, and may improve the proportionality of the revised statute.

Twenty-first, there is liability in second degree and fourth degree of the revised sexual assault statute for a sexual act or sexual contact with a mentally incapacitated complainant only if the actor doesn't also have a similarly serious mental disability or illness. The current second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact with a complainant that is: 1) "incapable of appraising the nature of the conduct";[147] 2) incapable of declining participation in" the sexual act or sexual contact;[148] or 3) "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.[149] The language is not statutorily defined, and there is no DCCA case law interpreting these provisions when the defendant has a similar disability or illness as the complainant. Resolving this ambiguity, second degree and fourth degree of the revised sexual assault statute establish liability for a sexual act or sexual contact with an incapacitated complainant only if the actor doesn't also have a "similarly serious" disability or illness as the complainant. There may still be liability under other provisions of the RCC sexual assault statute or the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency of the revised statute.

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[143] It is unclear whether "the offense" refers to the sexual act or sexual contact, or the totality of the defendant's actions leading to the sexual act or sexual contact. It is also unclear how to determine whether an injury is a "result" of the sexual act or sexual contact, particularly if a significant period of time passes between the incident and the development or discovery of the serious bodily injury.
[144] D.C. Code §§ 22-1804; 22-1804a.
[145] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[146] D.C. Code § 23-1328.
[147] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).
[148] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).
[149] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

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

First, the RCC sexual assault statute deletes "as is sufficient" from the current definition of "force." The current definition of "force" requires "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person."[150] It is unclear whether "as is sufficient" means the force must actually overcome, restrain, or injure the complainant, or whether the force must be sufficient to overcome, restrain, or injure a "reasonable" or "average" person, regardless of the effect on the complainant. However, independent of the current definition of "force," the current first degree sexual abuse statute requires that the defendant's use of force actually cause the complainant to engage in a sexual act or sexual contact.[151] Given this causation requirement, the clarity and consistency of the revised sexual assault statute improves if first degree and third degree require that the force actually overcome, restrain, or cause bodily injury to the complainant. The use of force that does not physically overcome, restrain, or cause bodily injury to the complainant, may be covered by second degree or fourth degree sexual assault if it satisfies the RCC definition of "coercive threat" and causes the complainant to engage in or submit to a sexual act or sexual contact. This change improves the clarity of the revised statute.

Second, the revised sexual assault statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses. Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[152] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[153] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[154] In the revised sexual assault statute, the RCC General Part's attempt

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

[151] D.C. Code §§ 22-3002(a)(1) (first degree sexual abuse statute stating "if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person."); 22-3004(1) (third degree sexual abuse statute stating "if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.").

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

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

[154] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit

provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence, as in current D.C. Code § 22-3018. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of revised statutes.

Third, first degree and third degree of the revised sexual assault offense prohibit "threatening, explicitly or implicitly" and second degree and fourth degree of the revised sexual assault offense prohibit "a coercive threat, express or implied." Current first degree through fourth degree sexual abuse prohibit "threatening or placing the other person in reasonable fear."[155] DCCA case law has interpreted "placing the other person in reasonable fear" as covering implicit threats.[156] The revised sexual assault statute omits "reasonable fear" and specifically prohibits both explicit and implicit threats and coercive threats. This change improves the clarity of the revised statute.

Fourth, the revised intoxication provision in first degree and third degree sexual assault specifically includes "causes [an intoxicant] to be administered." The current intoxication provision in the first degree and third degree sexual abuse statutes prohibits "administering" an intoxicant.[157] It is unclear from the statute whether the defendant has to personally administer the intoxicant and there is no DCCA case law on point. For clarification, the revised intoxication provision includes the actor personally administering or causing the intoxicant to be administered. This change clarifies the revised statutes.

Fifth, first degree and third degree of the revised sexual assault statute provide liability for sexual conduct caused by administering an intoxicant without "effective consent." The current intoxication prong in first degree and third degree sexual abuse prohibits administering an intoxicant to the complainant by "force or threat of force, or without the knowledge or permission" of the complainant.[158] "Force" is statutorily

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a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse, second degree sexual abuse, and third degree sexual abuse are "crimes of violence" and would have a maximum term of imprisonment of five years. Fourth degree sexual abuse is not "crime of violence," however, and would have a maximum term of imprisonment of 180 days.

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

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

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

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

defined in the current sex offenses,[159] but the other terms in the current intoxication provision are not. There is no DCCA case law on the intoxication provision. For clarification, the revised intoxication provision in first degree and third degree of the revised sexual assault statute requires the intoxicant to be administered "without the complainant's effective consent." The definition of "effective consent" in RCC § 22E-701 appears to include conduct that constitutes "force or threat of force"[160] or "without the knowledge or permission"[161] in the current intoxication provision and is a term that is used consistently throughout the RCC. This change clarifies the revised statutes.

Sixth, second degree and fourth degree sexual assault specify as a basis for liability that a complainant's inability to appraise the nature of the sexual act or sexual contact or give or withhold consent is due to "a drug, intoxicant, or other substance." The current second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[162] This language is not statutorily defined, and there is no DCCA case law on point. However, the DCCA has stated in dicta that "incapable of appraising the nature of the conduct" for "an adult victim . . . might involve proof of the victim's intoxication or general mental incapacity."[163] This change improves the clarity consistency, and proportionality of the revised statute.

Seventh, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) of second degree and fourth degree of the revised sexual assault statute include a complainant that is incapable of "understanding the right to give or withhold consent to" the sexual act or sexual contact. The current second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of the conduct,"[164] as well as "incapable of declining participation in that [sexual act or sexual contact]."[165] The language is not statutorily defined and there is no DCCA case law that interprets the meaning of "the nature of the conduct" or "declining participation." The revised language clarifies that understanding the right to give or withhold consent is a crucial part of sexual conduct and a complainant's mental inability to understand this right can be a basis for liability in second degree and fourth degree of the RCC sexual assault statute. This change improves the clarity, consistency, and proportionality of the revised statute.

Eighth, second and fourth degree of the revised sexual assault statute specifically include a complainant that is "[a]sleep, unconscious, paralyzed, or passing in and out of

[159] D.C. Code § 22-3001(5) ("'Force' means "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").
[160] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, an express or implied coercive threat, or deception."
[161] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception. If an actor obtains a complainant's consent to consume an intoxicant by lying about the presence of an intoxicant or without telling the complainant that an intoxicant is present, this would not be "effective consent" because it was obtained by "deception," as defined in RCC § 22E-701.
[162] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).
[163] In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013).
[164] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).
[165] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

consciousness." The current second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact with a complainant that is "incapable of declining participation in" the sexual act or sexual contact.[166] This language is not statutorily defined further and there is no DCCA case law. The revised language clearly specifies situations when a complainant would satisfy these requirements. This change improves the clarity of the revised statute.

Ninth, by the use of the phrase "in fact," the revised weapon penalty enhancement for the sexual assault statute applies strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." The sex offense aggravators include that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[167] The sex offense aggravators statute does not specify any culpable mental states. There is no DCCA case law regarding the aggravator, but DCCA case law for assault with a dangerous weapon[168] and the "while armed" enhancement in D.C. Code § 22-4502[169] support applying strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." For clarification, the revised weapons enhancement uses the phrase "in fact" to establish that strict liability applies to this element. Strict liability for this element is also consistent with the weapons gradations in other RCC offenses against persons. This change clarifies the revised statutes.

Tenth, the revised sexual assault penalty enhancements consistently refer to the "sexual act or sexual contact" as opposed to "the offense." Several of the current sexual abuse aggravators refer to "at the time of the offense"[170] or "as a result of the offense."[171] The revised penalty enhancements consistently refer to the sexual act or sexual contact, improving the clarity of the revised statute.

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

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

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

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

[170] D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense."); (a)(2) ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

[171] D.C. Code § 22-3020(a)(3) ("The victim sustained serious bodily injury as a result of the offense.").

RCC § 22E-1302. Sexual Abuse of a Minor.

Explanatory Note. *The RCC sexual abuse of a minor offense prohibits specified acts of sexual penetration or sexual touching when the complainant is under the age of 18 years. The penalty gradations are primarily based on the nature of the sexual conduct, as well as the age of the complainant. The revised sexual abuse of a minor offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse of a child,[1] second degree sexual abuse of a child,[2] first degree sexual abuse of a minor,[3] and second degree sexual abuse of a minor.[4] The revised sexual abuse of a minor offense also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[5] the state of mind proof requirement,[6] the attempt statute,[7] and the aggravating sentencing factors.[8] Insofar as they are applicable to sexual abuse of a child and sexual abuse of a minor, the revised sexual abuse of a minor offense also replaces the enhancement for committing offenses while armed,[9] the enhancement for committing offenses against minors,[10] certain minimum statutory penalties,[11] and the heightened penalties and aggravating circumstances in D.C. Code § 24-403.01(b-2).*

First degree sexual abuse of a minor (subsection (a)), second degree sexual abuse of a minor (subsection (b)), and third degree sexual abuse of a minor (subsection (c)), each require that the actor engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Paragraph (a)(1) specifies the prohibited conduct for first degree sexual abuse of a minor—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that he or she engages in a "sexual act" with the complainant or causes the complainant to engage in or submit to a "sexual act." Paragraph (a)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to the elements in

[1] D.C. Code § 22-3008.
[2] D.C. Code § 22-3009.
[3] D.C. Code § 22-3009.01.
[4] D.C. Code § 22-3009.02.
[5] D.C. Code § 22-30011.
[6] D.C. Code § 22-3012.
[7] D.C. Code § 22-3018.
[8] D.C. Code § 22-3020.
[9] D.C. Code § 22-4502.
[10] D.C. Code § 22-3611.
[11] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

subparagraph (a)(2)(A) and subparagraph (a)(2)(B). Subparagraph (a)(2)(A) specifies that the complainant must be under 12 years of age and subparagraph (a)(2)(B) specifies that the actor must be at least four years older than the complainant. There is no culpable mental state required for either the age of the complainant or the age gap.

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

Paragraph (c)(1) specifies the prohibited conduct for third degree sexual abuse of a minor—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (c)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that he or she engages in a "sexual act" with the complainant or causes the complainant to engage in or submit to a "sexual act." Paragraph (c)(2) requires that the actor be in a "position of trust with or authority over the" the complainant. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (c)(1) applies to this element. "Knowingly," a defined term in RCC § 22E-206, here requires that the actor be "practically certain" that he or she is in a position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. Paragraph (c)(3) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to the elements in subparagraph (c)(3)(A) and subparagraph (c)(3)(B). Subparagraph (c)(3)(A) specifies that the complainant must be under 18 years of age and subparagraph (c)(3)(B) specifies that the actor must be at least 18 years of age and at least four years older than the complainant. There is no culpable mental state required for the age of the complainant, the age of the actor, or the age gap.

Fourth degree sexual abuse of a minor (subsection (d)), fifth degree sexual abuse of a minor (subsection (e)), and sixth degree sexual abuse of a minor (subsection (f)), are identical to first degree sexual abuse of a minor, second degree sexual abuse of a minor, and third degree sexual abuse of a minor except that they require that the actor engage in a "sexual contact" with the complainant or cause the complainant to engage in or submit to "sexual contact" instead of "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (d)(1), paragraph (e)(1), and paragraph (f)(1) each specify a culpable

mental state of "knowingly" for engaging in a "sexual contact" with the complainant or causing the complainant to engage in or submit to "sexual contact." "Knowingly," a defined term in RCC § 22E-206, means here that the actor must be "practically certain" that he or she engages in a "sexual contact" with the complainant or causes the complainant to engage in or submit to "sexual contact." The requirements for the complainant and the actor in fourth degree sexual abuse of a minor (paragraph (d)(2), subparagraph (d)(2)(A), subparagraph (d)(2)(B)) are the same as the requirements in first degree sexual abuse of a minor (paragraph (a)(2), subparagraph (a)(2)(A), subparagraph (a)(2)(B)). The requirements for the complainant and the actor in fifth degree sexual abuse of a minor (paragraph (e)(2), subparagraph (e)(2)(A), subparagraph (e)(2)(B)) are the same as the requirements in second degree sexual abuse of a minor (paragraph (b)(2), subparagraph (b)(2)(A), subparagraph (b)(2)(B)). The requirements for the complainant and the actor in sixth degree sexual abuse of a minor (paragraph (f)(2)), paragraph (f)(3), subparagraph (f)(3)(A), subparagraph (f)(3)(B)) are the same as the requirements in third degree sexual abuse of a minor paragraph (c)(2)), paragraph (c)(3), subparagraph (c)(3)(A), subparagraph (c)(3)(B)).

Subsection (g) codifies three affirmative defenses for the revised sexual abuse of a minor statute. The general provision in RCC § 22E-XX establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

Paragraph (g)(1) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant are, "in fact," in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact.

Paragraph (g)(2) codifies an affirmative defense for a reasonable mistake of age for second degree sexual abuse of a minor (subsection (b)) and fifth degree sexual abuse of a minor (subsection (e)). For a valid defense, the actor must have a reasonable belief that the complainant is 16 years of age or older at the time of the sexual act or sexual contact (subparagraph (g)(2)(A)), the reasonable belief must be based on an oral or written statement that the complainant made to the actor about the complainant's age (subparagraph (g)(2)(B)), and the complainant must be 14 years or older at the time of the sexual act or sexual contact (subparagraph (g)(2)(C)). "In fact," a defined term in RCC § 22E-207, indicates there is no culpable mental state requirement for a given element. Per the rule of construction, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" in paragraph (g)(2) applies to the elements in subparagraphs (g)(2)(A), (g)(2)(B), and (g)(2)(C), and there is no culpable mental state requirement for the actor having a reasonable belief that the complainant is 16 years of age or older at the time of the sexual act or sexual contact, that such reasonable belief is based on an oral or written statement that the complainant made to the actor about the complainant's age, and that the complainant is 14 years of age or older at the time of the sexual act or sexual contact.

Paragraph (g)(3) codifies an affirmative defense for a reasonable mistake of age for third degree sexual abuse of a minor (subsection (c)) and sixth degree sexual abuse of a minor (subsection (f)). For a valid defense, the actor must have a reasonable belief that

the complainant is 18 years of age or older at the time of the sexual act or sexual contact (subparagraph (g)(3)(A)), the reasonable belief must be based on an oral or written statement that the complainant made to the actor about the complainant's age (subparagraph (g)(3)(B)), and the complainant must be 16 years or older at the time of the sexual act or sexual contact (subparagraph (g)(3)(C)). "In fact," a defined term in RCC § 22E-207, indicates there is no culpable mental state requirement for a given element. Per the rule of construction, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" in paragraph (g)(3) applies to the elements in subparagraphs (g)(3)(A), (g)(3)(B), and (g)(3)(C), and there is no culpable mental state requirement for the actor having a reasonable belief that the complainant is 18 years of age or older at the time of the sexual act or sexual contact, that such reasonable belief is based on an oral or written statement that the complainant made to the actor about the complainant's age, and that the complainant is 16 years of age or older at the time of the sexual act or sexual contact.

There is no affirmative defense for reasonable mistake of age for first degree sexual abuse of a minor (subsection (a)) or fourth degree sexual abuse of a minor (subsection (d)) when the complainant is under the age of 12 years.

Subparagraph (h)(1) through subparagraph (h)(6) specify relevant penalties for the offense. [*See* Second Draft of Report #41.]

Subparagraph (h)(7) codifies several penalty enhancements for the revised sexual abuse of a minor statute and specifies that these penalty enhancements are in addition to the general penalty enhancements under title 22E. Subparagraph (h)(7)(A) specifies that for any gradation of the revised sexual abuse of a minor offense, if one or more of the penalty enhancements in sub-subparagraphs (h)(7)(A)(i) through (h)(7)(A)(iii) is proven, the penalty classification is increased by one class. Sub-subparagraph (h)(7)(A)(i) codifies a penalty enhancement for recklessly causing the sexual act or sexual contact by displaying or using an object that, in fact, is a "dangerous weapon" or "imitation dangerous weapon." "By displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[12] Per the rules of interpretation in RCC § 22E-207, the culpable mental state of recklessly applies to both causing serious bodily injury and causing such injury by displaying or using an object. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused the sexual conduct by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the object is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Sub-subparagraph (h)(7)(A)(ii) codifies a penalty enhancement if the actor "knowingly" acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. Sub-subparagraph (h)(7)(A)(iii) codifies a penalty enhancement if the actor "recklessly" caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact. "Recklessly" is a defined

[12] *See* Commentary to RCC menacing statute (RCC § 22E-1203).

term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness. If a penalty enhancement from subparagraph (h)(7)(A) and sub-subparagraphs (h)(7)(A)(i), (h)(7)(A)(ii), or (h)(7)(A)(iii) is applied to any gradation of the RCC sexual abuse of a minor statute, the penalty enhancement in subparagraph (h)(7)(B) may not also be applied to that gradation.

Subparagraph (h)(7)(B) has a penalty enhancement that applies to first degree, second degree, fourth degree, and fifth degree of the revised sexual abuse of a minor statute. For these gradations, the penalty classification is increased by one class if the actor knows at the time of the sexual act or sexual contact that the actor is in a "position of trust with or authority over the complainant." "Knowingly," a defined term in RCC § 22E-206, here requires that the actor be "practically certain" that he or she is in a position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. If the penalty enhancement in subparagraph (h)(7)(B) is applied to first degree, second degree, fourth degree, and fifth degree sexual abuse of a minor, a second penalty enhancement from subparagraph (h)(7)(A) and sub-subparagraphs (h)(7)(A)(i), (h)(7)(A)(ii), or (h)(7)(A)(iii) may not also be applied to that gradation.

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

Relation to Current District Law. *The revised sexual abuse of a minor statute changes current District law in eight main ways.*

First, the revised sexual abuse of a minor statute provides separate gradations for a complainant under the age of 12 years when the actor is at least four years older than the complainant. The current child sexual abuse statutes only require that the complainant be under the age of 16 years when the actor is at least four years older.[13] The current sex offense aggravators provide a penalty enhancement for when the complainant was "under the age of 12 years at the time of the offense."[14] In contrast,

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

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

first degree and fourth degree of the revised sexual abuse of a minor statute provide gradations for a complainant under the age of 12 years when the actor is at least four years older. A more serious gradation for harming a complainant under the age of 12 years is consistent with the current penalty enhancement for complainants of such an age. The four year age gap matches the age gap in the current child sexual abuse statutes[15] and the other gradations of the revised sexual abuse of a minor statute. This change improves the consistency and proportionality of the revised sexual abuse of a minor statute.

Second, third degree and sixth degree of the revised sexual abuse of a minor statute require that the actor be at least four years older than the complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current sexual abuse of a minor statutes require that the complainant be under the age of 18 years and that the actor be 18 years of age or older and in a "significant relationship" with the complainant.[16] Unlike the current child sexual abuse statutes, which require at least a four year age gap between the actor and the complainant,[17] the current sexual abuse of a minor statutes do not have a required age gap. In contrast, third degree and sixth degree of the revised sexual abuse of a minor statute require at least a four year age gap between the actor and complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current definition of "significant relationship"[18] and the revised definition of "position of trust with or authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[19] While the special relationship between the actor and the complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between

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attained the age of 16 years."). A person convicted of second degree child sexual abuse when the child is under 12 years of age "may" face a maximum term of imprisonment of 15 years.

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

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

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

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

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

persons close in age should not be criminal.[20] Strict liability for the age gap matches the current sexual abuse of a child statutes,[21] the other gradations of the revised sexual abuse of a minor statute (RCC § 22E-1302), and the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the consistency and proportionality of the revised sexual assault of a minor offense.

Third, the revised sexual abuse of a minor statute provides an affirmative defense for a reasonable mistake of age in certain circumstances when the complainant is under the age of 16 years or under the age of 18 years. Current D.C. Code § 22-3012 establishes strict liability for the age of the complainant in the current child sexual abuse statutes[22] (complainant under the age of 16 years) and current D.C. Code § 22-3011 establishes strict liability for the age of the complainant in the current sexual abuse of a minor statutes[23] (complainant under the age of 18 years). In contrast, the revised sexual abuse of a minor statute codifies an affirmative defense to the equivalent gradations in the revised statute—second degree, third degree, fifth degree, and sixth degree sexual abuse of a minor. The accused must reasonably believe that the complainant was 16 years of age or older or 18 years of age or older at the time of the sexual act or sexual contact. The belief must be based on an oral or written statement that the complainant made to

[20] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1302(i)(1) provides that marriage is a defense to the revised sexual abuse of a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

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

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

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

the actor about the complainant's age,[24] and the complainant must be 14 or 16 years of age or older at the time of the sexual act or sexual contact. This change removes liability for an otherwise consensual sexual act or sexual contact between two people where the actor makes a reasonable mistake as to the complainant's age that is limited to one or two years and supported by the complainant's own representation as to their age. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[25] and legal experts[26] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[27] 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.[28] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[29] An affirmative defense requiring reasonableness is akin to requiring recklessness,[30] but places the initial burden of proof on the accused. The RCC general provision in RCC § 22E-XX establishes the burdens of production and proof for all affirmative defenses in

[24] The statement does not need to be a statement that the complainant is a specific, numerical age. The RCC reasonable mistake of age requires that the statement be "about" the complainant's age and statements such as "I'm old enough to drink," "I got into this bar, didn't I?" when carding is required for entry, or "I'm old enough to vote" would be sufficient for this requirement, although the other requirements of the defense must still be met. Showing a fake or altered written document of age, such as a fake driver's license, would also be a written statement "about" the complainant's age. Whether the complainant's statement is oral or written, however, the actor's belief as to age must still be proven reasonable.

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

[26] *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).

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

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

[29] *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.

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

the RCC. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, the revised sexual abuse of a minor statute specifies one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes,[31] D.C. Code § 22-3611 provides a separate penalty enhancement for committing child sexual abuse against complainants under the age of 18 years,[32] and D.C. Code § 22-4502 provides separate penalty enhancements for committing child sexual abuse against complainants when "armed with" or having "readily available" a deadly or dangerous weapon.[33] Current District statutes are silent as to whether or how these different penalty enhancements can each be applied to an offense, although DCCA case law suggests that the age-based sex offense aggravators and separate penalty enhancement may not apply to certain sex offenses because they overlap with elements of the offense.[34] In contrast, the revised sexual abuse of a minor statute specifies a single set of enhancements that is capped at a penalty increase of one class.[35] The penalty enhancements are generally identical to the penalty enhancements in the RCC sexual assault statute, the main difference being the RCC sexual abuse of a minor statute excludes or limits the applicability of the penalty enhancements that overlap with the requirements of the RCC

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

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

[33] D.C. Code § 22-4502.

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

[35] Note, however, that subtitle I of the RCC specifies certain penalty enhancements (e.g. hate crime) that may apply *in addition to* the penalty enhancements specified in the revised sexual abuse of a minor offense.

sexual abuse of a minor offense.[36] The RCC sexual abuse of a minor penalty enhancements result in several changes in law. First, the RCC sexual abuse of a minor statute is no longer subject to the current sex offense aggravators that overlap with the age requirements of the offense, or the current penalty enhancement in D.C. Code § 22-3611 for committing child sexual abuse against complainants under the age of 18 years. Second, because the revised statute incorporates multiple enhancements in the offense, the statute clarifies that it is not possible to enhance sexual abuse of a minor with, for example, both a weapon enhancement and an enhancement based on the identity of the complainant, or to double-stack different weapon penalties[37] and offenses. Third, the scope of the revised weapons aggravator is slightly narrower than the current "while armed" enhancement as it pertains to mere possession[38] and excludes objects the complainant incorrectly perceives as being a dangerous weapon.[39] This change improves the proportionality of the revised offense.

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[36] The RCC sexual abuse of a minor statute codifies the following penalty enhancements from the RCC sexual assault penalty enhancements: 1) causing the sexual act or sexual contact by displaying or using a dangerous weapon or imitation dangerous weapon; 2) acting with one or more accomplices that are physically present at the sexual act or sexual contact; and 3) causing serious bodily injury immediately before, during, or immediately after the sexual act or sexual contact. These penalty enhancements apply to any gradation of the RCC sexual abuse of a minor offense. In the alternative, for first degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor offense, the RCC sexual abuse of a minor statute codifies as a penalty enhancement that the actor knows that he or she is in a "position of trust with or authority" over the complainant. The requirements for liability in first degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor statute encompass the additional requirements for this enhancement in the RCC sexual assault statute—that the complainant is under the age of 18 years and the actor is at least four years older. The enhancement in the RCC sexual abuse of a minor statute requires a knowledge culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant, as opposed to recklessness in the sexual assault penalty enhancement, because the RCC sexual abuse of a minor statute criminalizes otherwise consensual sexual conduct on the basis of the age of the parties. Third degree and sixth degree of the RCC sexual abuse of a minor statute also requires a knowledge culpable mental state for liability for this element.
The RCC sexual abuse of a minor statute also does not codify the RCC sexual assault penalty enhancements for a complainant that is an 65 years of age or older or for a complainant that is a "vulnerable adult," as that term is defined in RCC § 22-701, because these enhancements are inapplicable to the RCC sexual abuse of a minor statute.

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

[38] The current "while armed" enhancement applies if the actor merely has "readily available" a dangerous weapon. D.C. Code § 22-4502(a). Having a dangerous weapon "readily available" is insufficient for the revised weapon aggravator in the sexual assault abuse of a minor statute. However, possessing a dangerous weapon or a firearm during sexual abuse of a minor, without using or displaying it, may have liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[39] The current "while armed" enhancement in D.C. Code § 22-4502 includes the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon. *See, e.g., Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."). The definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 exclude these objects.

Fifth, first degree and second degree of the RCC sexual abuse of a minor statute[40] are no longer subject to the heightened penalties and aggravating circumstances in current D.C. Code § 24-403.01(b-2). Current D.C. Code § 24-403.01(b-2) establishes heightened penalties for first degree sexual abuse of a child and first degree sexual abuse of a child while armed if specified procedural requirements are met[41] and "one or more aggravating circumstances exist beyond a reasonable doubt."[42] In contrast, the revised sexual abuse of a minor statute is subject to a single set of aggravators in subsection (h) of the revised statute, as well as the general enhancements in the RCC for repeat offenders (RCC § 22E-606), hate crimes (RCC § 22E-607), and pretrial release (RCC § 22E-608). As a result of this revision, the general aggravating circumstances in D.C. Code § 24-403.01(b-2) no longer apply to first degree sexual abuse of a minor and second degree sexual abuse of a minor, although several of them are covered by other provisions in the RCC.[43] The

[40] As will be discussed, current D.C. Code § 24-403.01(b-2) authorizes enhanced penalties for first degree sexual abuse of a child and first degree sexual abuse of a child while armed, and the RCC replaces those enhanced penalties. In the RCC, however, there is no longer a first degree sexual abuse of a child "while armed" offense. First, in the RCC, the equivalent offenses to first degree sexual abuse of a child are first degree and second degree sexual abuse of a minor. Second, the RCC no longer has a "while armed" version of child sexual abuse. Depending on the facts of the case, the equivalent offense would be first degree or second degree sexual abuse of a minor with the weapons enhancement under subsection (h) of the revised sexual abuse of a minor statute or first degree or second degree sexual abuse of a minor with additional liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses. For clarity, the commentary for this entry refers only to first degree sexual abuse of a minor and second degree sexual abuse of a minor when discussing the relevant RCC statutes, even though the various forms of liability for committing these offenses with the use or presence of a weapon are also affected by the revision.

[41] D.C. Code § 24-403.01(b-2) ("(1) The court may impose a sentence in excess of 60 years for first degree murder or first degree murder while armed, 40 years for second degree murder or second degree murder while armed, or 30 years for armed carjacking, first degree sexual abuse, first degree sexual abuse while armed, first degree child sexual abuse or first degree child sexual abuse while armed, only if: (A) Thirty-days prior to trial or the entry of a plea of guilty, the prosecutor files an indictment or information with the clerk of the court and a copy of such indictment or information is served on the person or counsel for the person, stating in writing one or more aggravating circumstances to be relied upon; and (B) One or more aggravating circumstances exist beyond a reasonable doubt.").

[42] The aggravating circumstances that apply to first degree sexual abuse of a child are unclear. D.C. Code § 24-403.01(b-2)(2) establishes that the "[a]ggravating circumstances for first degree child sexual abuse . . . are set forth in § 22-3020," but the statute also codifies an additional set of aggravating circumstances that apply to "all offenses." It is unclear whether first degree sexual abuse of a child is included in "all offenses" and is subject to the additional set of aggravating circumstances, or if "all offenses" is limited to the offenses for which D.C. Code § 24-403.01(b-2) authorizes an enhanced penalty that do not have offense-specific aggravating circumstances. The aggravating circumstances that apply for first degree sexual abuse of a child while armed are similarly unclear. D.C. Code § 24-403.01(b-2)(2) does not specify whether first degree sexual abuse of a child while armed is included in the reference to first degree sexual abuse of a child and the aggravating circumstances in D.C. Code § 22-3020, or if it is subject only to the additional set of aggravating circumstances for "all offenses." Regardless, the revised sexual assault statute replaces the aggravating circumstances in D.C. Code § 24-403.01(b-2) insofar as they are applicable to first degree sexual abuse of a child and first degree sexual abuse of a child while armed. The revised sexual assault statute also replaces the aggravating circumstances in D.C. Code § 22-3020, which is discussed elsewhere in this commentary as a substantive change in law.

[43] The general aggravating circumstances in D.C. Code § 24-403.01(b-2)(2) are: "(A) The offense was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression (as defined in § 2-1401.02(12A); (B) The offense was committed because the victim

special procedures in D.C. Code § 24-403.01(b-2) to give notice to a defendant are unnecessary because aggravating circumstances must be charged in the criminal indictment per Supreme Court case law decided after passage of the District statute.[44] This revision improves the consistency and proportionality of the revised sexual assault of a minor statute.

Sixth, the revised sexual assault statute replaces certain minimum statutory penalties for child sexual abuse in D.C. Code § 24-403.01(e).[45] These minimum statutory penalties require specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code[46] apply, if at all, to these provisions. There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. In contrast, the revised sexual abuse of a minor statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. This change improves the consistency and proportionality of the revised offense.

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was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning; (G) The victim was less than 12 years old or more than 60 years old or vulnerable because of mental or physical infirmity; [and] (H) Except where death or serious bodily injury is an element of the offense, the victim sustained serious bodily injury as a result of the offense." D.C. Code § 24-403.01(b-2)(2).

In the RCC, none of these aggravating circumstances apply to first degree or second degree of the revised sexual abuse of a minor offense. However, first degree or second degree of the revised sexual abuse of a minor offense is subject to two penalty enhancements that are substantially similar to two of the aggravating circumstances—the general penalty enhancement for hate crimes in RCC § 22E-607 and the sexual abuse of a minor penalty enhancement for recklessly causing serious bodily injury to the complainant (sub-subparagraph (h)(7)(A)(iii)). In addition, first degree and second degree sexual abuse of a minor already grade the offense based on the complainant being under 12 years of age.

The remaining aggravators in D.C. Code § 24-403.01(b-2)(2) appear better suited for the homicide offenses that are subject to enhanced penalties in the statute: "(B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning." To the extent that these aggravators would apply to first degree and second degree sexual abuse of a minor, other offenses in the RCC may cover the conduct, such as [RCC §§ 22E-XXX obstruction of justice] or are more appropriate for consideration at sentencing.

[44] The D.C. Council approved D.C. Code § 24-403(b-2) well before *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) was decided, and the statute became law shortly before *Apprendi* was decided. D.C. Code § 24-403(b-2) was approved on August 2, 2000, and became effective on June 8, 2001. The Sentencing Reform Amendment Act of 2000, 2000 District of Columbia Laws 13-302 (Act 13–406). *Apprendi* was decided on June 26, 2000. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[45] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

[46] D.C. Code §§ 22-1804; 22-1804a.

Seventh, the revised sexual abuse of a minor penalty enhancement for weapons requires that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" an object that, in fact, is a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[47] No culpable mental state is specified, and there is no DCCA case law interpreting the current weapons aggravator.[48] In addition to the sex offense weapons aggravator, current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit first degree, second degree, and third degree sexual abuse[49] "while armed" or "having readily available" a dangerous weapon.[50] In contrast, the revised sexual abuse of a minor penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" an object that, in fact, is a dangerous weapon or imitation weapon.[51] The term "use" is intended to include making physical contact with the weapon and conduct other speech—i.e. other than oral or

[47] D.C. Code § 22-3020(a)(6).

[48] However, there is DCCA case law interpreting the repealed armed rape offense that may inform how the DCCA would interpret the current armed aggravator. The previous armed rape offense required that the defendant commit rape "when armed with or [when] having readily available any . . . dangerous or deadly weapon," which is the same language in the current armed aggravator. *Johnson v. United States*, 613 A.2d 888, 897 (D.C. 1992) (quoting D.C. Code § 22-3202(a) (1989 & 1991 Suppl.)). In *Johnson v. United States*, the appellant did not actually use the dangerous weapon during the sexual assault, but used the dangerous weapon prior to the sexual assault to injure the complainant and the weapon was present in the room at the time of the sexual assault. *Johnson v. United States*, 613 A.2d 888, 891, 898 (D.C. 1992). The DCCA held that "the government satisfied its burden of proving the 'armed' element by demonstrating that the coercive element of the sexual assault arose directly from appellant's use of a dangerous weapon." *Johnson*, 613 A.2d at 898. Although the armed rape offense has been repealed, *Johnson* may support requiring a causation element in the current armed aggravator for the sexual abuse statutes because of the identical "while armed" language.

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

[50] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

[51] The current sexual abuse weapons aggravators refers to "a pistol or any other firearm (or imitation thereof). D.C. Code § 22-3020(a)(6). The revised enhancement does not, however, because the revised definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 specifically include firearms and imitation firearms.

written language, symbols, or gestures—that indicates the presence of a weapon.[52] The revised enhancement is narrower than the current sex offense aggravator because it requires the use or display of the weapon, and also requires that the use or display of the weapon caused the sexual activity. An actor that is merely "armed with" or "had readily available" a dangerous weapon or imitation dangerous weapon may still face liability under the RCC weapons offenses as well as liability for second degree or fourth degree of the revised sexual assault statute for a "coercive threat." The "recklessly" culpable mental state is consistent with weapons gradations in other RCC offenses against persons. The revised enhancement includes imitation dangerous weapons because in the context of sexual assault, an imitation dangerous weapon can be as coercive as a real dangerous weapon. This change improves the proportionality of the revised sexual abuse of a minor statute.

Eighth, the revised sexual abuse of a minor penalty enhancement for causing serious bodily injury, due to the revised definition of "serious bodily injury," no longer includes rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current sex offense aggravator for causing serious bodily injury[53] incorporates the current definition of "serious bodily injury" for the sex offenses, which includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[54] As is discussed in the commentary to the revised definition of "serious bodily injury" in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that otherwise fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised penalty enhancement using that term, are limited to a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ, or a protracted loss of consciousness. This change improves the consistency and proportionality of the revised sex offenses.

Beyond these eight substantive changes to current District law, nine other aspects of the revised sexual abuse of a minor statute may be viewed as a substantive change of law.

First, the revised sexual abuse of a minor statute consistently requires that the actor engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[55] This

[52] The commentary to the RCC menacing statute (RCC § 22E-1203) further discusses the meaning of "use."
[53] D.C. Code § 22-3020(a)(3).
[54] D.C. Code § 22-3001(7).
[55] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to

variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[56] In addition to case law, District practice does not appear to follow the variations in statutory language.[57] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the revised sexual abuse of a minor statute requires a "knowingly" culpable mental state for engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. The current child sexual abuse statutes[58] and sexual abuse of a minor statutes[59] do not specify any culpable mental state for engaging in or submitting to a sexual act or sexual contact.

"engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

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

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

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

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

Due to the statutory definition of "sexual contact,"[60] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement.[61] There is no DCCA case law regarding commission of a "sexual act" in the current child sexual abuse statutes or the sexual abuse of a minor statutes.[62] The revised sexual abuse of a minor statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for engaging in a sexual act or sexual contact with the complainant causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[63] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[64] This change improves the clarity and consistency of the revised statutes.

Third, third degree and sixth degree of the revised sexual abuse of a minor statute require a "knowingly" culpable mental state for the element that actor was in a "position of trust with or authority over" the complainant. The current sexual abuse of a minor statutes require that the actor be "in a significant relationship with a minor,"[65] but they do

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

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

[62] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC § 22E-1301, Sexual assault, above, for further discussion.

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

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

[65] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor, and engages in a sexual act with a minor or causes that minor to engage in a sexual act."); 22-3009.02 (second degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor[,] and

not specify what, if any, culpable mental states apply, and there is no DCCA case law on point. Third degree and sixth degree of the revised sexual abuse of a minor statute resolve this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[66] This change improves the clarity and consistency of the revised statutes.

Fourth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of third degree and sixth degree of the revised sexual abuse of a minor statute and the penalty enhancement for being in a "position of trust with or authority over" may differ as compared to the current sexual abuse of a minor statutes. The current sexual abuse of a minor statutes[67] require that the actor be in a "significant relationship" with the complainant and the fact that the actor was in a "significant relationship" with the complainant is included in the current sex offense aggravators.[68] "Significant relationship" is defined in D.C. Code § 22-3001[69] as "includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[70] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

Fifth, the revised sexual abuse of a minor penalty enhancements require that accomplices be "physically present at the time of the sexual act or sexual contact." The current accomplice aggravator for the sexual abuse statutes requires that the "defendant was aided or abetted by 1 or more accomplices."[71] There is no DCCA case law

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engages in a sexual contact with that minor or causes that minor to engage in a sexual contact."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

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

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

[68] D.C. Code § 22-3020(a)(2) ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

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

[70] D.C. Code § 22-3001(10).

[71] D.C. Code § 22-3020(a)(4).

interpreting this aggravator.[72] It is unclear whether the aggravator would apply if an accomplice was not physically present. It is also unclear if the required aiding and abetting is limited to the sexual act or sexual contact, or encompasses the totality of the actor's conduct leading to the sexual act or sexual contact. Resolving this ambiguity, the revised sexual abuse of a minor penalty enhancement requires that the accomplices must be "physically present at the time of the sexual act or sexual contact." Accomplices that are physically present at the time of the sexual act or sexual contact potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. Limiting the enhancement to accomplices that are present at the time of the offense improves the proportionality of the revised offense.

Sixth, the revised sexual abuse of a minor penalty enhancement requires a "knowingly" culpable mental state for the actor acting with one or more accomplices. The current accomplice aggravator for the sex offenses requires that the "defendant was aided or abetted by 1 or more accomplices."[73] The current statute does not specify any culpable mental states and there is no DCCA case law for this issue. Resolving this ambiguity, the revised sexual abuse of a minor penalty enhancement requires a "knowingly" culpable mental state for acting with "one or more accomplices that are physically present at the time of the sexual act or sexual contact."[74] The "knowingly" culpable mental state improves the clarity and consistency of the revised sexual abuse of a minor statute.

Seventh, the revised sexual abuse of a minor statute is subject to the RCC general provision enhancement for repeat offenders. The current sex offense aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories."[75] The plain language of the enhancement is unclear[76] and there is no case law clarifying the issue. In addition, current District law has general recidivist penalty enhancements applicable to sex offenses.[77] It is unclear how the multiple recidivist enhancements apply to the sex offenses, and there is no case law. Instead of overlapping recidivist enhancements, the revised sexual abuse of a minor statute is subject to the RCC general recidivist penalty

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

[73] D.C. Code § 22-3020(a)(4).

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

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

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

[77] D.C. Code §§ 22-1805; 22-1805a.

enhancement (RCC § 22E-606). By eliminating overlapping recidivist penalty enhancements, the RCC improves the consistency and proportionality of the revised sexual abuse of a minor statutes.

Eighth, the revised serious bodily injury penalty enhancement requires a "recklessly" culpable mental state and requires that the defendant cause serious bodily injury "immediately before, during, or immediately after" the sexual act or sexual contact. The current sex offense aggravators include when the "victim sustained serious bodily injury as a result of the offense."[78] The current sex offense aggravators statute does not specify any culpable mental states and the scope of "as a result of the offense" is unclear.[79] There is no DCCA case law for these issues. Resolving this ambiguity, the revised penalty enhancement requires a "recklessly" culpable mental state for causing serious bodily injury immediately before, during, or immediately after the sexual act or sexual contact. The "recklessly" culpable mental state consistent with several gradations of the revised assault statute (RCC § 22E-1202). An actor who is not at least reckless as to causing serious bodily injury would still be subject to liability for sexual abuse of a minor, but not this penalty enhancement. This change improves the consistency and proportionality of the revised offense.

Ninth, the revised sexual abuse of a minor statute specifies how penalty enhancements in the revised statute interact with other, general penalty enhancements in the RCC. Neither the current sex offense aggravators in D.C. Code § 22-3020 nor other general penalty enhancements defined in the D.C. Code specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the sex offense aggravators in D.C. Code § 22-3020, and the D.C. Code provisions concerning repeat offender enhancements,[80] hate crime enhancements,[81] and pretrial release penalty enhancements.[82] Resolving this ambiguity, the revised statute specifies that the revised sexual assault statute's penalty enhancements apply "in addition to the general penalty enhancements under this title." This change improves the clarity, and may improve the proportionality 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 sexual abuse of a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of

[78] D.C. Code § 22-3020(a)(3).
[79] It is unclear whether "the offense" refers to the sexual act or sexual contact, or the totality of the defendant's actions leading to the sexual act or sexual contact. It is also unclear how to determine whether an injury is a "result" of the sexual act or sexual contact, particularly if a significant period of time passes between the incident and the development or discovery of the serious bodily injury.
[80] D.C. Code §§ 22-1804; 22-1804a.
[81] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[82] D.C. Code § 23-1328.

16 years,[83] and sexual abuse of a minor, for complainants under the age of 18 years.[84] For clarification, the revised sexual abuse of a minor statute no longer distinguishes separate offenses for complainants who are a "child" or "minor" and instead organizes all offenses against minors as gradations of one "sexual abuse of a minor" statute. The text of the revised sexual abuse of a minor statute also specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[85] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexual abuse of a minor statute, by use of the phrase "in fact," clarifies that no culpable mental state is required as to the age of the complainant, the actor's own age, or the required age gap. Neither the current sexual abuse of a child statutes[86] nor the current sexual abuse of a minor statutes[87] specify culpable mental states as to the ages of the parties or the gap in their ages. However, current D.C. Code § 22-3012 states that for child sexual abuse, the government "need not prove that the defendant knew the child's age or the age difference between himself or herself and the child"[88] and current D.C. Code § 22-3011 establishes that "mistake of age" is not a defense to prosecution under the child sexual abuse and sexual abuse of a minor statutes.[89] DCCA case law further suggests that no culpable mental state whatsoever is required as to the age of the complainant or the age gap with the actor.[90] The revised sexual abuse of a minor statute, by use of the phrase "in fact," establishes strict liability as to the age of the complainant, the age of the actor, or the relevant age gap. Codifying the strict liability requirement improves the clarity and consistency of the revised statute.

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

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

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

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

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

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

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

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

Third, the revised sexual abuse of a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[91] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[92] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[93] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[94] In the revised sexual abuse of a minor statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, the marriage and domestic partnership defense in the revised sexual abuse of a minor statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to sexual abuse of a minor "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt

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

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

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

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

statute] or § 22-403 [assault with intent to commit certain offenses]."[95] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[96] The marriage or domestic partnership defense in the revised sexual abuse of a minor statute applies only to prosecution for the revised sexual abuse of a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[97] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[98] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexual abuse of a minor offense.

Fifth, the marriage and domestic partnership defense in the revised sexual abuse of a minor statute makes two clarificatory changes to the current defense.[99] First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Sixth, the revised sexual abuse of a minor statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a defense" for the current sexual abuse of a child statutes and current sexual abuse of a minor statutes.[100] However, nothing in the RCC sexual abuse of a minor statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

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

[96] D.C. Crim. Jur. Instr. § 9.700.

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

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

[99] D.C. Code § 22-30011(b).

[100] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."). The current child sexual abuse statutes and current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3008 – 22-3009.02 and fall within the specified range of statutes in D.C. Code § 22-3011(a).

Seventh, by the use of the phrase "in fact," the revised weapon penalty enhancement for the sexual abuse of a minor statute applies strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." The sex offense aggravators include that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[101] The sex offense aggravators statute does not specify any culpable mental states. There is no DCCA case law regarding the aggravator, but DCCA case law for assault with a dangerous weapon[102] and the "while armed" enhancement in D.C. Code § 22-4502103 support applying strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." For clarification, the revised weapons enhancement uses the phrase "in fact" to establish that strict liability applies to this element. Strict liability for this element is also consistent with the weapons gradations in other RCC offenses against persons. This change clarifies the revised statutes.

Eighth, the revised sexual abuse of a minor penalty enhancements consistently refer to the "sexual act or sexual contact" as opposed to "the offense." Several of the current sexual abuse aggravators refer to "at the time of the offense"[104] or "as a result of the offense."[105] The revised penalty enhancements consistently refer to the sexual act or sexual contact, improving the clarity of the revised statute.

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

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

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

[104] D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense."); (a)(2) ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

[105] D.C. Code § 22-3020(a)(3) ("The victim sustained serious bodily injury as a result of the offense.").

RCC § 22E-1303. Sexual Exploitation of an Adult.

Explanatory Note. *The RCC sexual abuse by exploitation offense prohibits specified acts of sexual penetration or sexual touching with several populations of vulnerable individuals. The penalty gradations are based on the nature of the sexual conduct. The revised sexual abuse by exploitation offense replaces six distinct offenses in the current D.C. Code: first degree sexual abuse of a secondary education student,[1] second degree sexual abuse of a secondary education student,[2] first degree sexual abuse of a ward,[3] second degree sexual abuse of a ward,[4] first degree sexual abuse of a patient or client,[5] and second degree sexual abuse of a patient or client.[6] The RCC sexual abuse by exploitation offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[7] the attempt statute,[8] and the aggravating sentencing factors.[9]*

Paragraph (a)(1) specifies the prohibited conduct for first degree sexual abuse by exploitation—engaging in a sexual "act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that he or she would engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Subparagraph (a)(2)(A) through subparagraph (a)(2)(D) specify the prohibited situations for an actor to engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to the "sexual act." Subparagraph (a)(2)(A) requires that the actor be a "teacher, counselor, principal, administrator, nurse, coach, or security officer[10] in a secondary school." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to this element and the actor must be "practically certain" that he or she is one of these specified categories. Sub-subparagraph (a)(2)(A)(i) specifies two requirements for the complainant. The complainant must either be "an enrolled student in the same secondary school" as the actor (sub-subparagraph (a)(2)(A)(i)(I)) or receive services or attend programming at the same secondary school as the actor (sub-subparagraph (a)(2)(A)(i)(II)).[11] Per the rules of interpretation in RCC § 22E-207, the "recklessly disregards" culpable mental state in subparagraph (a)(2)(A) applies to both of these requirements for the complainant.

[1] D.C. Code § 22-3009.03.
[2] D.C. Code § 22-3009.04.
[3] D.C. Code § 22-3013.
[4] D.C. Code § 22-3014.
[5] D.C. Code § 22-3015.
[6] D.C. Code § 22-3016.
[7] D.C. Code § 22-30017.
[8] D.C. Code § 22-3018.
[9] D.C. Code § 22-3020.
[10] The term "security officer," per its ordinary definition, includes school resource officers, school security guards, and other secondary school personnel engaged in a security role.
[11] Services and programming may include, for example, sports practices, music lessons, or a required class.

"Recklessly disregards" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the complainant is an enrolled student in the same secondary school or receive services or attend programming at the same secondary school. Sub-subparagraph (a)(2)(A)(ii) specifies a final requirement for the complainant—that he or she is under the age of 20 years. Per the rules of interpretation in RCC § 22E-207, the "recklessly disregards" culpable mental state in subparagraph (a)(2)(A) applies to this requirement and means the actor is aware of a substantial risk that the complainant is under the age of 20 years.

Subparagraph (a)(2)(B) specifies that the actor must engage in the sexual act with the complainant or cause the complainant to engage in or submit to the sexual act when the actor falsely represents that he or she is someone else who is personally known to the complainant. Subparagraph (a)(2)(B) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here requires that the actor be "practically certain" that his or her conduct falsely represents that he or she is someone else who is personally known to the complainant.

Subparagraph (a)(2)(C) requires that the actor be a "healthcare provider," a "health professional," or a "religious leader described in D.C. Code § 14-309," or that the actor purports to be such a person. The terms "healthcare provider" and "health professional" are defined terms in RCC § 22E-701, and include massage therapists, psychologists, and addiction counselors. A "religious leader described in D.C. Code § 14-309" is a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science."[12] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subparagraph (a)(2)(B) applies to this element, and per the definition of "knowingly" in RCC § 22E-206, the actor must be "practically certain" that he or she is a "healthcare provider," "heath professional," or "a religious leader described in D.C. Code § 14-309," or purports to be a such a person. Sub-subparagraph (a)(2)(C)(i) through sub-subparagraph (a)(2)(C)(iii) specify additional requirements for an actor that is a healthcare provider, heath professional, or a specified religious leader, or purports to be such. Sub-subparagraph (a)(2)(C)(i) requires that the actor falsely represents that the sexual act is done for a bona fide medical, therapeutic, or professional purpose and sub-subparagraph (a)(2)(C)(ii) requires that the actor commit the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subparagraph (a)(2)(B) applies to all the elements in sub-subparagraph (a)(2)(C)(i) and sub-subparagraph (a)(2)(C)(ii). Per the definition of "knowingly" in RCC § 22E-206, the actor must be "practically certain" that he or she falsely represents that the sexual act is done for a bona fide professional purpose or that he or she commits the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services.

Sub-subparagraph (a)(2)(C)(iii) requires that the actor commit the sexual act while the complainant is a patient or client of the actor. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subparagraph (a)(2)(B) applies

[12] D.C. Code § 14-309.

to these elements. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she commits the sexual act while the complainant is a patient or client of the actor. Sub-subparagraph (a)(2)(C)(iii) also requires that the actor "recklessly disregard" that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired from declining participation in the sexual act. "Recklessly disregards" is a defined term in RCC § 22E-206 that here means that the actor must be aware of a substantial risk that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired for declining participation in the sexual act.

Subparagraph (a)(2)(D) requires that the actor "knowingly" work at a specified institution or "knowingly" transports or is a custodian of persons at such an institution. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she works at such an institution or transports or is a custodian of persons at such an institution. Subparagraph (a)(2)(D) further requires that the actor "recklessly disregard" that the complainant is a ward, patient, client, or prisoner at such an institution. "Recklessly disregard" is a defined term in RCC § 22E-206 that here means that the actor must be aware of a substantial risk that the complainant is a ward, patient, client, or prisoner at such an institution.

Subsection (b) specifies the required conduct for second degree sexual abuse by exploitation. The prohibited conduct is the same as first degree sexual abuse by exploitation except it requires a "sexual contact" instead of a "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person.

Subsection (c) codifies an affirmative defense for the RCC sexual abuse by exploitation statute. The general provision in RCC § 22E-XX establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC. Subsection (c) establishes an affirmative defense that the actor and the complainant were in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact.

Subsection (d) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The RCC sexual abuse by exploitation statute changes current District law in four main ways.*

First, the RCC sexual abuse by exploitation statute limits liability to an actor who is "a healthcare provider, a health professional, or a religious leader described in D.C. Code § 14-309," or purports to be such. The current first and second degree sexual abuse of a patient or client statutes apply to any person who "purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature" or is "otherwise in a professional relationship of trust"

with the complainant.[13] There is no DCCA case law more clearly specifying included professions. "Professional relationship of trust" is not defined in the D.C. Code and there is no DCCA case law interpreting the phrase. In contrast, the RCC sexual abuse by exploitation statute limits the offense to actors that are "a healthcare provider, a health professional, or a religious leader described in D.C. Code § 14-309," or actors that purport to be such. "Healthcare provider" and "health professional" are defined terms in RCC § 22E-701 and the D.C. Code,[14] referring to a wide array of medical and related professions, including massage therapists and addiction counselors. A "religious leader described in D.C. Code § 14-309" is a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science."[15] This provision is intended to be interpreted broadly to include Christian and non-Christian religious officials. Complainants in a healthcare or spiritual setting are especially vulnerable to the conduct prohibited in the RCC sexual exploitation of an adult offense. Sexual activity in other professional settings[16] can be addressed by professional censure or civil liability. This change improves the clarity and proportionality of the RCC sexual abuse by exploitation statute.

Second, the RCC sexual abuse by exploitation statute no longer prohibits "the actor falsely represents that he or she is licensed as a particular kind of professional." The current first and second degree sexual abuse of a patient or client statutes prohibit an actor from "represent[ing] falsely that he or she is licensed as a particular type of professional."[17] There is no DCCA case law interpreting this provision. Other provisions in the current sexual abuse of a patient or client statutes prohibit committing a sexual act or sexual contact during the "provision of professional services," when the actor "represents falsely that the sexual… [act or contact] is for a bona fide professional purpose," or when the actor "knows or has reason to know that the patient or client is impaired from declining participation."[18] In contrast, the RCC sexual abuse by exploitation statute does not specifically criminalize sexual conduct when the actor falsely represented that he or she is licensed as a particular kind of professional. The RCC sexual abuse by exploitation offense continues to penalize sexual conduct when falsely representing the conduct is for a medical, professional, or therapeutic purpose, during the provision of professional services, or when the actor disregards the possibility that the complainant is impaired. Apart from such circumstances, criminal punishment for lying about the status of one's professional licensing may be reprehensible but is not directly related to the sexual conduct. This change improves the proportionality of the RCC sexual abuse by exploitation statute.

[13] D.C. Code §§ 22-3015 (first degree sexual abuse of a patient or client); 22-3016 (second degree sexual abuse of a patient or client).
[14] D.C. Code §§ 3–1205.01; 16–2801
[15] D.C. Code § 14-309.
[16] For example, it is possible that "a professional relationship of trust" could be alleged to exist between a supervisor and employee, a contractor and contractee, and other common business relationships that involve a measure of trust.
[17] D.C. Code §§ 22-3015; 22-3016.
[18] D.C. Code §§ 22-3015 and 22-3016.

Third, only the general penalty enhancements in subtitle I of the RCC apply to the RCC sexual abuse by exploitation statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[19] In contrast, the revised sexual abuse by exploitation statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[20] are not necessary in the RCC sexual abuse by exploitation statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the RCC sexual exploitation of an adult offense improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Fourth, the RCC sexual abuse by exploitation statute completely specifies persons of authority in a secondary school that are subject to the revised statute, limiting liability to situations where the student has a substantial link to the secondary school where the actor works. The current first and second degree sexual abuse of a secondary education student statutes prohibit "[a]ny teacher, counselor, principal, coach, or other person of authority in a secondary level school" from engaging in sexual conduct with a "student under the age of 20 years enrolled in that school or school system."[21] The statute does not define the term "person of authority" and there is no case law on point. In contrast, the RCC sexual abuse by exploitation statute limits the liable persons at a secondary school to any "teacher, counselor, principal, administrator, nurse, coach, or security officer" and requires either that the complainant is enrolled at the same secondary school as the actor, or receives services or attends programming at the same secondary school as the actor. Categorical inclusion of all persons within a school system appears to be overbroad insofar as it would include persons who are not actually in a position to exert authority over the complainant, while limiting liability to persons within the school where the complainant is enrolled appears to be under-inclusive. The revised statute is tailored to inherently coercive roles at a secondary school where a student is enrolled or otherwise receives services or programming, including reference to a "security officer" that is not

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

[20] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexual abuse by exploitation, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[21] D.C. Code §§ 22-3009.03; 22-3009.04.

specified in the current statute. If the facts of a case fall outside the requirements of the revised statute, there may still be liability under second degree or fourth degree of the revised sexual assault statute (RCC § 22E-1301) for the use of a coercive threat or under third degree and sixth degree sexual abuse of a minor (RCC § 22E-1304) if the actor is in a "position of trust with or authority over" the complainant. This change improves the clarity, completeness, and proportionality of the RCC statute.

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

First, the RCC sexual abuse by exploitation statute consistently requires that the actor engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[22] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[23] In addition to case law, District practice does not appear to follow the variations in statutory language.[24] Instead of these variations in language, the revised sex

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

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

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

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

Second, the sexual abuse by exploitation an adult statute separately prohibits a sexual act or sexual contact when the actor "falsely represents that the actor is someone else who is personally known to the complainant." The current sexual abuse of a patient or client statutes do not contain a provision specifically addressing false identity used to engage in sexual conduct. However, the current misdemeanor sexual abuse (MSA) statute[25] prohibits engaging in a sexual act or sexual contact without the "permission" of the other person. "Permission" is not defined in the current D.C. Code and it is unclear whether or how "permission" differs from the defined term "consent."[26] In addition, the DCCA has used the terms "permission" and "consent" interchangeably in discussing the current MSA statute.[27] To the extent that the current MSA statute prohibits a sexual act or sexual contact without "consent," the current definition of "consent" appears to exclude consent that is obtained by deception because the current definition of "consent" requires that the words or actions be "freely given."[28] There is no DCCA case law on point. Resolving this ambiguity, the RCC sexual abuse by exploitation statute prohibits a specific type of deception, when the actor falsely represents that he or she is someone else who is personally known to the complainant.[29] This particular form of deception is more serious than other forms of deception that the RCC nonconsensual sexual conduct offense (RCC § 22E-1307) may prohibit. This change improves the clarity and proportionality of the RCC sexual abuse by exploitation statute.

(sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

[25] D.C. Code § 22-3006.

[26] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[27] *See, e.g.*, *Davis v. United States*, 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United States*, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

[28] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[29] *See, e.g.*, *People v. Morales*, 150 Cal. Rptr. 3d 920 (2013) (Defendant entered the dark bedroom of complainant after seeing her boyfriend leave late at night, and has sex with the complainant by pretending to be the boyfriend).

Third, the RCC sexual abuse by exploitation statute requires a "knowingly" culpable mental state for engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. The current sexual abuse statutes that comprise the RCC sexual abuse by exploitation statute[30] do not specify any culpable mental state for engaging in or submitting to a sexual act or sexual contact. Due to the statutory definition of "sexual contact,"[31] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement.[32] There is no DCCA case law regarding commission of a "sexual act" in the current statutes that comprise the RCC sexual exploitation of an adult statute.[33] The RCC sexual abuse by exploitation statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[34] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[35] This change improves the clarity and consistency of the RCC sexual abuse by exploitation statute.

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[30] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

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

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

[33] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. *See* commentary to RCC 22E-1303, Sexual assault, above, for further discussion.

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

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

Fourth, the RCC sexual abuse by exploitation statute requires a "knowingly" culpable mental state for offense elements concerning the actor's own status and actions. The current sexual abuse statutes that comprise the RCC sexual abuse by exploitation statute[36] do not specify culpable mental states for the many facts regarding the actor's status or actions that must be proven for the offenses, apart from the "intent" required for "sexual contact."[37] There is no DCCA case law on point. The RCC sexual abuse by exploitation statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the many alternative facts that constitute the offense and involve the actor's own status or actions.[38] 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.[39] This change improves the clarity and consistency of the revised statutes.

Fifth, the RCC sexual abuse by exploitation statute requires a "recklessly" culpable mental state as to facts about the complainant's status. The current sexual abuse statutes that comprise the sexual abuse by exploitation statute[40] do not specify culpable mental states for the many facts that must be proven for the offenses, apart from the "intent" required by the statutory definition of "sexual contact."[41] There is no DCCA case law on point. The RCC sexual abuse by exploitation statute resolves this ambiguity by requiring a "recklessly" culpable mental state for the many alternative facts that constitute the offense and involve the complainant's status.[42] Requiring, at a minimum, a

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the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

[36] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[37] D.C. Code § 22-3001(9).

[38] Specifically, the RCC sexual exploitation of an adult offense requires a "knowingly" culpable mental state as to the following alternative elements: being a "teacher, counselor, principal, administrator, nurse, coach, or security officer in a secondary school"; falsely representing oneself to be someone else personally known to the complainant; being a healthcare provider, a health professional, or a religious leader in D.C. Code § 14-309, or purporting to be such; falsely representing that sexual conduct is for a bona fide medical, therapeutic, or professional purpose; committing the sexual act or sexual contact during a consultation, examination, treatment, therapy, or other provision of professional services; committing the sexual act or sexual contact while the complainant is a patient or client of the actor; and being a person who works at a hospital, treatment facility, detention or correctional facility, group home, or other institution housing persons who are not free to leave at will, or transports or is a custodian to persons at such an institution.

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

[40] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[41] D.C. Code § 22-3001(9).

[42] Specifically, the RCC sexual exploitation of an adult offense requires a "recklessly" culpable mental state as to the following alternative elements: that the complainant is an enrolled student in the same secondary school as the actor or receives services or attends programming at the same secondary school as the actor; the secondary education student complainant is under the age of 20 years; that the complainant is "impaired

knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[43] However, a lower culpable mental state may be justified given the heightened power, responsibilities, and training of a person of authority in a secondary school, healthcare providers, clergy, and persons who work at custodial institutions. Recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[44] This change improves the clarity and consistency of the revised statutes.

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

First, the RCC sexual abuse by exploitation offense combines in one offense the current sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses, with the same penalty. The current D.C. Code codifies as separate statutes sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client, but these statutes all have the same penalties—a maximum term of imprisonment of 10 years for first degree, requiring a "sexual act"[45] and a maximum term of imprisonment of 5 years for second degree, requiring "sexual contact."[46] Having separate statutes for these various offenses is unnecessarily confusing given that their penalties are equivalent and all pertain to sexual conduct with vulnerable adult populations. This change improves the clarity and organization of the revised statute.

Second, the RCC second degree sexual abuse by exploitation statute requires "sexual contact" with a secondary education student. The current second degree sexual abuse of a secondary education student statute prohibits engaging in "sexual conduct" with specified secondary education students under the age of 20 years or causing specified secondary education students to engage in "sexual conduct."[47] "Sexual conduct" is not defined in the current sexual abuse statutes, nor does it appear in any other sexual abuse statute. In addition, the lower gradations of all the current sexual abuse statutes require "sexual contact."[48] There is no legislative history or DCCA case

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from declining participation" in sexual activity; and that the complainant is a ward, patient, client, or prisoner at a specified institution.

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

[44] *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.

[45] D.C. Code §§ 22-3009.03 (first degree sexual abuse of a secondary education student); 22-3013 (first degree sexual abuse of a ward; 22-3015 (first degree sexual abuse of a patient or client).

[46] D.C. Code §§ 22-3014 (second degree sexual abuse of a ward); 22-3016 (second degree sexual abuse of a patient or client). Second degree sexual abuse of a secondary education student prohibits "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system and is punishable by a maximum term of imprisonment of 5 years. D.C. Code § 22-3009.04. As is discussed elsewhere in this commentary, "sexual conduct" appears to be a typo for "sexual contact."

[47] D.C. Code § 22-3009.04 (second degree sexual abuse of a secondary education student prohibiting "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system as any "teacher, counselor, principal, couch, or other person of authority in a secondary school and punishable by a maximum term of imprisonment of 5 years).

[48] D.C. Code §§ 22-3004 and 22-3005 (third degree and fourth degree sexual abuse requiring "sexual contact."); 22-3009 (second degree child sexual abuse requiring "sexual contact."); 22-3009.02 (second degree sexual abuse of a minor requiring "sexual contact."); 22-3014 (second degree sexual abuse of a

law for the current sexual abuse of a secondary education student statutes. For clarification, second degree of the RCC sexual abuse by exploitation statute codifies "sexual contact." This change improves the clarity and consistency of the revised statute.

Third, the RCC sexual abuse by exploitation statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[49] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[50] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[51] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[52] In the RCC sexual abuse by exploitation statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised statute.

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ward requiring "sexual contact."); 22-3016(a) (second degree sexual abuse of a patient or client requiring "sexual contact.").

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

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

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

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

Fourth, the marriage and domestic partnership defense in the RCC sexual abuse by exploitation statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to sexual abuse "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[53] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[54] The marriage or domestic partnership defense in the revised sexual abuse by exploitation statute applies only to prosecution for the revised sexual abuse by exploitation offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[55] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[56] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the RCC sexual abuse by exploitation offense.

Fifth, the marriage and domestic partnership defense in the RCC sexual abuse by exploitation statute makes two clarificatory changes to the current defense. First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not

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[53] As is discussed in this commentary as a clarificatory change to law, the RCC sexual abuse by exploitation statute combines into one statute several current sexual abuse statutes: sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses. It is unclear whether a marriage and domestic partnership defense applies to the current sexual abuse of a secondary education student statutes. The current sexual abuse of a secondary education student statutes are codified at D.C. Code §§ 22-3009.03 and 22-3009.04, which fall into the range of specified statutes for the marriage and domestic partnership defense codified at 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 . . . 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." The defense refers to a "child" or "minor," which appears to exclude a secondary education student, and although the sexual abuse of a secondary education student statutes fall within the specified range of offenses, the defense was never specifically amended to reflect the codification of the sexual abuse of a secondary education student statutes. However, this appears to be a drafting error.
The marriage and domestic partnership defense for the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014) and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016) is codified at D.C. Code § 22-3017(b): "That the defendant and victim were married or in a domestic partnership at the time of the offense is a defense, which the defendant must prove by a preponderance of the evidence, to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018."

[54] D.C. Crim. Jur. Instr. § 9.700.

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

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

specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Sixth, the revised sexual abuse by exploitation statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a defense" for certain sexual abuse statutes.[57] However, nothing in the RCC sexual abuse by exploitation statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

[57] As is discussed in this commentary as a clarificatory change to law, the RCC sexual abuse by exploitation statute combines into one statute several current sexual abuse statutes: sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses.
It is unclear whether a provision barring consent as a defense applies to the current sexual abuse of a secondary education student statutes. The current sexual abuse of a secondary education student statutes are codified at D.C. Code §§ 22-3009.03 and 22-3009.04, which fall into the range of specified statutes for the consent prohibition codified at D.C. Code 22 § 3011(a): "Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403." Although the sexual abuse of a secondary education student statutes fall within the specified range of offenses, the provision was never specifically amended to reflect the codification of the sexual abuse of a secondary education student statutes. Regardless, it would be inconsistent to permit a consent defense for the sexual abuse of a secondary education student statutes when it is prohibited for most of the other current sexual abuse statutes.
The prohibition on consent for the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014) and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016) is codified at D.C. Code § 22-3017(a): "Consent is not a defense to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018."

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

Explanatory Note. *The RCC sexually suggestive conduct with a minor offense prohibits comparatively less serious sexual conduct with certain complainants under the age of 18 years, such as touching a complainant with intent to cause the sexual arousal or sexual gratification of any person. The offense has a single penalty gradation. The revised sexually suggestive conduct with a minor offense replaces the current misdemeanor sexual abuse of a child or minor statute.*[1] *The revised sexually suggestive conduct with a minor statute also replaces in relevant part three distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,*[2] *the attempt statute,*[3] *and the aggravating sentencing factors.*[4]

Paragraph (a)(1), subparagraph (a)(1)(A), subparagraph (a)(1)(B), and sub-subparagraphs (a)(1)(B)(i) and (a)(1)(B)(ii) establish the different requirements for the actor and the complainant in the revised sexually suggestive conduct with a minor statute. Paragraph (a)(1) requires that the actor "in fact" is at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (a)(1) applies to every element that follows until a culpable mental state is specified. In paragraph (a)(1), this means that there is no culpable mental state required for the actor's age or the required four year age gap.

In addition to the requirements in paragraph (a)(1), subparagraph (a)(1)(A) and subparagraph (a)(1)(B) specify alternative requirements for liability. Subparagraph (a)(1)(A) requires that the actor is "reckless" as to the fact that the complainant is under the age of 16 years. "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the complainant is under the age of 16 years. In the alternative, but also in addition to the requirements in paragraph (a)(1), subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(i) require that the actor is "reckless" as to the fact that the complainant is under 18 years of age and paragraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(ii) require that the actor "knows" that he or she is in a "position of trust with or authority over" the complainant. "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the complainant is under the age of 18 years. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that the he or she is in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches.

Paragraph (a)(2), subparagraph (a)(2)(A), and sub-subparagraphs (a)(2)(A)(i) through (a)(2)(A)(iii) specify one type of prohibited conduct for the revised sexually suggestive conduct with a minor statute. The actor must "engage[] in" a "sexual act" that is visible to the complaint, a "sexual contact" that is visible to the complainant, or a

[1] D.C. Code § 22-3010.01.
[2] D.C. Code § 22-30011.
[3] D.C. Code § 22-3018.
[4] D.C. Code § 22-3020.

"sexual or sexualized display" of the genitals, pubic area, or anus that is visible to the complainant. "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Subparagraph (a)(2)(A) specifies a culpable mental state of "purposely" and per the rule of construction in RCC § 22E-701, applies to the prohibited conduct in sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(ii), and (a)(2)(A)(iii). "Purposely" is a defined term in RCC § 22E-206 that here means the actor must "consciously desire" that he or she engages in a sexual act that is visible to the complaint, a sexual contact that is visible to the complainant, or a sexual or sexualized display of the genitals, pubic area, or anus that is visible to the complainant.

Subparagraph (a)(2)(B) and sub-subparagraphs (a)(2)(B)(i) through (a)(2)(B)(ii) specify another type of prohibited conduct for the revised sexually suggestive conduct statute. Sub-sub-subparagraph (a)(2)(B)(i)(I) prohibits "touching or kissing any person, either directly or through the clothing" and sub-sub-subparagraph (a)(2)(B)(ii)(II) prohibits "removing clothing from any person." Sub-subparagraph (a)(2)(B)(i) prohibits the actor engaging in either type of conduct with the complainant or causing the complainant to engage in or submit to either type of conduct. Subparagraph (a)(2)(B) specifies a culpable mental state of "knowingly" and per the rules of interpretation in RCC § 22E-207 applies to all elements in sub-subparagraphs (a)(2)(B)(i) and sub-sub-subparagraphs (a)(2)(B)(i)(I) and (a)(2)(B)(i)(II). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she engages in with the complainant, or causes the complainant to engage in or submit to, touching or kissing any person, either directly or through the clothing, or removing clothing from any person. Sub-subparagraph (a)(2)(B)(ii) requires that the prohibited conduct under subparagraph (a)(2)(B) be done with "intent to cause the sexual arousal or sexual gratification of any person." "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would cause the sexual arousal or sexual gratification of any person. 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 an arousal or gratification actually occurred, just that the defendant believed to a practical certainty that such arousal or gratification would result.

Subparagraph (a)(2)(C) specifies the final type of prohibited conduct for the revised sexually suggestive conduct with a minor statute—engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact. Subparagraph (a)(2)(C) specifies that the prohibited culpable mental state for this conduct is "knowingly." "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she will engage in a sexual act or sexual contact with the complainant or cause the complainant to engage in or submit to a sexual act or sexual contact. This language establishes that the revised sexually suggestive conduct with a minor statute is a lesser included offense of the RCC sexual abuse of a minor statute (RCC § 22E-1302) and is intended to have the same scope as in the RCC sexual abuse of a minor statute.

Subsection (b) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact. The general provision in RCC § 22E-XX establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

Subsection (c) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised sexually suggestive conduct with a minor statute changes current District law in nine main ways.*

First, the revised sexually suggestive conduct with a minor statute replaces the prohibition on "touching one's own genitalia or that of a third person" with engaging in a "sexual act" that is visible to the complainant, a "sexual contact" that is visible to the complainant, or a specific sexualized display that is visible to the complainant. The current D.C. Code MSACM statute prohibits "engaging in" "touching one's own genitalia or that of a third person" with a child or minor.[5] The terms "touching" and "genitalia" are not statutorily defined and the only DCCA case law concerning this provision sustained an attempted MSACM conviction when the actor touched his penis "in front of" the complainant.[6] In contrast, the revised sexually suggestive conduct with a minor statute prohibits engaging in a "sexual act" that is visible to the complainant, a "sexual contact" that is visible to the complainant, or a sexualized display of the genitals, pubic area, or anus that is visible to the complainant. The scope of "touching" and "genitalia" in the current MSACM statute is unclear and if interpreted narrowly, there would be no liability under the current MSACM statute for showing genitalia, without touching it, or for touching sexual areas that are not "genitalia," such as the anus or pubic area more generally. The revised sexually suggestive conduct statute expands the offense to include a "sexual act" or "sexual contact," as those terms are defined in RCC § 22E-701, that is visible to the complainant, or a sexualized display of the genitals, pubic area, or anus that is visible to the complainant. This change improves the clarity of the revised statute, its consistency with the requirement in the RCC sexual abuse of a minor statute of a sexual act or sexual contact, and removes gaps in liability.

Second, the revised sexually suggestive conduct with a minor statute requires a "purposely" culpable mental state for engaging in a sexual act that is visible to the complainant, a sexual contact that is visible to the complainant, or a specific sexualized

[5] D.C. Code § 22-3010.01(b), (b)(4).

[6] *Sutton v. United States*, 140 A.3d 1198, 1201, 1202 (D.C. 2016) (holding that the evidence was sufficient for attempted misdemeanor sexual abuse of a child under D.C. Code § 22-3010.01 when appellant touched his penis "in front of" the complainant).

display that is visible to the complainant. The current D.C. Code MSACM statute requires "engaging in . . . touching one's own genitalia or that of a third person"[7] in a way "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[8] The current D.C. Code "reasonably causes" language may mean that the offense is a general (rather than specific) intent offense,[9] or may indicate a culpable mental state similar to negligence as defined in the RCC. There is no DCCA case law interpreting this language. In contrast, the revised sexually suggestive conduct with a minor statute requires a "purposely" culpable mental state for engaging in a sexual act that is visible to the complainant, a sexual contact that is visible to the complainant, or a specific sexualized display that is visible to the complainant. A knowledge culpable mental state would criminalize adult sexual conduct in front of a minor, particularly in a small or shared living space. The "purposely" culpable mental state requires that the defendant consciously desires that the sexual act, sexual contact, or sexualized display is visible to the complainant. This change improves the consistency and proportionality of the revised statute.

Third, the revised sexually suggestive conduct statute prohibits "touching or kissing any person, either directly or through the clothing" and "removing clothing from any person." The current D.C. Code MSACM statute prohibits: 1) "touching a child or minor inside his or her clothing"[10]; 2) "touching a child or minor inside or outside his or her clothing close to the genitalia, breast, or buttocks"[11]; and 3) "placing one's tongue in the mouth of the child or minor."[12] The various requirements for touching in the current statute may lead to counterintuitive liability[13] and it is unclear whether the current statute includes touching a naked child or minor, or undressing a child or minor. There is no DCCA case law interpreting the scope of these provisions. In contrast, the revised sexually suggestive conduct statute prohibits "touching or kissing any person, either directly or through the clothing" and "removing clothing from any person." The revised statute simplifies the requirements for liability by removing the focus on where and how the complainant was touched or undressed and instead making the defendant's intent the deciding factor. Any touching, kissing, or removal of clothing, when done with the intent to cause the sexual arousal or sexual gratification of any person, is sufficient for liability, provided the other requirements of the offense are met. This change improves the clarity, consistency, and proportionality of the revised statute and removes gaps in liability.

Fourth, the revised sexually suggestive conduct statute prohibits the actor from engaging in prohibited conduct with the complainant or causing the complainant to

[7] D.C. Code § 22-3010.01(b), (b)(4).
[8] D.C. Code § 22-3010.01(b).
[9] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. *See* commentary to RCC 22E-1303, Sexual assault, above, for further discussion.
[10] D.C. Code § 22-3010.01(b)(1).
[11] D.C. Code § 22-3010.01(b)(2).
[12] D.C. Code § 22-3010.01(b)(3).
[13] For example, under the current misdemeanor sexual abuse of a child or minor statute, a person would not have liability for touching a minor complainant on the complainant's bare foot or licking the complainant's face with the intent to sexually arouse or gratify himself or herself.

engage in or submit to prohibited conduct. The current D.C. Code MSACM statute prohibits: 1) "touching a child or minor inside his or her clothing"[14]; 2) "touching a child or minor inside or outside his or her clothing close to the genitalia, breast, or buttocks"[15]; and 3) "placing one's tongue in the mouth of the child or minor."[16] The current statute appears limited to the actor touching the complainant and would exclude, for example, the actor causing the complainant to touch the actor or a third person. This limited liability is inconsistent with other current sexual abuse statutes, as well as the RCC sex offenses that require a "sexual act" or "sexual contact."[17] There is no DCCA case law interpreting the scope of these provisions. In contrast, the revised sexually suggestive conduct statute prohibits the actor from engaging in touching, kissing, or undressing "any person" with the complainant or the actor causing the complainant to engage in or submit to touching, kissing, or undressing "any person." This change improves the consistency of the revised statute and removes gaps in liability.

Fifth, the revised sexually suggestive conduct with a minor statute requires "intent to cause the sexual arousal or sexual gratification of any person" for the prohibited touching, kissing, or undressing. The current MSACM statute requires engaging in specified conduct "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[18] There is no DCCA case law interpreting this language. In contrast, the revised sexually suggestive conduct with a minor statute requires "with intent to cause the sexual arousal or sexual gratification of any person" for the prohibited touching, kissing, or undressing. The current "reasonably causes" alternative language may be interpreted to mean that the current MSACM offense is a general (rather than specific) intent offense,[19] or may indicate a culpable mental state similar to negligence. However, using negligence as the basis for criminal liability is disfavored for elements that distinguish otherwise non-criminal from criminal conduct.[20]

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[14] D.C. Code § 22-3010.01(b)(1).
[15] D.C. Code § 22-3010.01(b)(2).
[16] D.C. Code § 22-3010.01(b)(3).
[17] As is discussed in the commentaries to the RCC sex offenses, several of the current sexual abuse statutes specifically prohibit causing the complainant to "engage in" or "submit to" a sexual act or sexual contact, which includes liability for the actor penetrating or touching the complainant, as well as the actor causing the complaint to touch or penetrate the actor, the complainant, or a third party, or the actor causing the complainant to submit to being penetrated or touched by a third party. The RCC sex offenses that require a sexual act or sexual contact consistently prohibit the actor engaging in a sexual act or sexual contact with the complainant or the actor causing the complainant to engage in or submit to a sexual act or sexual contact.
[18] D.C. Code § 22-3010.01(b).
[19] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC § 22E-1301, Sexual assault, above, for further discussion.
[20] *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand").) *See also Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L. Ed. 2d 1 (2015) (J. Alito, concurring) ("Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify

Conduct that is not intended to but "reasonably causes" sexual arousal or sexual gratification may be criminalized by the offensive physical contact offense in RCC § 22E-1205. This change improves the proportionality of the revised offense.

Sixth, the revised sexually suggestive conduct with a minor statute requires a "recklessly" culpable mental state as to the age of the complainant. Current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[21] In contrast, the revised sexually suggestive conduct with a minor statute applies a "recklessly" culpable mental state to the age of complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[22] and legal experts[23] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[24] 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.[25] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[26] A "recklessly" culpable mental state in the revised sexually suggestive conduct with a minor statute is consistent with the culpable mental state required in other RCC sex offenses such as the revised enticing statute (RCC § 22E-1305) and the nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency and proportionality of the revised offense.

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the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.").

[21] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

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

[23] *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).

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

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

[26] *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.

Seventh, the revised sexually suggestive conduct with a minor statute requires at least a four-year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current MSACM statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 16 years,[27] but does not require any age gap when the complainant is under the age of 18 years and in a "significant relationship" with the actor.[28] In contrast, the revised sexually suggestive conduct with a minor statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability for this age gap. The current definition of "significant relationship"[29] and the revised definition of "position of trust with or authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[30] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[31] Strict liability for the age gap matches the current sexual abuse of a child statutes[32] and the

[27] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[28] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

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

[30] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, touches the buttocks of a 17 year old touches the 17 year old inside his or her clothing with intent to cause the sexual arousal or sexual gratification of any person would be guilty under the current MSACM statute.

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

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

revised sexual abuse of a minor statute (RCC § 22E-1302) and the revised enticing a minor statute (RCC § 22E-1305). This change improves the consistency and proportionality of the revised statute.

Eighth, only the general penalty enhancements in subtitle I of the RCC apply to the revised sexually suggestive conduct with a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[33] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[34] In contrast, the revised sexually suggestive conduct with a minor statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[35] are not necessary in the revised sexually suggestive conduct with a minor statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised sexually suggestive conduct with a minor statute improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Ninth, the revised sexually suggestive conduct statute is a lesser included offense of the RCC sexual abuse of a minor statute (RCC § 22E-1302). The current D.C. Code MSACM statute does not appear to be a lesser included offense of the current child

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

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

[35] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

sexual abuse statutes[36] or sexual abuse of a minor statutes[37] because it has different conduct requirements and requires that the defendant "intended to cause or reasonably causes the sexual arousal or sexual gratification of any person." There is no DCCA case law that addresses the relationship between the current MSACM statute and the current child sexual abuse statutes or sexual abuse of a minor statute. In contrast, the revised sexually suggestive conduct with a minor statute is a lesser included offense of the RCC sexual abuse of a minor statute under paragraph (a)(2)(C) if the other requirements of the offense are met. This change improves the consistency and proportionality of the revised statute.

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

First, the revised sexually suggestive conduct with a minor statute requires a "knowingly" culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant. The current MSACM statute requires that an actor 18 years of age or older be in a "significant relationship" with a complainant under the age of 18 years,[38] but it does not specify a culpable mental state and there is no DCCA case law on point. The revised sexually suggestive conduct with a minor statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[39] This change improves the clarity and consistency of the revised statute.

Second, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the revised sexually suggestive conduct with a minor statute may differ as compared to the current MSACM statute. The current MSACM statute requires that the actor be in a "significant relationship" with the complainant[40] and "significant relationship" is defined in D.C. Code § 22-3001.[41] The current definition of "significant relationship" is open-ended and defines "significant relationship" as

[36] D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

[37] D.C. Code §§ 22-3009.01, 22-3009.02, 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").

[38] D.C. Code §§ 22-3010.01(a) ("Whoever . . . being 18 years of age or older and being in a significant relationship with a minor."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

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

[40] D.C. Code § 22-3010.01(a).

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

"includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[42] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

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

First, the revised sexually suggestive conduct with a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[43] and sexual abuse of a minor, for complainants under the age of 18 years.[44] The current MSACM statute has the same distinction in one statute, applying to complainants under the age of 16 years[45] and complainants under the age of 18 years.[46] For clarification, the revised sexually suggestive conduct with a minor statute no longer distinguishes specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[47] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexually suggestive conduct with a minor statute, by use of the phrase "in fact," requires no culpable mental state as to the actor's own age or the required age gap. The current MSACM statute does not specify any culpable mental states for the age of the actor or the required age gap.[48] However, current D.C. Code §

[42] D.C. Code § 22-3001(10).
[43] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[44] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").
[45] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[46] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[47] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).
[48] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3), (5A) (defining "child" as a "person who has not yet attained the age of 16 years" and "minor" as a "person who has not yet attained the age of 18 years.").

22-3011 states that a mistake of age is not a defense to the current MSACM statute.[49] For clarification, the revised sexually suggestive conduct with a minor statute uses the phrase "in fact," establishing strict liability as to the ages of the actor and the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[50] Strict liability for these elements also is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the clarity and consistency of the revised offense.

Third, for a complainant under the age of 16 years, the revised sexually suggestive conduct with a minor statute requires an age gap between the complainant and the actor of "at least four years." The current MSACM statute requires that an actor 18 years of age or older be "more than 4 years older" than a complainant under the age of 16 years.[51] The current child sexual abuse statutes, in contrast, are worded to require that the complainant be "at least four years older" than the complainant.[52] Consequently, there is a difference of a day in liability between the two offenses due to the different required age gaps.[53] For clarification, the revised sexually suggestive conduct with a minor statute uses the language "at least four years older," the same as in the revised sexual abuse of a minor statute (RCC § 22E-1302) for complainants that are under the age of 16 years. The change improves the consistency of the revised offense.

Fourth, the revised sexually suggestive conduct with a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[54] Under the statute, if the maximum term of imprisonment

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[49] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

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

[51] D.C. Code §§ 22-3010.01(a) ("Whoever, being 18 years of age or older and more than 4 years older than a child."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[52] D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting "[w]hoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."); 22-3009 (second degree child sexual abuse statute prohibiting "[w]hoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[53] For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is "at least four years older" than the complainant. However, the actor would not be liable under the current MSACM statute because, while the actor is over the age of 18, the actor is not "more than four years older" than the complainant.

[54] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a

for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[55] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[56] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[57] In the revised sexually suggestive conduct with a minor statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexually suggestive conduct, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexually suggestive conduct with a minor offense.

Fifth, the marriage and domestic partnership defense in the revised sexually suggestive conduct with a minor statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to MSACM "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[58] There is

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ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor).

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

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

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

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

no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[59] The marriage or domestic partnership defense in the revised sexually suggestive conduct with a minor statute applies only to prosecution for the revised sexually suggestive conduct with a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[60] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[61] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexually suggestive conduct with a minor offense.

Sixth, the marriage and domestic partnership defense in the revised sexually suggestive conduct statute makes two clarificatory changes to the current defense.[62] First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Seventh, the revised sexually suggestive conduct statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a defense" for the current MSACM statute.[63] However, nothing in the RCC sexually suggestive conduct statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

[59] D.C. Crim. Jur. Instr. § 9.700.
[60] See above Commentary to RCC § 22E-1304 on reliance on the RCC general attempt statute.
[61] See Commentary to RCC § 22E-1202 (revised assault statute).
[62] D.C. Code § 22-3011(b).
[63] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."). The current child sexual abuse statutes and current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3008 – 22-3009.02 and fall within the specified range of statutes in D.C. Code § 22-3011(a).

RCC § 22E-1305. Enticing a Minor into Sexual Conduct.

Explanatory Note. *The RCC enticing a minor offense prohibits commanding, requesting, or trying to persuade certain complainants under the age of 18 years to engage in sexual conduct. The revised enticing a minor offense replaces the current enticing a child statute.*[1] *The revised enticing a minor statute also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage or domestic partnership defense,*[2] *the state of mind proof requirement,*[3] *the attempt statute,*[4] *and the aggravating sentencing factors.*[5]

Paragraph (a)(1) specifies the prohibited conduct―commanding, requesting, or trying to persuade the complainant to engage in or submit to a sexual act or sexual contact. "Commands, requests, or tries to persuade" matches the language in the RCC solicitation statute (RCC § 22E-302). "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (a)(1) specifies a culpable mental state of "knowingly" for the prohibited conduct. "Knowingly" is a defined term in RCC § 22E-206 that means the actor must be practically certain that he or she will command, request, or try to persuade the complainant to engage in or submit to a sexual act or sexual contact.

The RCC enticing statute generally has two bases for liability. Paragraph (a)(2), subparagraph (a)(2)(A), subparagraph (a)(2)(B), and sub-subparagraphs (a)(2)(B)(i) and (a)(2)(B)(ii) establishe the requirements for the actor and the complainant when the complainant is a "real," i.e., not fictitious, person. Paragraph (a)(3), subparagraph (a)(3)(A), and subparagraph (a)(3)(B) establish the requirements for the actor and the complainant when the complainant is a fictitious person―specifically, a law enforcement officer purporting to be a person under the age of 16 years.

For a "real," i.e., not fictitious complainant, paragraph (a)(2) requires that the actor "in fact" is at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term in RCC § 22E-207 that means no culpable mental state is required for a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to each element that follows the phrase until a culpable mental state is specified. In paragraph (a)(2), there is no culpable mental state requirement for the age of the actor or the required four year age gap with the complainant.

When an actor satisfies the requirements of paragraph (a)(2) (at least 18 years of age and at least four years older than the complainant), there are two alternative bases for liability. First, under subparagraph (a)(2)(A), there is liability if the actor is "reckless" as to the fact that the complainant is under 16 years of age. "Reckless" is a

[1] D.C. Code § 22-3010.
[2] D.C. Code § 22-30011.
[3] D.C. Code § 22-3012.
[4] D.C. Code § 22-3018.
[5] D.C. Code § 22-3020.

defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was under 16 years of age. Second, and in the alternative, there is liability if the actor is "reckless" as to the fact that the complainant is under 18 years of age (sub-subparagraph (a)(2)(B)(i)) and the actor "knows" that he or she is in a "position of trust with or authority over" the complainant (sub-subparagraph (a)(2)(B)(ii)). "Reckless" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was under 18 years of age. Knowledge is a defined term in RCC § 22E-206 that means the accused must be practically certain that he or she is in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches.

Paragraph (a)(3) requires that the actor "in fact" is at least 18 years of age and at least four years older than the "purported age" of the complainant. "In fact" is a defined term in RCC § 22E-207 that means no culpable mental state is required for a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to each element that follows the phrase until another culpable mental state is specified. In paragraph (a)(3), there is no culpable mental state requirement for the age of the actor or the required age gap. Per subparagraph (a)(3)(A), the complainant must be a "law enforcement officer," as that term is defined in RCC § 22E-701, who purports to be a person under the age of 16 years. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" in paragraph (a)(3) applies to subparagraph (a)(3)(A) and there is no culpable mental state requirement for the fact that the complainant is a "law enforcement officer," as that term is defined in RCC § 22E-701, who purports to be a person under 16 years of age. Per subparagraph (a)(3)(B), the actor must be "reckless" as to the fact that the purported age of the complainant is under 16 years. "Reckless" is a defined term in RCC § 22E-206 that means the actor was aware of a substantial risk that purported age of the complainant was under 16 years of age. The references to the "purported age" of the complainant in paragraph (a)(3) and subparagraph (a)(3)(B), and the reference to the law enforcement officer "purport[ing]" to be a person under 16 years of age in subparagraph (a)(3)(A) do not require the law enforcement officer to state a specific age.

Subsection (b) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact. The general provision in RCC § 22E-XX establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

Subsection (c) specifies the penalty for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised enticing a minor statute changes current District law in seven main ways.*

First, the revised enticing statute no longer prohibits taking or attempting to take the complainant to a location for the purpose of committing a specified sex offense. The current D.C. Code enticing statute prohibits in D.C. Code § 22-3010(a)(1) "tak[ing] that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02,"; and in D.C. Code § 22-3010(b)(2) "attempt[ing] . . . to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact." The enticing provision in paragraph (a)(1) that prohibits taking a complainant overlaps with the current D.C. Code kidnapping statute, which has a significantly higher maximum penalty (30 years)[6] than the current enticing statute (5 years).[7] The scope of the provision in paragraph (b)(2) for attempting to entice, etc. a person that represents himself or herself to be a child to go to any place also is unclear.[8] In contrast, the RCC relies upon the revised kidnapping offense (RCC § 22E-1401) to criminalize when the actor successfully takes the complainant to a location with the intent to commit a sex offense. When the actor attempts to entice, etc., a complainant to go to any place for the ultimate purpose of engaging in a sexual act or sexual contact provision, but is unsuccessful, that conduct is now criminalized as attempted kidnapping under the general RCC attempt statute (RCC § 22E-301). This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised enticing statute requires a "reckless" culpable mental state for the age or purported age of the complainant. The current enticing a child statute[9] (enticing statute) does not specify any culpable mental states and there is no DCCA case law on this issue. However, current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the age of the complainant, real or fictitious, in the current enticing statute.[10] In contrast, the revised enticing statute applies a "reckless" culpable

[6] D.C. Code § 22-2001.
[7] D.C. Code § 22-3010(a), (b).
[8] D.C. Code § 22-3010(b)(2) states: "Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts . . . (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact . . . ."). It is unclear if the "attempt" provision in paragraph (b)(2) of the current enticing statute is intended to include situations where the actor engages in persuading or enticing, but is prevented from engaging in enticing the complainant at all, or if the "attempt" language is limited to providing liability in situations when the complainant is an individual falsely representing to be under the age of 16 years.
[9] D.C. Code § 22-3010.
[10] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a drafting error.

mental state to the age or purported age of the complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[11] and legal experts[12] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[13] 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.[14] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[15] A "reckless" culpable mental state in the revised enticing statute is consistent with the culpable mental state required in parts of the sexually suggestive conduct with a minor statute (RCC § 22E-1304), sexual abuse by exploitation statute (RCC § 22E-1303), and the nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency and proportionality of the revised offense.

Third, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element. The current enticing statute[16] does not specify any requirements for the age of the actor. DCCA case law does not address the point. In contrast, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact,"

D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute is included.

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

[12] *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).

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

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

[15] *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.").

[16] D.C. Code §§ 22-3010(a), (b) ("Whoever, being at least four years older than a child, or being in a significant relationship with a minor" and "Whoever, being at least four years older than the purported age of a person who represents himself or herself to be a child."); 22-3001(3), (5A) (defining "child" as "a person who has not yet attained the age of 16 years" and "minor" as "a person who has not yet attained the age of 18 years.").

requires strict liability for this element. Requiring the actor to be 18 years of age or older ensures that the enticing offense is reserved for adults to who engage in predatory behavior of complainants under the age of 18 years.[17] While an actor presumably will know his or her own age, it is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[18] Requiring that the actor be 18 years of age or older and applying strict liability to this element also is consistent with this element in the revised sexually suggestive contact with a minor statute (RCC § 22E-1307), and third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the consistency and proportionality of the revised offense.

Fourth, the revised enticing statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current enticing statute requires a four year age gap between the actor and a complainant under the age of 16 years,[19] but does not have an age gap requirement when the complainant is under the age of 18 years.[20] In contrast, the revised enticing statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability for this age gap. The current definition of "significant relationship"[21] and the revised definition of "position of trust with or authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise

[17] For example, under the revised enticing statute, a 17 year old actor would not be guilty of enticing a 12 year old complainant to engage in sexual intercourse. However, depending on the facts of the case, the 17 year old could be guilty of attempted second degree sexual abuse of a minor (RCC § 22E-1304) and if sexual intercourse actually occurs, the 17 year old actor could be guilty of second degree sexual abuse of a minor unless there was a reasonable mistake of age defense.

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

[19] D.C. Code §§ 22-3010(a), (b); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[20] D.C. Code §§ 22-3010(a); 22-3001(5A) (defining a "minor" as "a person who has not yet attained the age of 18 years."). The current arranging statute is limited to complainants under the age of 16 years and requires at least a four year age gap. D.C. Code §§ 22-3010.02(a); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

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

consensual sexual conduct between individuals close in age would be criminal.[22] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[23] Strict liability for the age gap matches the current sexual abuse of a child statutes[24] and third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22E-1302), and the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the consistency and proportionality of the revised statute.

Fifth, the revised enticing statute limits the offense to fictitious complainants that are law enforcement officers. The current enticing statute applies to any fictitious complainant,[25] while the closely-related statute for arranging sexual conduct with a real or fictitious child (current arranging statute) is limited to fictitious complainants that are law enforcement officers.[26] The legislative history for the current arranging statute states that the statute was limited to law enforcement officers because otherwise the statute could "enable mischief, such as blackmail, between adults where they are acting out fantasies with no real child involved or intended to involved (the thrill such as it is, being in the salacious banter)."[27] In contrast, the revised enticing statute is limited to fictitious complainants who actually are law enforcement officers. The same legislative rationales that underlie the current arranging statute's limitation to fictitious persons who are really police officers also apply to enticement-type conduct. This change improves the consistency and proportionality of the revised offense.

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[22] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, texts his 17 year old girlfriend that he wants to touch her buttocks may be guilty of enticing a minor under current District law.

[23] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1307(d) provides that marriage is a defense to the revised enticing a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

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

[25] D.C. Code § 22-3010(b) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child.").

[26] D.C. Code § 22-3010.02(a) ("For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer.").

[27] Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary, Bill 18-963, the "Criminal Code Amendment Act" at 7 (internal quotation marks omitted) (quoting written testimony of Richard Gilbert, District of Columbia Association of Criminal Defense Lawyers). The current arranging contact statute was enacted in 2011 as part of the "Criminal Code Amendment Act of 2010, 2010 District of Columbia Laws 18-377 (Act 18-722)."

Sixth, only the general penalty enhancements in subtitle I of the RCC apply to the revised enticing statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[28] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[29] In contrast, the revised enticing statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[30] are not necessary in the revised enticing statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. This change improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Seventh, the revised enticing statute relies on the RCC general attempt statute to define what conduct constitutes an attempt and set the punishment for an attempt. The current D.C. Code enticing statute explicitly includes an attempt in the offense definition.[31] As is discussed elsewhere in this commentary, the scope of "attempt" in the current enticing statute is unclear, but the current statute treats an "attempt" to commit enticing the same as the completed offense. The current D.C. Code enticing offense does not describe the elements necessary to prove an attempt, however, and there is no case

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

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

[30] However, an actor that merely possesses a dangerous weapon or a firearm while committing enticing, without using or displaying it, may face may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[31] D.C. Code § 22-3010.

law on point.[32] In contrast, in the RCC, an attempt to commit enticing is no longer punished the same as the completed offense. The RCC relies on the General Part's attempt provision (RCC § 22E-301) to describe the requirements to prove an attempt and set the penalty at ½ the maximum imprisonment sentence, consistent with other RCC sex offenses. This change improves the consistency and completeness of the revised sexual abuse of a minor offense.

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

First, the RCC enticing statute prohibits the conduct: "commands, requests, or tries to persuade the complainant" instead of relying on references to attempts. The current D.C. Code enticing statute prohibits, in D.C. Code § 22-3010(a)(2) "attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact," and in D.C. Code § 22-3010(b)(1) "attempts . . . to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact." There is no DCCA case law interpreting this language and the scope of "attempts" to "seduce, entice, allure, convince, or persuade" is unclear.[33] Resolving this ambiguity, the revised enticing statute requires "commands, requests, or tries to persuade the complainant." With this change, the revised enticing statute uses language identical to the RCC solicitation statute (RCC § 22E-302), and the RCC enticing statute differs from solicitation liability primarily in the required culpable mental state—enticing requires "knowingly" and solicitation requires "purposely." This change rephrases "attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact" in the current enticing statute as "tries to persuade" in the revised offense. To the extent the language in the current D.C. Code enticing statute prohibits an actor knowingly enticing a complainant when the actor is ultimately unsuccessful in persuading the complainant, this remains criminalized as a completed offense under the "tries to persuade" language of the revised statute. However, to the extent that the current D.C. Code enticing statute's "attempts" provision includes in the completed enticing offense conduct that is not covered by the "tries to persuade"

[32] In addition to the "attempt" language in the current enticing statute, the current enticing statute is subject to current D.C. Code § 22-3018, which provides an attempt penalty applicable to all current sex offenses, including enticing. D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense." It is unclear how the attempt statute in D.C. Code § 22-3018 applies to the current enticing statute, which includes an "attempt" in the definition of the offense.

[33] Paragraph (a)(2) of the current enticing statute is for a "real," i.e., not fictitious minor, and has "attempt" language. D.C. Code § 22-3010(a)(2) ("(a) Whoever, being at least 4 years older than a child or being in a significant relationship with a minor . . . (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact."). Paragraph (b)(1) of the current enticing statute is for a "fake" minor, i.e., an individual that "represents himself or herself to be a child," and also has "attempt" language. It is unclear if the "attempt" provisions are intended to include situations where the actor engages in persuading or enticing, but is prevented from engaging in enticing the complainant at all, or if the "attempt" language is limited to providing liability in situations when the complainant is an individual falsely representing to be under the age of 16 years.

language of the revised offense, there would remain liability for attempted enticing under the RCC attempt offense. This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised enticing statute requires a "knowingly" culpable mental state for commanding, requesting, or trying to persuade. The current enticing statute does not specify any culpable mental states, and there is no DCCA case law on this issue. The revised enticing statute resolves these ambiguities by requiring a "knowingly" culpable mental state for commanding, requesting, or trying to persuade. 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.[34] This change improves the clarity and consistency of the revised statutes.

Third, the revised enticing statute consistently requires that the actor commands, requests, or tries to persuade the complainant "to engage in or submit to a sexual act or sexual contact." While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[35] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[36] In addition to case law, District practice does not appear to follow the variations in statutory language.[37] Instead

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

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

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

[37] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact,

of these variations in language, the revised sex offenses consistently require that the actor "engages" in a sexual act or sexual contact with the complainant or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Given the unique requirements of the revised enticing statute, it requires that the actor commands, requests, or tries to persuade the complainant "to engage in or submit to" the sexual act or sexual contact. The language clearly establishes that the actor is liable for commanding, requesting, or trying to persuade the complainant to engage in or submit to a sexual act or sexual contact with the actor, with a third party, or with the complainant. Differentiating liability based on whether an actor entices the complainant to engage in the sexual conduct with the actor, or whether the actor entices the complainant to engage in or submit to the sexual conduct with the complainant or a third party, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Fourth, the revised enticing statute requires a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. The current enticing statute requires that the actor be "in a significant relationship with a minor,"[38] but it does not specify a culpable mental state and there is no DCCA case law for this issue. The revised enticing statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[39] This change improves the clarity and consistency of the revised statute.

Fifth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the revised enticing statute may differ as compared to the current enticing statute. The current enticing statute requires that the actor be in a "significant relationship" with the complainant[40] and "significant relationship" is defined in D.C. Code § 22-3001.[41] The current definition of "significant relationship" is open-ended and defines "significant relationship" as "includ[ing]" the specified individuals as

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even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

[38] D.C. Code §§ 22-3010; 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

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

[40] D.C. Code § 22-3010.01(a).

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

well as "any other person in a position of trust with or authority over" the complainant."[42] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

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

First, the revised enticing statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[43] and sexual abuse of a minor, for complainants under the age of 18 years.[44] The current enticing statute[45] makes the same distinctions. For clarification, the revised enticing statute specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[46] These changes improve the clarity and consistency of the revised statute.

Second, the revised enticing statute, by use of the phrase "in fact," requires strict liability for the age gap between the actor and complainants under the age of 16 years, or the purported age gap between the actor and a complainant that is a law enforcement officer. Current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the required age gap between the actor and a complainant, real or fictitious, under the age of 16 years in the current enticing statute.[47] For clarification, the revised enticing

[42] D.C. Code § 22-3001(10).

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

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

[45] D.C. Code § 22-3010.

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

[47] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a

statute uses the phrase "in fact," establishing strict liability as to the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[48] Strict liability for the required age gap also is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302) and the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the clarity and consistency of the revised offense.

Third, the marriage and domestic partnership defense in the revised enticing statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to enticing "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[49] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[50] The marriage or domestic partnership defense in the revised enticing statute applies only to prosecution for the revised enticing offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[51] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[52] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised enticing offense.

Fourth, the marriage and domestic partnership defense in the revised enticing statute makes two clarificatory changes to the current defense.[53] First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and

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drafting error. However, D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute was meant to be included in D.C. Code § 22-3011.

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

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

[50] D.C. Crim. Jur. Instr. § 9.700.

[51] *See* above Commentary to RCC § 22E-1304 on reliance on the RCC general attempt statute)

[52] *See* Commentary to RCC § 22E-1202 (revised assault statute).

[53] D.C. Code § 22-3011(b).

consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Fifth, the revised enticing statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a defense" for the current enticing statute.[54] However, nothing in the RCC enticing statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

[54] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."). The current enticing statute is codified at D.C. Code §§ 22-3010 and falls within the specified range of statutes in D.C. Code § 22-3011(a).

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.

Explanatory Note. *The RCC arranging for sexual conduct with a minor offense prohibits an actor with a responsibility under civil law for the health, welfare, or supervision of the complainant from giving effective consent for the complainant to engage in or submit to a sexual act or sexual contact. The offense has a single penalty gradation. The revised arranging for sexual conduct with a minor offense replaces the current arranging for a sexual contact with a real or fictitious child statute.*[1] *The revised arranging for sexual conduct with a minor offense also replaces in relevant part two distinct provisions for the sexual abuse offenses: the attempt statute*[2] *and the aggravating sentencing factors.*[3]

Subparagraph (a)(1)(A) specifies that the actor must have a "responsibility under civil law for the health, welfare, or supervision of the complainant."[4] Subparagraph (a)(1)(B) specifies the prohibited conduct for the revised arranging statute—giving "effective consent" for the complainant to engage in or submit to a "sexual act" or a "sexual contact." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception."

Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state applies to the elements in subparagraph (a)(1)(A) and (a)(1)(B). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant" and that he or she gives effective consent for the complainant to engage in or submit to a sexual act or a sexual contact.

Paragraph (a)(2) requires that the complainant be under the age of 18 years and specifies a culpable state of "recklessly disregards" for this element. "Recklessly disregards" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was under 18 years of age.

Subsection (b) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised arranging for sexual conduct with a minor statute changes current District law in five main ways.*

[1] D.C. Code § 22-3010.02.
[2] D.C. Code § 22-3018.
[3] D.C. Code § 22-3020.
[4] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

First, the revised arranging statute replaces "arranges for a sexual act or sexual contact" between the actor and the complainant, or between a third person and the complainant, with "Gives effective consent for the complainant to engage in or submit to a sexual act or sexual contact." The scope of "arranges" is unclear in the current arranging statute and there is no DCCA case law. In contrast, the revised arranging statute requires that the defendant give effective consent for the complainant to engage in or submit to a sexual act or sexual contact. This language encompasses arranging, but is clearer, and "effective consent" is a defined term used consistently in the RCC. The language is also consistent with a provision in the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807) and RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809). This change improves the clarity of the revised statute.

Second, the revised arranging statute replaces the various age requirements for the complainant and any third party in the current arranging statute with the requirements that the actor is "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and the complainant is under the age of 18 years. The current arranging statute requires, in relevant part, that the complainant be a person under the age of 16 years, but it is unclear whether a four year age gap is required between the actor and the complainant, as well as between the complainant and any third party with whom the sexual conduct is arranged.[5] There is no DCCA case law on this issue. There is also no liability in the current arranging statute for a complainant that is 16 years of age or older, but under the age of 18 years, which is inconsistent with other current D.C. Code sex offenses.[6] In contrast, the revised arranging statute requires that the actor is "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and the complainant is under the age of 18 years. The RCC uses the phrase a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" consistently in the RCC. This responsibility justifies the comparatively low mental state of "knowingly" and other requirements for liability in the RCC arranging statute as compared to soliciting under RCC § 22E-302 or accomplice liability under RCC § 22E-210. These requirements also include liability for certain complainants that are at least 16 year of age, but under the age of 18 years. This change improves the clarity, consistency, and proportionality of the revised statute.

Third, the revised arranging statute applies a culpable mental state of "reckless" as to the age of the complainant. The current arranging statute does not specify any culpable mental states[7] and there is no DCCA case law on this issue. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly

[5] The ambiguity arises from the multiple references to a "person" in the current arranging statute. D.C. Code § 22-3010.02(a) ("It is unlawful *for a person* to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger *than the person*.") (emphasis added).

[6] For example, the current, closely-related enticing a child statute includes "real" complainants under the age of 18 years when the actor is in a "significant relationship" with the complainant. D.C. Code §§ 22-3010(a); 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").

[7] D.C. Code § 22-3010.02.

disfavored by courts[8] and legal experts[9] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[10] 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.[11] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[12] In contrast, the revised arranging statute applies a "reckless" culpable mental state to the age of the complainant. A "reckless" culpable mental state in the revised arranging statute is consistent with the culpable mental state for the age of certain complainants in the sexual exploitation of an adult statute (RCC § 22E-1303), the sexually suggestive conduct with a minor statute (RCC § 22E-1304), and the enticing statute (RCC § 22E-1305). This change improves the consistency and proportionality of the revised offense.

Fourth, the revised arranging statute no longer applies when the "arrangement is done with or by a law enforcement officer." The current arranging statute states that it is unlawful for a "person" to arrange to engage in a sexual act or sexual contact "with an individual (whether real or fictitious) . . . who is represented to be a child at least 4 years younger than the person" or "to arrange for another person" to engage in a sexual act or sexual contact "with an individual (whether real or fictitious) . . . who is represented to be a child at least 4 years younger than the person."[13] This statutory language seems to limit the role of a fictitious person to the complainant, but the current statute further provides that "arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer."[14] There is no DCCA case law interpreting the provisions in the current arranging statute for fictitious complainants. In contrast, the revised arranging statute is limited to real complainants that are under the age of 18 years. The RCC enticing statute

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

[9] *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).

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

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

[12] *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.").

[13] D.C. Code § 22-3010.02(a).

[14] D.C. Code § 22-3010.02(a).

specifically includes law enforcement officers that purport to be a complainant under the age of 16 years. This change improves the clarity and consistency of the revised statute.

Fifth, only the general penalty enhancements in subtitle I of the RCC apply to the revised arranging statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[15] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[16] In contrast, the revised arranging statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[17] are not necessary in the arranging statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. This change improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Beyond these five substantive changes to current District law, one other aspect of the revised arranging statute may be viewed as a substantive change of law.

The revised arranging statute requires a "knowingly" culpable mental state for the actor being a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and for giving effective consent for the complainant to

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

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

[17] However, an actor that merely possesses a dangerous weapon or a firearm while committing the revised arranging offense, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

engage in or submit to a sexual act or sexual contact. The current arranging statute does not specify any culpable mental state and there is no DCCA case law on this issue. The revised sexual abuse of a minor statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the actor being a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and for giving effective consent for the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[18] This change improves the clarity and consistency of the revised statutes.

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

First, the revised arranging statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[19] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[20] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[21] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[22] In the revised enticing statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for the arranging offense, consistent with other offenses. While a separate attempt statute for sex offenses

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

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

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

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

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

may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised arranging offense.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

Explanatory Note. *The RCC nonconsensual sexual conduct offense prohibits engaging in a sexual act or sexual contact with the complainant or causing a complainant to engage in or submit to a sexual act or sexual contact without the complainant's effective consent. The penalty gradations are based on the nature of the sexual conduct. The revised nonconsensual sexual conduct offense replaces the current misdemeanor sexual abuse statute.*[1] *The revised nonconsensual sexual conduct offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the consent defense,*[2] *the attempt statute,*[3] *and the aggravating sentencing factors.*[4]

Subsection (a) specifies the prohibited conduct for first degree nonconsensual sexual conduct. Paragraph (a)(1) requires that the actor engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. Paragraph (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that his or her conduct will engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." Paragraph (a)(2) requires that the actor be "reckless" as to the fact that the actor lacks the complainant's "effective consent." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the actor lacks the complainant's effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception."

Subsection (b) specifies the prohibited conduct for second degree nonconsensual sexual conduct. Paragraph (b)(1) requires that the actor engage in a "sexual contact" with the complainant or cause the complainant to engage in or submit to a "sexual contact." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (b)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that he or she engages in a "sexual contact" with the complainant or cause the complainant to engage in or submit to a "sexual contact." Paragraph (b)(2) requires that the actor be "reckless" as to the fact that the actor lacks the complainant's "effective consent." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the actor lacks the complainant's effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception."

[1] D.C. Code § 22-3006.
[2] D.C. Code § 22-3007.
[3] D.C. Code § 22-3018.
[4] D.C. Code § 22-3020.

Subsection (c) excludes from liability for the offense an actor's use of deception to induce[5] the complainant to consent, notwithstanding the fact that such deception may otherwise negate the complainant's effective consent as is required for liability in paragraphs (a)(2) and (b)(2). The use of deception as to the nature[6] of the sexual act or sexual contact remains a possible basis for liability if the use of deception as to the nature of the sexual act or sexual contact negates the complainant's effective consent.

Subsection (d) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised nonconsensual sexual conduct statute changes current District law in six main ways.*

First, the revised nonconsensual sexual conduct statute is comprised of two gradations, based on whether a "sexual act" or "sexual contact" was committed. The current misdemeanor sexual abuse (MSA) statute prohibits committing either a "sexual act" or "sexual contact" without distinction in penalty, with both types of conduct subject to the same maximum imprisonment of 180 days.[7] In contrast, first degree of the nonconsensual sexual conduct statute prohibits a "sexual act" without effective consent and second degree prohibits "sexual contact" without effective consent. Differentiating the penalties for a "sexual act" and "sexual contact" is consistent with the grading in other current D.C. Code and RCC sex offenses.[8] This change improves the consistency and proportionality of the revised offense.

Second, second degree of the revised nonconsensual sexual conduct statute generally replaces non-violent sexual touching forms of assault. The District's current assault offense, D.C. Code § 22-404, does not specifically refer to sexual touching. However the DCCA has held that a simple assault per D.C. Code § 22-404(a)(1) includes non-violent sexual touching,[9] and that such an assault is a lesser included offense of the

[5] Examples of deception to induce a sexual act or sexual contact include: a false statement about one's feelings for the complainant; a false assertion that one is a celebrity; and a false promise to perform a future action in return for the sexual conduct.

[6] Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to: the object or body part that is used to penetrate the other person; a person's current use of birth control (e.g. use of a condom or IUD); and a person's health status (e.g. having a sexually transmitted disease). In addition to the RCC nonconsensual sexual conduct offense, the RCC sexual exploitation of an adult statute (RCC § 22E-1303) specifically prohibits a sexual act or sexual contact when the actor falsely represents that he or she is someone else who is personally known to the complainant. This particular form of deception is more serious than other forms of deception that the RCC nonconsensual sexual conduct offense may prohibit.

[7] D.C. Code § 22-3006.

[8] The other current sexual abuse statutes grade offenses involving a "sexual act" more severely than offense involving a "sexual contact." *Compare* D.C. Code §§ 22-3002, 22-3003, 22-3008, 22-3009.01, 22-3013, 22-3015 (first degree sexual abuse offenses prohibiting a "sexual act") *with* §§ 22-3004, 22-3006, 22-3009, 22-3009.02, 22-3014, 22-3016 (second degree sexual abuse offenses prohibiting "sexual contact.").

[9] The District's current assault statute does not state the elements of the offense. D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both."). DCCA case law, however, recognizes that assault includes non-violent touching. *See, e.g.*, *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) ("Non-violent sexual touching assault . . . is committed by the voluntary

current MSA statute.[10] DCCA case law also suggests that a simple assault in D.C. Code § 22-404(a)(1) also likely requires a culpable mental state of recklessness.[11] In contrast, in the RCC, second degree nonconsensual sexual conduct generally replaces liability for the non-violent sexual touching form of assault. RCC § 22E-1205, the offensive physical contact offense, provides even more general liability for offensive touching (regardless whether there is a sexual intent),[12] and in some circumstances a non-consensual sexual touching may satisfy the elements of more serious RCC sex offenses.[13] However, in general, second degree nonconsensual sexual conduct is the crime in the RCC which covers non-consensual sexual touching. This change reduces unnecessary overlap between offenses and improves the proportionality and consistency of the revised offense.

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touching of another in a sexually sensitive or private area without consent. Sexual touching need only consist of a touching that could offend a person of reasonable sensibility.") (quotations and citations omitted).

[10] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act."). However, the sexual conduct at issue in *Mungo* was a "sexual contact." *Mungo*, 772 A.2d at 242. Consequently, the *Mungo* decision that non-consensual sexual touching forms of assault are a lesser included of MSA may only be *dicta* with respect to sexual acts, even though the DCCA's holding in *Mungo* did not differentiate between an MSA conviction based on a "sexual act" and an MSA conviction based on "sexual contact." *Id.* at 246 ("[W]e conclude that non-violent sexual touching assault is a lesser included offense" of MSA). Instead, the court was focused on the parts of the current definitions of "sexual act" and "sexual contact" that require an extra intent to gratify or arouse that simple assault does not. *Id.* ("When prosecuting MSA based on an alleged sexual contact or an alleged sexual act [based on subsection (C) of the current definition], the government must therefore prove an element of intent, i.e., the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[11] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[12] However, the general merger provision in RCC § 22E-214 would likely prohibit an actor from receiving a conviction for both offensive physical contact and nonconsensual sexual conduct based on the same course of conduct, which would be consistent with current case law on assault and MSA. *See, e.g.*, *Mattete v. United States*, 902 A.2d 113, 117-18 (agreeing with appellant and the government that appellant's assault conviction merges into the conviction for MSA and remanding the case to the trial court for the purpose of vacating the assault conviction).

[13] For example, a non-consensual sexual touching of a person who is unconscious may constitute fourth degree sexual assault in the RCC.

Third, the revised nonconsensual sexual conduct offense requires a culpable mental state of "recklessly" as to the fact that the actor lacked effective consent from the complainant. The current MSA statute requires that an actor "should have knowledge or reason to know that the act was committed without that other person's permission."[14] There is no case law describing the meaning of these mental state terms.[15] However, District case law[16] and District practice[17] have consistently construed the culpable mental state regarding the lack of permission in the current MSA statute as "know or should have known," without discussion of the discrepancy with the statutory language. In contrast, the RCC nonconsensual sexual conduct offense requires a "recklessly" culpable mental state as to the lack of effective consent. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[18] However, recklessness has been upheld

[14] D.C. Code § 22-3006.

[15] The current "should have knowledge or reason to know" language may suggest a culpable mental state akin to negligence. However, negligence is disfavored as a basis for criminal liability. *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand"). In addition, with respect to the similar phrase "knowing or having reason to believe" in the District's current receiving stolen property offense, D.C. Code § 22-3232, the DCCA held that the culpable mental state still required a subjective awareness by the defendant as to the offense element. *See Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge"). However, in *Coleman v. United States*, the DCCA recently held that in the District's stalking statute, a culpable mental state of "should have known" is an "objective standard" that allows for a stalking conviction "based on what an objectively reasonable person would have known." *Coleman v. United States*, 202 A.3d 1127, 1143, 1144 (D.C. 2019). In *Coleman*, the DCCA distinguished the *Owens* opinion as "merely reflect[ing] courts' longstanding reluctance to read a negligence standard into a criminal statute in the absence of a 'clear statement from the legislature.'" *Coleman*, 202 A.2d at 1143 (internal citations omitted). The DCCA stated that the "should have known" language in the current stalking statute represents "the type of clear legislative statement not present in *Owens*." *Id.* at 1143-1144.
It should be noted, however, that the current mental state language in the MSA statute does not fit neatly into either category of mental state discussed in *Owens* ("reason to believe") or *Coleman* ("should have known."). The current MSA statute requires "*should* have knowledge or reason to know that the act was committed without that other person's permission.

[16] *See, e.g.*, *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001) (stating that the "essential elements" of MSA are "(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact.") (citing the Criminal Jury Instructions for the District of Columbia, No. 460A (4th ed. 1993 & Supp. 1996)); *Harkins v. United States*, 810 A.2d 895, 900 (D.C. 2002) (stating that MSA "occurs when an individual 'engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission," citing the MSA statute, but also stating that "there are two essential elements to [MSA]: "'(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact." (quoting *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001)).

[17] D.C. Crim. Jur. Instr.§ 4.400 at 4-116 (jury instruction stating the culpable mental state in the MSA statute as "knew or should have known.")

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

in some cases as a minimal basis for punishing morally culpable crime.[19] It would be disproportionate to allow a conviction, particularly a felony conviction that requires sex offender registry, on the basis of negligence. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the revised nonconsensual sexual conduct offense requires proof that the actor lacked "effective consent" and does not provide for a separate consent defense. The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission."[20] "Permission," unlike "consent,"[21] is undefined in the current sexual abuse statutes. DCCA case law has not specifically addressed the definition of "permission," although it has used the terms "permission" and "consent" interchangeably in discussing the MSA statute.[22] The current MSA statute, however, is subject to the same consent defense applicable to other sexual abuse statutes.[23] In contrast, the nonconsensual sexual conduct offense requires proof of lack of "effective consent" and eliminates the consent defense for the MSA statute. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." The RCC definition of "effective consent" appears to be consistent with the current definition of "consent" for sex abuse offenses.[24] Elimination of a separate consent defense to the RCC nonconsensual sexual conduct offense does not change the scope of the statute because if a complainant gives effective consent, that negates an element of the offense, and the actor is not guilty. The elimination of a consent defense, moreover, avoids unconstitutionally shifting the burden of proof for an element of the offense to the actor.[25] These changes improve the clarity, consistency and legality of the revised offense.

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[19] *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.").

[20] D.C. Code § 22-3006.

[21] D.C. Code § 22-3001(4) ("'Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[22] *See, e.g., Davis v. United States,* 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United States*, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

[23] D.C. Code § 22-3007.

[24] D.C. Code § 22-3001(4), defining consent, requires that there be "words or overt actions indicating a *freely* given agreement" (emphasis added). There is no DCCA case law interpreting the "freely given" requirement in the current definition of "consent." However, the RCC definition of "effective consent" in RCC § 22E-701 appears to cover this requirement insofar as it requires consent that is obtained by means other than physical force, a coercive threat, or deception.

[25] *In re Winship*, 397 U.S. 358, 364 (1970) ("[The] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). To the extent that "permission" in the current MSA statute is the same as

Fifth, only the general penalty enhancements in subtitle I of the RCC apply to the revised nonconsensual sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[26] In contrast, the revised nonconsensual sexual conduct statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[27] are not necessary in the revised nonconsensual sexual conduct statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised nonconsensual sexual conduct statute improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Sixth, to the extent that the protection of District public officials statute,[28] various offense-specific penalty enhancements,[29] and certain statutory minimum penalties[30] apply to the current assault statute and related assault offenses, the RCC second degree

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"consent," (see commentary above) the current consent defense may unconstitutionally shift the burden of proof to the defendant.

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

[27] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[28] D.C. Code § 22-851.

[29] The enhancement for committing an offense while armed (D.C. Code § 22-4502); the enhancement for senior citizens (D.C. Code § 22-3601); the enhancement for citizen patrols (D.C. Code § 22-3602); the enhancement for minors (D.C. Code § 22-3611); the enhancement for taxicab drivers (D.C. Code §§ 22-3751; 22-3752); and the enhancement for transit operators and Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

[30] D.C. Code §§ 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

nonconsensual sexual conduct offense partially replaces them. These statutes are silent as to whether the provisions are intended to apply to low-level assaultive conduct and there is no DCCA case law on the issue. In contrast, in the RCC, low-level assaultive conduct is no longer subject to these enhancements and provisions. For the RCC second degree nonconsensual sexual conduct offense specifically, non-violent sexual touching is no longer subject to these provisions.[31] This change improves the proportionality of the revised offense.[32]

Beyond these six substantive changes to current District law, three other aspects of the revised nonconsensual sexual conduct statute may be viewed as a substantive change of law.

First, the revised nonconsensual sexual conduct statute consistently requires that the actor "engages in" a sexual act or sexual contact with the complainant or "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[33] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[34] In addition to case law, District practice does not appear to follow the

[31] As discussed in the commentary to the revised assault statute (RCC § 22E-1202), in addition to non-violent sexual touching, current District law includes in assault: 1) unwanted touchings that do not cause pain or impairment to the complainant; and 2) intent-to-frighten assaults that do not result in physical contact with the complainant's body. In the RCC, this conduct is no longer covered by the revised assault statute, but may be covered by attempted assault under the general attempt provision (RCC § 22E-301), or by menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), or second degree nonconsensual sexual conduct (RCC § 22E-1307(b)). As with the RCC second degree nonconsensual sexual conduct offense, menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), and offensive physical contact (RCC § 22E-1205) are no longer subject to the protection of District public officials statute and these offense-specific penalty enhancements and statutory minimums, which is discussed further in the commentaries to these RCC statutes. The commentary to the RCC assault statute discusses the scope of the revised offense as it pertains to these provisions.

[32] For further discussion of how these enhancements and provisions apply to the District's current assault statutes, see the commentary to the revised assault statute (RCC § 22E-1202).

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

[34] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of

variations in statutory language.[35] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the revised nonconsensual sexual conduct offense requires a culpable mental state of "knowingly" as to engaging in the sexual act or contact. The current MSA statute does not specify any culpable mental state for engaging in a sexual act or sexual contact, although the current statutory definition of "sexual contact" requires an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[36] The DCCA has characterized the current first degree and third degree sexual abuse statutes, which concern a "sexual act," as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness.[37] In addition, the current assault statute,[38] which has been interpreted by the DCCA to include liability for nonconsensual sexual

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

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

[36] D.C. Code § 22-3001(9) (defining "sexual contact."). Despite this additional intent element the definition of "sexual contact" requires, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted "with intent to abuse, humiliate, harass, degrade, or arouse or gratify." *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[37] See commentary to RCC § 22E-1301, Sexual assault, for further discussion.

[38] D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

touching,[39] likely requires a culpable mental state of recklessness.[40] Resolving this ambiguity, the revised nonconsensual sexual conduct statute requires a "knowingly" culpable mental state in each gradation for causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[41] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[42] This change improves the clarity and consistency of the revised statutes.

Third, notwithstanding the requirement for liability that the defendant lack "effective consent," subsection (c) of the RCC nonconsensual sexual conduct statute excludes from liability the use of deception to induce the sexual conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." As is discussed earlier in this commentary, the RCC definition of "effective consent" appears

[39] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act.").

[40] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

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

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

to be consistent with the current definition of "consent" for sex offenses,[43] which requires that the agreement be "freely given." However, there is no DCCA case law interpreting the current definition of "consent" for the sex offense statutes and it is not clear whether deception, or what kind of deception, prevents consent from being "freely given." To resolve this ambiguity, the RCC excludes from liability deception as to the inducement of the sexual act or sexual contact. The use of deception to induce the sexual act or sexual contact is not of the same gravity as deception as to the nature of the sexual conduct. Criminalizing sexual conduct by deception is largely disfavored in current American criminal law,[44] with the exceptions of falsely represented medical procedures and impersonation of a woman's husband.[45] This change improves the consistency and proportionality of the revised statute.

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

The revised nonconsensual sexual conduct statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[46] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[47] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[48] These attempt penalties differ from the attempt

[43] The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission." "Permission," unlike "consent," is undefined in the current sexual abuse statutes, but, as is discussed elsewhere in this commentary, DCCA case law has used the terms "permission" and "consent" interchangeably in discussing the MSA statute.

[44] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1372, (2013) (stating that "[r]ape-by-deception" is almost universally rejected in American criminal law.").

[45] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1397 (2013) (noting that "sex falsely represented as a medical procedure, and impersonation of a woman's husband--have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception.") (citing Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 119 (1998).

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

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

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

penalties established under D.C. Code § 22-1803, the current general attempt statute.[49] In the revised nonconsensual sexual conduct statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised nonconsensual sexual conduct offense.

[49] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current MSA statute would have a maximum term of imprisonment of 180 days, which is the same as the current penalty for the completed offense. D.C. Code § 22-3010.01.

RCC § 22E-1308. Limitations on Liability for RCC Chapter 13 Offenses.

Explanatory Note. *RCC § 22E-1308 establishes a limitation on liability for specified sex offenses in RCC Chapter 13 for persons under the age of 12 years.*

RCC § 22E-1308 establishes that persons under the age of 12 years are not subject to liability for any offense in RCC Chapter 13 except for RCC § 22E-1303(a), first degree sexual assault, and RCC § 22E-1303(c), third degree sexual assault.

Relation to Current District Law. *The limitations on liability for RCC Chapter 13 offenses statute changes existing District law in one main way.*

The limitations on liability for RCC Chapter 13 offenses statute (limitations on liability statute) prohibits liability for RCC Chapter 13 sex offenses for defendants under the age of 12 years except for first degree sexual assault and third degree sexual assault. The current District sex offense statutes[1] do not have a general statutory provision that addresses the age at which a person is liable for the sexual abuse offenses, and the DCCA has not discussed an age limit for liability. In contrast, the RCC prohibits a person under the age of 12 years from being convicted of RCC sex offenses except for RCC § 22E-1303(a), first degree sexual assault, and RCC § 22E-1303(c), third degree sexual assault.[2] Limiting liability for a person under 12 years of age to first degree and third degree sexual assault ensures that the RCC sex offenses are reserved for predatory behavior targeting young complainants.[3] First degree sexual assault and third degree sexual

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

[2] The RCC sex offenses from which a person under the age of 12 years is exempt when there would otherwise be liability are: second degree sexual assault (RCC § 22E-1301(b)), fourth degree sexual assault (RCC § 22E-1301(d), sexual abuse of a minor (RCC § 22E-1302), and nonconsensual sexual conduct (RCC § 22E-1307). The remaining sex offenses require that the actor be at least 18 year of age (RCC §§ 22E-1304 (sexually suggestive conduct with a minor); 22E-1305 (enticing a minor); 22E-1306 (arranging for sexual conduct with a minor) or typically involve adult actors (RCC § 22E-1303 (sexual exploitation of an adult).

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

assault involve the use of physical force, serious threats, or involuntary intoxication of the complainant. This change improves the proportionality of the revised statutes.

RCC § 22E-1309. Duty to Report a Sex Crime Involving a Person Under 16 Years of Age.

Explanatory Note. *The RCC duty to report a sex crime involving a person under 16 years of age statute (revised duty to report statute) establishes a duty for persons 18 years of age or older to report known or suspected specified sex crimes involving persons under 16 years of age. The revised duty to report statute also establishes several exclusions from the duty to report, as well as immunity from liability and employment discrimination for good-faith reports made pursuant to this statute. Along with the civil infraction for failure to report a sex crime involving a person under 16 years of age statute,[1] the revised duty to report statute replaces five distinct provisions in the current D.C. Code: the child sexual abuse reporting requirements and privileges statute,[2] the defense to non-reporting statute,[3] the penalties for failing to report statute,[4] immunity from liability for good-faith reporting statute,[5] and definitions for these provisions.[6]*

Subsection (a) of the revised duty to report statute requires a person 18 year of age or older who is aware of a substantial risk that a person under the age of 16 years of age is being, or has been subjected to, a "predicate crime" to report such information or belief in specified ways. Subsection (e) of the revised duty to report statute defines "predicate crime" as specified sex offenses in the current D.C. Code and in the RCC.

Subsection (b), paragraph (b)(1), subparagraphs (b)(1)(A), (b)(1)(B), (b)(1)(C), and sub-subparagraphs (b)(1)(C)(i) through (iv), establish several exclusions from the duty to report established in subsection (a). Paragraph (b)(2) states that no other legal privilege applies to the duty to report established in subsection (a).

Subsection (c) establishes that RCC § 22E-1309 does not alter the mandatory reporting requirements for certain individuals, such as teachers, that are required in D.C. Code § 4-1321.02(b).

Subsection (d) establishes immunity for persons who make good-faith reports pursuant to this statute. In particular, subsection (d)(1) is specific to immunity from civil or criminal liability with respect to making the report or any participation in any judicial proceeding involving the report. In all relevant civil or criminal proceedings, subsection (d)(1) establishes that good faith shall be presumed unless rebutted. Subsection (d)(2) states that in the event of employment discrimination due to a good-faith report made pursuant to this statute, a person may commence a civil action for appropriate relief and a court may grant appropriate relief. Subsection (d)(2) also states that the District may intervene in any action commenced under subsection (d)(2).

Subsection (e) provides a definition of "predicate crime" applicable to this statute.

Relation to Current District Law. *The revised duty to report statute changes current District law in one main way.*

[1] RCC § 22E-1310.
[2] D.C. Code § 22-3020.52.
[3] D.C. Code § 22-3020.53.
[4] D.C. Code § 22-3020.54.
[5] D.C. Code § 22-3020.55.
[6] D.C. Code § 22-3020.51.

First, the predicate crimes that give rise to the duty to report in the revised statute differ as compared to current law. The current duty to report statute applies to a violation of: 1) D.C. Code § 22-1834 (sex trafficking of children); 2) D.C. Code § 22-2704 (abducting or enticing a child from his or her home for the purposes of prostitution; harboring such child); 3) Chapter 30 of Title 22 of the D.C. Code (sexual abuse offenses); and 4) D.C. Code § 22-3102 (sexual performance using minors).[7] In contrast, the revised duty to report statute specifically includes three additional predicate crimes: 1) Trafficking in a Commercial Sex Act (RCC § 22E-1604); 2) Commercial Sex with a Trafficked Person (RCC § 22E-1608); and 3) through the inclusion of any RCC sex offense in RCC Chapter 13, incest (RCC § 22E-1312). D.C. Code § 22-1834 in the current duty to report statute is specific to sex trafficking of children, but there are two other human trafficking crimes in the current D.C. Code and the RCC that are sex-related and could apply when the complainant is a child, though they do not require the complainant to be a child—Trafficking in Commercial Sex under RCC § 22E-1604, or Commercial Sex with a Trafficked Person under RCC § 22E-1608. The RCC specifically includes these human trafficking offenses, which is consistent with the current D.C. Code duty to report statute including any sex offense in Chapter 30 of Title 22 in its definition of a predicate crime. Similarly, the RCC duty to report statute includes incest. The current incest statute is codified at D.C. Code § 22-1901, and, as a result, is not included in Chapter 30 of current D.C. Code Title 22. The RCC codifies incest as a sex offense in Chapter 13 of Title 22E, which includes incest as a "predicate crime" for the RCC duty to report a sex crime statute. Beyond these additional three crimes, the scope of the RCC duty to report predicate offenses may differ in scope as compared to current law. This change improves the consistency of the revised duty to report statute.

Beyond this one substantive change to current District law, three aspects of the revised duty to report statute may be viewed as substantive changes of law.

First, the revised duty to report statute requires that a person 18 years of age or older be "aware of a substantial risk" that a person under 16 years of age is being, or has been subjected to, specified sex crimes. The current reporting statute requires such a person "knows" or "has reasonable cause to believe."[8] There is no DCCA case law interpreting these culpable mental state terms in the current statute. To resolve these ambiguities, the revised duty to report statute requires the person to be "aware of a substantial risk." This language requires that the person have subjective awareness of a substantial risk (as opposed to negligence—that the person merely should have known that there was a substantial risk of abuse). An objective (negligence) standard that applies even when a person had no subjective awareness of misconduct would be inconsistent with the Council's stated intent to encourage persons to report behavior.[9] This change improves the clarity and completeness of the revised statute.

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[7] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").

[8] D.C. Code § 22-3020.52(a).

[9] *See, e.g.*, Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 6 ("Requiring everyone to report simplifies the reporting requirement,

Second, the revised duty to report statute applies to situations where a person is aware of a substantial risk that a person under 16 years of age "is being," currently, or "has been subjected to," in the past, specified sexual crimes. The current reporting statute applies to a child that "is a victim" of specified sexual crimes. "Victim" is defined for the current reporting statute and all of Chapter 30 of Title 22 of the D.C. Code as "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter [Chapter 30].[10] However, as applied in the reporting statute, this definition of "victim" conflicts with the definition of "sexual abuse," which includes sex crimes that are not in Chapter 30 of Title 22 of the D.C. Code.[11] Moreover, it is unclear whether the current reporting statute includes both current and past instances of known or suspected sexual abuse, or if it is limited to current instances. There is no DCCA case law interpreting the scope of the current statute and the legislative history is ambiguous.[12] To resolve this ambiguity, the revised duty to report statute applies to a child under 16 years of age that is being, or has been subjected to, a predicate crime. This requirement is consistent with the scope of the mandatory reporters statute in D.C. Code § 4-1321.02.[13] This change improves the clarity, completeness, and consistency of the revised statute.

Third, the revised duty to report statute replaces the reference in the current duty to report statute to a "priest, clergyman, rabbi, or other duly appointed, licensed, ordained, or consecrated minister of a given religion in the District of Columbia, or a duly accredited practitioner of Christian Science in the District of Columbia"[14] with "a religious leader described in D.C. Code § 14-309." The language in the current statute

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eliminates the need to analyze whether one is a mandatory reporter, and may overcome the reluctance of many . . . to get involved.").

[10] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter." D.C. Code § 22-3001(11). The current reporting statute is codified in D.C. Code § 22-3020.52 and is included in Chapter 30. The definition of "victim" in D.C. Code § 22-3001(11) applies to the current reporting statute.

[11] *See* D.C. Code §§ 22-3020.51(4) (defining "sexual abuse" to include D.C. Code § 22-1834, § 22-2704, and § 22-3102, as well as all offenses in Chapter 30 of Title 22); 22-3020.52(a) ("Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report…").

[12] The Committee Report for the current reporting statute frequently refers to a child that "is a victim of sexual abuse," which raises the same ambiguity that is in the statute. *See, e.g.*, Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 1, 6. There are at least two references to "is being sexually abused," which may indicate a legislative intent to limit the reporting statute to current sexual abuse. Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 4, 13. However, there is no discussion in the legislative history regarding the required time frame or the meaning of the term "victim."

[13] D.C. Code § 4-1321.02(a) ("Notwithstanding § 14-307, any person specified in subsection (b) of this section who knows or has reasonable cause to suspect that a child known to him or her in his or her professional or official capacity *has been or is in immediate danger of* being a mentally or physically abused or neglected child, as defined in § 16-2301(9), shall immediately report or have a report made of such knowledge or suspicion to either the Metropolitan Police Department of the District of Columbia or the Child and Family Services Agency.") (emphasis added).

[14] D.C. Code § 22-3020.52(c)(2)(A).

and the religious leaders described in D.C. § 14-309[15] differ primarily in that D.C. Code § 14-309 refers to specified religious leaders that are "authorized to perform a marriage ceremony" in the District, and the current statute refers to a duly appointed, licensed, ordained, or consecrated minister "of a given religion" in the District. It is unclear whether this is a substantive difference and there is no DCCA case law. Resolving this ambiguity, the RCC duty to report statute refers to a "religious leader in D.C. Code § 14-309," which is consistent with the inclusion of this language in the RCC sexual abuse by exploitation statute (RCC § 22E-1303). 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, paragraph (b)(2) states that "No legal privilege, except the privileges set forth in subsection (b) of this section, shall apply to the duty to report in subsection (a) of this section." Paragraph (b)(2) accounts for the language in the current D.C. Code duty to report statute that "[n]o other legally recognized privilege, except the following."[16]

Second, the revised reporting statute revises and deletes the separate definitions for "child," "person," and "police" that apply to the current reporting statute and related provisions.[17] Instead of having separate defined terms, the revised definitions are incorporated directly into RCC § 22E-1309. The revised definitions are intended to be clarificatory and not change current District law.[18]

Third, subsection (b) of revised duty to report statute deletes the provision in the current duty to report statute that states "A confession or communication made under any other circumstances does not fall under this exemption."[19] Nothing in the revised duty to report statute suggests that confessions or communications that do not satisfy the requirements in sub-subparagraphs (b)1)(C)(i) through (b)(1)(C)(iv) would be privileged, and the new paragraph (b)(2) clearly establishes that no other privileges than those described in subsection (b) apply. Codifying a provision that explicitly states other confessions or communications are *not* privileged is potentially confusing for other

[15] D.C. Code § 14-309 refers to a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science."

[16] D.C. Code § 22-3020.52(c).

[17] D.C. Code § 22-3020.51(1), (2), (3) ("For the purposes of this subchapter, the term: (1) "Child" means an individual who has not yet attained the age of 16 years. (2) "Person" means an individual 18 years of age or older. (3) "Police" means the Metropolitan Police Department.").

[18] D.C. Code § 22-3020.51 currently defines "child" as "an individual who has not yet attained the age of 16 years." D.C. Code § 22-3020.51(1). Consistent with other RCC offenses and provisions, RCC § 22E-1309 instead codifies "a person under 16 years of age" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 currently defines "person" as "an individual 18 years of age or older." D.C. Code § 22-3020.51(2). Consistent with other RCC offenses and provisions, RCC § 22E-1309 refers to "a person 18 years of age or older" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 defines "police" as "the Metropolitan Police Department." RCC § 22-1309 refers to "the Metropolitan Police Department" as necessary.
The current definitions of "child" and "person" in D.C. Code § 22-3020.51 refer to an "individual," whereas RCC § 22E-1309 refers to a "person."

[19] D.C. Code § 22-3020.52(c)(2)(B).

provisions that do not similarly list what is "not" included. Deleting this provision from the current statute is a clarificatory change in law.

RCC § 22E-1310. Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age.

Explanatory Note. *The RCC civil infraction for failure to report a sex crime involving a person under 16 years of age statute (revised civil infraction statute) establishes a civil infraction for failing to report a predicate sexual crime involving a person under 16 years of age pursuant to RCC § 22E-1309(a). The civil infraction has a single penalty gradation. Along with the revised duty to report a sex crime involving a person under 16 years of age statute,[1] the revised duty to report statute replaces five distinct provisions in the current D.C. Code: the child sexual abuse reporting requirements and privileges statute,[2] the defense to non-reporting statute,[3] the penalties for failing to report statute,[4] immunity from liability for good-faith reporting statute,[5] and definitions for these provisions.[6]*

Subsection (a) establishes the requirements for the civil infraction. First, per paragraph (a)(1), the person must "know" that he or she has a duty to report the predicate crime involving a person under 16 years of age as required by RCC § 22E-1309(a). By referring specifically to RCC § 22E-1309(a), paragraph (a)(1) incorporates the requirements of the duty to report established in RCC § 22E-1309(a), including that the person with the duty to report must be 18 years of age or older, and the definition of "predicate crime" in RCC § 22E-1309(e). "Knows" is a defined term in RCC § 22E-206 that here means the person must be practically certain that he or she has a duty to report as required by RCC § 22E-1309(a).

Paragraph (a)(2) requires that the person fails to carry out his or her duty to report as required by RCC § 22E-1309(a). Per the rules of interpretation in RCC § 22E-207, the knowledge mental state in subsection (a)(1) applies to the elements in subsection (a)(2). "Knows" is a defined term in RCC § 22E-206 that here means the person must be practically certain that his or her conduct will result in failing to carry out his or her duty to report pursuant to RCC § 22E-1309(a).

Subsection (b) establishes a defense to the failure to report civil infraction. The defense applies if the person's failure to report the known or suspected child sexual abuse is "because" the person is a survivor of either intimate partner violence, as defined in D.C. Code § 16-1001(17), or intrafamily violence, as defined in D.C. Code § 16-1001(9). The general provision in RCC § 22E-XX establishes the burdens of proof and production for all defenses in the RCC.

Subsection (c) establishes that the penalty for the failure to report civil infraction is a $300 fine.

Subsection (d) establishes that the Office of Administrative Hearings has jurisdiction to adjudicate civil infractions under this statute, pursuant to D.C. Code § 2-1831.03(b-6).

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[1] RCC § 22E-1309.
[2] D.C. Code § 22-3020.52.
[3] D.C. Code § 22-3020.53.
[4] D.C. Code § 22-3020.54.
[5] D.C. Code § 22-3020.55.
[6] D.C. Code § 22-3020.51.

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

Relation to Current District Law. *The revised civil infraction statute makes three possible substantive changes to current District law.*

First, the revised civil infraction statute requires that a person "knows" that he or she has a duty to report a known or suspected specified sexual crime pursuant to RCC § 22E-1309(a). The current civil infraction statute prohibits "willfully fail[ing]" to make the required report.[7] "Willfully" is not defined in the current civil infraction statute and there is no DCCA case law for this statute. It is unclear whether "willfully" requires that a person know that he or she has a duty to report as required by D.C. Code § 22-3020.52. Instead of this ambiguity, the revised civil infraction statute requires that a person "knows" that he or she has a duty to report pursuant to RCC § 22E-1309(a). Supreme Court case law commonly interprets "willfully" in a criminal statute as requiring that the defendant act with a purpose to disobey or disregard the law,[8] and in the case of highly complex laws such as federal tax laws, may require that the defendant know of the specific law that his or her conduct is violating.[9] In addition, Supreme Court case law recognizes due process limits on criminal convictions for the mere failure to act if there is no reason for the person to believe he or she had a legal duty to act or that his or her failure to act was blameworthy. [10] This case law supports requiring at least a "knowing"

[7] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

[8] *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 191–92 (1998) ("The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we explained in *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), a variety of phrases have been used to describe that concept. As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (internal citations and footnotes omitted); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (holding that "[t]o establish that a defendant willfully violated the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.").

[9] *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 194 (1991) ("In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. See, *e.g.*, *Cheek v. United States*, 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991).").

[10] Former D.C. Code § 22-2511 stated in relevant part, "It is unlawful for a person to be voluntarily in a motor vehicle if that person knows that a firearm is in the vehicle, unless the firearm is being lawfully carried or lawfully transported." D.C. Code § 22-2511(a) (Repl. 2015). The statute was repealed in 2015. Prior to its repeal, however, the DCCA in *Conley v. United States* held that the statute was unconstitutional for two reasons. Pertinent to the present discussion, the second reason was that:

> [I]t is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy. The fundamental constitutional vice of § 22–2511 is that it criminalizes entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle, which the average citizen would not suppose to be wrongful (let alone felonious)—without requiring the

culpable mental state for the duty to report as required in RCC § 22E-1309(a). This change improves the clarity and completeness of the revised infraction.

Second, the revised civil infraction statute requires that the person knowingly fail to carry out his or her duty to report specified sex crimes to the authorities per RCC § 22E-1309(a). The current civil infraction statute prohibits "willfully fail[ing]" to make the required report.[11] It is unclear what is required for a person to "willfully" fail to make the required report and there is no DCCA case law on this issue. To resolve this ambiguity, the revised civil infraction statute requires a "knowingly" culpable mental state for failing "to carry out his or her duty to report" as required by RCC § 22E-1309(a). The current and revised duty to report statutes have specific reporting requirements. Requiring a "knowing" culpable mental state for the duty to report in RCC § 22E-1309(a) is proportional to the specificity of these requirements. This change improves the clarity and completeness of the revised infraction.

Third, the defense to the revised civil infraction statute for survivors of domestic violence requires that the survivor fail to report the known or suspected sexual abuse as required by RCC § 22E-1309(a) "because" he or she is a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). The current defense states that "[a]ny survivor of [intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9)] may use such . . . violence as a defense to his or her failure to report."[12] The current defense does not appear to require any causal link between the violence and the failure to report, meaning that the specified types of violence are a defense even if they are unrelated to the known or suspected child sexual abuse or the failure to report is part of a purposeful criminal scheme. However, the

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> government to prove that the defendant had notice of any legal duty to behave otherwise."

Conley v. United States, 79 A.3d 270, 273 (D.C. 2013) (citing *Lambert v. California*, 355 U.S. 225 (1957)).

The DCCA acknowledged that *Lambert* "applies only when an unusual statute is 'triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations.'" *Conley*, 79 A.3d at 283 (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 547 (1982) (Brennan, J., dissenting)). The DCCA stated that courts have typically rejected *Lambert* challenges for "public welfare offenses" that involve dangerous articles like drugs and dangerous weapons and for statutes "imposing legal obligations on persons with other particular reasons to be on notice of them, as in prosecutions for violating [statutes that prohibit the possession of firearms by persons who have been convicted of misdemeanor domestic violence offenses or who are subject to a judicial anti-harassment or anti-stalking order] and for failing to register as required by the Sex Offender Registration and Notification Act." *Conley*, 79 A.3d at 283-84.

However, despite these limitations, the DCCA found that D.C. Code § 22-2511 was similar to the statute held unconstitutional in *Lambert* because it criminalized mere presence and did not require proof of any conduct "that would traditionally and foreseeably subject a person to criminal sanction, such as handling or concealing the firearm, constructively possessing it, or aiding and abetting someone else's possession or use of it." *Id*. at 285. In addition, the statute targeted individuals "who are not engaged in [firearm ownership, possession, transportation, or dealing] and who therefore have no reason to be familiar with the firearms laws or to investigate whether those laws impose any duties on *them*." *Id.* at 286 (emphasis in original).

[11] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

[12] D.C. Code § 22-3020.53(a).

legislative history for the current reporting statute and related provisions suggests that a causal link was intended.[13] To resolve this ambiguity, the defense in the revised civil infraction statute requires that the failure to report be "because" the person is a survivor of intimate partner violence or intrafamily violence. This change improves the clarity and completeness of the revised statute.

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

The revised civil infraction statute revises and deletes the separate definitions for "child," "person," and "police" that apply to the current reporting statute and related provisions.[14] Instead of having separate defined terms, the revised definitions are incorporated directly into RCC § 22E-1309. The revised definitions are intended to be clarificatory and not change current District law.[15]

[13] Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 4-5 (stating that the legislation "[p]rovides a defense to any survivor of domestic violence who, due to the domestic violence, failed to report as required by this bill."). In addition, the legislative history indicates that the defense should be narrowly interpreted:

> Although victims will now have an opportunity to reach safety before reporting, the defense should not be used as a reason to never notify authorities about the known or suspected sexual abuse. Once a victim and his or her family are safely away from their abuser, the Committee intends that authorities be notified in order to report the abuse and to ensure that the abuser is not able to prey upon other children.

Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 11.

[14] D.C. Code § 22-3020.51(1), (2), (3) ("For the purposes of this subchapter, the term: (1) "Child" means an individual who has not yet attained the age of 16 years. (2) "Person" means an individual 18 years of age or older. (3) "Police" means the Metropolitan Police Department.").

[15] D.C. Code § 22-3020.51 currently defines "child" as "an individual who has not yet attained the age of 16 years." D.C. Code § 22-3020.51(1). Consistent with other RCC offenses and provisions, RCC § 22E-1309 instead codifies "a person under 16 years of age" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 currently defines "person" as "an individual 18 years of age or older." D.C. Code § 22-3020.51(2). Consistent with other RCC offenses and provisions, RCC § 22E-1309 refers to "a person 18 years of age or older" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 defines "police" as "the Metropolitan Police Department." RCC § 22-1309 refers to "the Metropolitan Police Department" as necessary.

The current definitions of "child" and "person" in D.C. Code § 22-3020.51 refer to an "individual," whereas RCC § 22E-1309 refers to a "person."

RCC § 22E-1311. Admission of Evidence in Sexual Assault and Related Cases.

Explanatory Note. *The RCC admission of evidence in sexual assault and related cases statute (revised admission of evidence statute) establishes limitations on the use of evidence pertaining to a complainant's past sexual behavior in criminal cases for sex offenses under RCC Chapter 13. The revised admission of evidence statute replaces four distinct provisions in the current D.C. Code: the statute prohibiting the use of reputation or opinion evidence of a complainant's past sexual behavior,[1] the statute governing admissibility of other evidence of a complainant's past sexual behavior,[2] the prompt reporting statute,[3] and the statute prohibiting privilege between spouses or domestic partners.[4]*

Subsection (a) states that notwithstanding any other provision of law, in a criminal case under RCC Chapter 13, reputation or opinion evidence of the past sexual behavior of the complainant is not admissible. Subsection (e) defines "past sexual behavior" for this statute.

Subsection (b) governs the admissibility of evidence of a complainant's past sexual behavior, other than reputation or opinion evidence, in criminal cases under RCC Chapter 13. Paragraph (1) states the standards for when such evidence is admissible. Paragraph (2) establishes the procedural requirements an actor must follow if the actor intends to offer such evidence. Paragraph (3) and paragraph (4) establish court procedures for determining the admissibility, as well as the use of such evidence.

Subsection (c) states that evidence of delay in reporting an offense under RCC Chapter 13 to a public authority shall not raise any presumption concerning the credibility or veracity of a charge under RCC Chapter 13.

Subsection (d) states that laws attaching a privilege against disclosure of communications between spouses or domestic partners are inapplicable in prosecutions under RCC Chapter 13 in specified situations.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC and also provides a definition of "past sexual behavior" applicable to this statute.

Relation to Current District Law. *The changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.*

First, the revised admission of evidence statute refers to a "complainant" instead of "victim" or "alleged victim." "Victim" is defined for the current admissibility of evidence statutes and related provisions as "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter [Chapter 30].[5] RCC § 22E-701

[1] D.C. Code § 22-3021.
[2] D.C. Code § 22-3022.
[3] D.C. Code § 22-3023.
[4] D.C. Code § 22-3024.
[5] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter." D.C. Code § 22-3001(11). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "victim" in D.C. Code § 22-3001(11) applies to these statutes.

defines "complainant" as "person who is alleged to have been subjected to a criminal offense." Consistently using the defined term "complainant" instead of "victim" or "alleged victim" improves the clarity and consistency of the revised admission of evidence statute.

Second, the revised admission of evidence statute refers to the "actor" instead of the "person accused of an offense under subchapter II of this chapter,"[6] the "accused"[7] or the "defendant."[8] RCC § 22E-701 defines "actor" as "person accused of a criminal offense." Consistently using the defined term "actor" improves the clarity and consistency of the revised admission of evidence statute.

Third, subsection (b)(1)(B)(ii) refers to the "effective consent" of the complainant. The current admission of evidence statute refers to the "consent" of the complainant.[9] "Consent" is currently defined, in part, as "words or overt actions indicating a freely given agreement to the sexual act or contact in question."[10] The RCC breaks the current sex offense definition of "consent" into two terms. The RCC definition of "consent" in RCC § 22E-701 refers to the bare fact of an agreement between parties obtained by any means, while the RCC definition of "effective consent" in RCC § 22E-701 refers to "consent other than consent induced by physical force, an express or implied coercive threat, or deception." RCC sex offenses refer to "effective consent" instead of "consent," but they continue to incorporate the concept of "consent," as defined by RCC § 22E-701. The revised admission of evidence statute refers to "effective consent" to match the terminology of the RCC sex offenses. As is discussed in the commentaries to the definitions of "consent" and "effective consent," these terms may substantively change parts of current District law for the sex offenses to which they apply. However, the use of these terms in the revised admission of evidence statute is not intended to affect the procedures established in current D.C. Code § 22-3022. This change improves the clarity and consistency of the revised statute.

Fourth, the revised admission of evidence statute incorporates the RCC definitions of "domestic partner" and "bodily injury" in RCC § 22E-701. The RCC definition of "domestic partner" is the same as it is for the current admission of evidence statute.[11] As is discussed to the commentary for the revised definition of "bodily injury" in RCC § 22E-701, the RCC definition of "bodily injury" is changed from the definition that applies to the current admission of evidence statute.[12] Although the revised

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[6] *See, e.g.*, D.C. Code §§ 22-3021(a); 22-3022(a).

[7] *See, e.g.*, D. C. Code § 22-3022(a)(2)(A), (b)(1).

[8] D.C. Code § 22-3024.

[9] D.C. Code § 22-3022(a)(2)(B) ("Past sexual behavior with the accused where consent of the alleged victim is at issue and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.").

[10] D.C. Code § 22-3001(4).

[11] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'domestic partner' shall have the same meaning as provided in § 32-701(3)." D.C. Code § 22-3001(4A). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "domestic partner" in D.C. Code § 22-3001(4A) applies to these statutes and is unchanged in RCC § 22E-701.

[12] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'bodily injury' means injury

definition may substantively change parts of current District law for the sex offenses to which they apply, the use of these terms in the revised admission of evidence statute is not intended to affect the procedures established in current D.C. Code § 22-3022. This change improves the clarity and consistency of the revised statute.

involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain." D.C. Code § 22-3001(2). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "bodily injury" in D.C. Code § 22-3001(2) applies to these statutes.

RCC § 22E-1312. Incest.

Explanatory Note. *This section establishes the incest offense and penalty for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in a sexual act with a specified family member. The offense has a single gradation. The incest offense replaces the incest offense*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies that the actor must, "in fact," be at least 16 years of age. In fact," a defined term in RCC § 22E-207, is used here to indicate that there is no culpable mental state requirement as to the age of the actor.

Paragraph (a)(2) specifies the prohibited conduct for incest —engaging in a "sexual act" with another person who is related to the actor. Paragraph (a)(2) specifies that the required culpable mental state for this conduct is "knowingly." "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that he or she engages in a "sexual act" with another person who is related to the actor. "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(2)(E), (a)(2)(F), and (a)(2)(G) specify the family members that are included in the scope of the incest statute. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (a)(2) applies to each of these subsections. "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that the other person is a family member in one of the specified relationships.

Subsection (b) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

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

First, the revised incest statute no longer prohibits marriage or cohabitation. The current incest statute, D.C. Code § 22-1901, states that no person "shall marry or cohabit with" specified family members. The statute does not define "marry" or "cohabit" and there is no DCCA case law on the issue. In contrast, the revised incest statute is limited to engaging in a "sexual act," as that term is defined in RCC § 22E-701, and does not prohibit marriage or cohabitation. Marriage between several of the specified individuals may be precluded under District or other jurisdictions' civil law. Cohabitation with a relative, absent engaging in sexual acts, is decriminalized. This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised incest statute prohibits sexual acts between adoptive parents and grandparents and their adopted children and grandchildren, regardless of which party initiates the sexual act. The current incest statute, D.C. Code § 22-1901, is limited to specified consanguineous relationships which do not include relationships by adoption. There is no DCCA case law interpreting whether the current incest statute includes adoptive relationships. In contrast, the revised incest statute prohibits sexual acts

[1] D.C. Code § 22-1901.

between adoptive parents and grandparents and their adopted children and grandchildren, regardless of which party initiates the sexual act. While there may be no genetic rationale for including adopted children and grandchildren in the scope of incest, sexual acts can be equally harmful to such familial relationships. It is also consistent with the scope of several current and RCC sex offenses that prohibit adoptive parents and grandparents from engaging in sexual conduct with adopted children and grandchildren if certain requirements are met.[2] This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Third, the revised incest statute prohibits a person from engaging in a sexual act with his or her step-sibling, with his or her stepchild or step-grandchild, or with his or her step-parent or step-grandparent, while the marriage creating the relationship exists. The current incest statute, D.C. Code § 22-1901, is limited to specified consanguineous relationships which do not include these relationships by affinity. In contrast, the revised incest statute prohibits sexual acts with step-siblings, stepchildren and step-grandchildren, and stepparents and step-grandparents, while the marriage creating the relationship exists. While there may be no genetic rationale for including these individuals in the scope of incest, sexual acts can be equally harmful to such familial relationships. This inclusion recognizes the importance of these relationships, but the revised statute also prohibits sexual activity only while the marriage creating the relationship exists. Including step-siblings, step children and step-grandchildren, and step-parents and step-grandparents is also consistent with the scope of several current and RCC sex offenses that prohibit sexual conduct with these individuals if certain requirements are met.[3] This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

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[2] Current District law includes adoptive parents and adoptive grandparents in the definition of "significant relationship." D.C. Code § 22-3001(10) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). The current sexual abuse of a minor statutes prohibit an actor that is 18 years of age or older and in a "significant relationship" with a person under the age of 18 years from engaging in a sexual act with that younger person. D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). The current misdemeanor sexual abuse of a child or minor statute (D.C. Code § 22-3010.01) and the current enticing a minor statute (D.C. Code § 22-3010) also require that the defendant be in a "significant relationship," but prohibit different conduct and have different requirements.

The RCC sex offenses in Chapter 13 of the RCC have a similar scope as current law through the definition of "position of trust with or authority over" in RCC § 22E-701.

[3] Current District law includes step-siblings, stepparents, and step-grandparents in the definition of "significant relationship." D.C. Code § 22-3001(10)(A) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). The current sexual abuse of a minor statutes prohibit an actor that is 18 years of age or older and in a "significant relationship" with a person under the age of 18 years from engaging in a sexual act with that younger person. D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). The current misdemeanor sexual abuse of a child or minor statute (D.C. Code § 22-3010.01) and the current enticing a minor statute (D.C. Code § 22-3010) also require that the defendant be in a "significant relationship," but prohibit different conduct and have different requirements.

The RCC sex offenses in Chapter 13 of the RCC have a similar scope as current law through the definition of "position of trust with or authority over" in RCC § 22E-701.

Fourth, the revised incest statute prohibits siblings by adoption from engaging in a sexual act. The current incest statute, D.C. Code § 22-1901, is limited to specified consanguineous relationships which do not include these relationships by adoption. In contrast, the revised incest statute prohibits sexual acts between adopted siblings because, while there may be no genetic rationale for including adopted siblings in the scope of incest, sexual acts can be equally harmful to such familial relationships. Including adopted siblings is also consistent with the scope of several current and RCC sex offenses that prohibit sexual conduct with adopted siblings if certain requirements are met.[4] This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Fifth, the revised incest statute requires that the actor be at least 16 years of age and, by use of the phrase "in fact," requires strict liability for this element. The current incest statute, D.C. Code § 22-1901, does not address whether an actor must be a certain age and there is no DCCA case law on this issue. However, absent an age requirement for the actor, the current incest statute would categorically criminalize the conduct of a young person under the age of 16 who engages in a sexual act with a parent or other, significantly older family member, as well as sexual acts between two young persons of similar age, both under the age of 16. This differs from current District sexual abuse statutes and the RCC which criminalize otherwise consensual sexual acts between persons under the age of 16 only when the actor is at least four years older than the complainant.[5] In contrast, the revised incest statute requires that the actor be at least 16 years of age and applies strict liability to this element.[6] This change clearly and categorically removes criminal liability for young persons. It is inconsistent and disproportionate to convict a person under 16 years of age for incest if his or her conduct would not otherwise be criminal. It is very likely persons under the age of 16 who

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[4] Current District law includes adopted siblings in the definition of "significant relationship." D.C. Code § 22-3001(10)(A) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). The current sexual abuse of a minor statutes prohibit an actor that is 18 years of age or older and in a "significant relationship" with a person under the age of 18 years from engaging in a sexual act with that younger person. D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). The current misdemeanor sexual abuse of a child or minor statute (D.C. Code § 22-3010.01) and the current enticing a minor statute (D.C. Code § 22-3010) also require that the defendant be in a "significant relationship," but prohibit different conduct and have different requirements.

The RCC sex offenses in Chapter 13 of the RCC have a similar scope as current law through the definition of "position of trust with or authority over" in RCC § 22E-701.

[5] The current first degree child sexual abuse statute requires that the complainant be under the age of 16 years and that the defendant be at least four years older. D.C. Code §§ 22-3008; 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). First degree and second degree of the RCC sexual abuse of a minor have the same requirements. RCC § 22E-1302(a), (b).

[6] It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct. *See Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464)."). Strict liability for the age of the actor also is consistent with several of the RCC sex offenses.

engage in otherwise consensual sexual activity with the relatives specified in the revised incest statute are unable to appreciate the significance of the familial relationship. If a person under the age of 16 takes advantage of the familial relationship, particularly with a younger family member, that person still may have liability under the RCC sexual assault statute (RCC § 22E-1301) or the RCC sexual abuse of a minor statute (RCC § 22E-1302).[7] This change improves the clarity, consistency, and proportionality of the revised statute.

Sixth, the revised incest statute is subject to the RCC duty to report a sex crime statute and the related civil infraction (RCC § 22E-1309 and § 22E-1310), and the RCC evidentiary provisions for RCC sex offenses (RCC § 22E-1311). The current D.C. Code incest statute is codified in D.C. Code § 22-1901. As a result, it is not subject to the current D.C. Code equivalents of these provisions.[8] In contrast, the revised incest statute is subject to the RCC duty to report a sex crime statute and the related civil infraction (RCC § 22E-1309 and § 22E-1310), and the RCC admission of evidence in sexual assault and related cases statute (RCC § 22E-1311). Given the overlap between the current D.C. Code sexual abuse statutes and the RCC sexual abuse statutes discussed elsewhere in this commentary, it is inconsistent for the duty to report and related civil infraction and sex offense evidentiary provisions to not apply to incest. This change improves the clarity and consistency of the revised statute.

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

First, the revised incest statute requires a "knowingly" culpable mental state for engaging in the sexual act. The current incest statute requires that the defendant know that he or she is related to the other person within one of the specified degrees of consanguinity,[9] but does not specify any culpable mental state for marrying, cohabiting, or engaging in sexual intercourse. There is no DCCA case law regarding the required mental state, if any, for this conduct. Resolving these ambiguities, the revised incest statute requires a "knowingly" culpable mental state for engaging in a sexual act. 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.[10] Requiring a "knowingly" culpable mental state is also consistent with the RCC sex offenses, which require that the defendant "knowingly" engage in the prohibited conduct. This change improves the clarity and consistency of the revised statutes.

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[7] Depending on the facts and ages of the parties, and subject to the limitation that a person under 12 years of age is not liable for any sex offense other than first degree and third degree sexual assault (RCC § 22E-1309).

[8] Incest is not included in the current D.C. Code duty to report a sex crime statute and failing to report incest is not included in the related civil infraction. D.C. Code §§ 22-3020.51(4) (defining "sexual abuse" for the purposes of the duty to report a sex crime and related statutes as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102."). Similarly, incest is not included in the current D.C. Code evidence provisions for the current D.C. Code sexual abuse offenses in Chapter 30 of Title 22. *See* D.C. Code §§ 22-3021 through 22-3024.

[9] D.C. Code § 22-1901 ("knowing him or her to be within said degree of relationship.").

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

Second, the revised incest statute prohibits engaging in a "sexual act," as that term is defined in RCC § 22E-701. The current incest statute, D.C. Code § 22-1901, prohibits "sexual intercourse," but does not define the term. However, DCCA case law states that incest "involves the same bodily invasion, *i.e.*, sexual intercourse, as that of rape,"[11] and some District case law appears to limit "sexual intercourse" in that context to penile penetration of the vagina.[12] In 1995, the District's sexual assault laws were significantly amended to specifically prohibit means of sexual penetration besides penile penetration of the vagina,[13] but the incest statute was not revised. Resolving this ambiguity, through the definition of "sexual act" in RCC § 22E-701, the revised incest statute prohibits additional forms of sexual penetration other than penile penetration of the vagina. Although there is no genetic rationale for prohibiting forms of sexual penetration that cannot result in pregnancy, such sexual acts can be equally harmful to familial relationships. Requiring a "sexual act" is also consistent with the scope of RCC sex offenses and gradations that require a "sexual act." This change improves the clarity, consistency, and proportionality of the revised statute.

Third, the revised incest statute specifies that half-siblings by blood are included. The current incest statute, D.C. Code § 22-1901, prohibits marriage, cohabitation, or sexual intercourse with a person related "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." The statute does not specify whether a half-sibling is included, and there is no DCCA case law on this issue. Resolving this ambiguity, the revised incest statute specifies that half-siblings are included. Including half-siblings is consistent with the genetic rationale for incest, as well as the broader rationale that sexual acts can be equally harmful to such familial relationships. This change improves the clarity and consistency of the revised statutes, and removes a possible gap in current law.

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

First, the revised incest statute replaces the language "related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law" in the current statute with the specific relatives with whom a sexual act is prohibited.[14] This change improves the clarity of the revised statute without changing current District law.

Second, the revised incest statute no longer specifies that the actor must be "in the District." The language is surplusage, particularly since the revised statute is limited to

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[11] *Robinson v. United States*, 452 A.2d 354, 359 (D.C. 1982); *Pounds v. United States*, 529 A.2d 791, 797 (D.C. 1987) (citing *Robinson v. United States*, 452 A.2d 354, 359 (D.C. 1982)).

[12] *United States v. Bryant*, 420 F.2d 1327, 1334 (D.C. Cir. 1969) ("In a rape case the prosecution must establish the fact of sexual intercourse (that is, penetration of the female sexual organ by the sexual organ of the male) . . . .").

[13] Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385) (1995).

[14] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

sexual intercourse, and no longer prohibits marriage. Deleting it does not change the scope of the offense.

Third, the revised incest statute specifies "A parent's sibling or sibling's child by blood." These relationships are included in the current incest statute as a person related "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law."[15]

[15] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

RCC § 22E-1501. Criminal Abuse of a Minor.

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

There are three degrees of criminal abuse of a minor. Each gradation requires that the accused must be "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age"[6] (paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to both the fact that the complainant has the specified responsibility to the complainant and the fact that the complainant is under 18 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant and that the complainant is under the age of 18 years. "As to the fact that" indicates that the accused must actually have the specified responsibility to the complainant and the complainant must actually be under 18 years of age.

Paragraph (a)(2) specifies the two types of prohibited conduct in first degree criminal abuse of a minor, the highest grade of the revised offense. Subparagraph (a)(2)(A) establishes liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subparagraph (a)(2)(A) specifies that the culpable mental state for causing "serious mental injury" to the complainant is "purposely," a term defined in RCC § 22E-206 to here mean the accused must consciously desire that his or her conduct causes "serious mental injury" to the complainant. Subparagraph (a)(2)(B) establishes liability causing "serious bodily injury," a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or

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[1] RCC §§ 22E-1202(f) (sixth degree assault), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1205 (offensive physical contact), 22E-1404 (criminal restraint), 22E-1801 (stalking), 22E-1802 (electronic stalking).
[2] RCC § 22E-1502.
[3] D.C. Code § 22-1101.
[4] D.C. Code § 22-1102.
[5] D.C. Code § 22-3611.
[6] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

impairment of the function of a bodily member or organ, or protracted unconsciousness. Subparagraph (a)(1)(B) specifies that the culpable mental state for causing "serious bodily injury" to the complainant is "recklessly," a term defined in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause serious bodily injury to the complainant.

Subparagraph (b)(2) specifies the two types of prohibited conduct in second degree criminal abuse of a minor, the middle grade of the revised offense. Subparagraph (b)(2)(A) establishes liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subparagraph (b)(2)(B) establishes liability for causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (b)(1) applies to both causing "serious mental injury" to the complainant in subparagraph (b)(2)(A) and "significant bodily injury" to the complainant in subparagraph (b)(2)(B). "Recklessly" is a defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause "serious mental injury" or "significant bodily injury" to the complainant.

Paragraph (c)(2) specifies the prohibited conduct for third degree criminal abuse of a minor, the lowest grade of the revised offense—the accused commits sixth degree assault, menacing, criminal threats, offensive physical contact, criminal restraint, stalking, or electronic stalking as those crimes are defined in the RCC,[7] against the complainant. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subsection (d) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised criminal abuse of a minor statute changes current District law in five main ways.*

First, the revised criminal abuse of a minor statute does not criminalize as a completed offense conduct that does not actually harm the complainant. The current second degree child cruelty statute criminalizes not only actual "maltreatment" of a complainant, but also causing a "grave risk of bodily injury," without any distinction in penalty.[8] In contrast, the revised criminal abuse of a minor statute does not criminalize

[7] RCC §§ 22E-1202(f) (sixth degree assault), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1205 (offensive physical contact), 22E-1404 (criminal restraint), 22E-1801 (stalking), 22E-1802 (electronic stalking).

[8] D.C. Code § 22-1101(b)(1), (c)(2) (second degree child cruelty statute prohibiting "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child" and, for either basis of liability, providing for a maximum term of imprisonment of 10 years).

as a completed offense mere risk creation. Conduct that results in a risk of serious bodily injury, death, significant bodily injury, or serious mental injury is criminalized by the revised criminal neglect of a minor statute (RCC § 22E-1502). The RCC criminal neglect of a minor statute does not include the risk of "bodily injury" because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. However, conduct that results in a risk of physical or mental harm, including "bodily injury," may also constitute attempted criminal abuse of a minor. This change improves the organization, clarity, and proportionality of the revised statute.

Second, the revised criminal abuse of a minor statute partially grades the offense based on whether the defendant "purposely" or "recklessly" caused "serious mental injury." The current District child cruelty statute is silent as to whether the offense covers purely psychological harms.[9] However, DCCA case law is clear that the current child cruelty statute extends at least to serious psychological harm.[10] Moreover, the current child cruelty statute provides for the same penalties whether such harm was inflicted "intentionally, knowingly, or recklessly."[11] In contrast, the revised criminal abuse of a minor statute specifically prohibits "serious mental injury," as defined in RCC § 22E-701. There are two gradations for "serious mental injury" in the revised statute depending on the culpable mental state—purposely causing "serious mental injury" in first degree criminal abuse of a minor and recklessly causing "serious mental injury" in second degree criminal abuse of a minor. This change improves the clarity, consistency, and proportionality of the revised statute.

Third, the revised criminal abuse of a minor statute limits liability to a person that is reckless as to the fact that that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant." The current child cruelty statute requires that the complainant be under 18 years of age,[12] but does not state any requirements for the defendant's relationship to the complainant. As a result, the current statute significantly overlaps with the District's current assault statutes,[13] which are also subject to separate enhancements for harming a minor.[14] In contrast, the revised criminal abuse of a minor statute limits liability to a person that is reckless as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the complainant (e.g., a teacher, doctor, daycare provider, or babysitter may be liable for the offense). The revised criminal abuse of a minor offense

[9] D.C. Code § 22-1101.
[10] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro v. United States*, 859 A.2d 149, 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).
[11] D.C. Code § 22-1101(a), (b), (c).
[12] D.C. Code § 22-1101.
[13] D.C. Code §§ 22-404; 22-404.01.
[14] D.C. Code § 22-3611.

thus provides a distinct charge for individuals with responsibilities under civil law for complainants under the age of 18 years and who harm those they are supposed to protect. The revised offense still overlaps in many respects with assault and other offenses that are predicates for third degree criminal abuse of a minor, but only for persons with a duty of care to the complainant they harm. Individuals who do not satisfy this requirement may still have liability under other revised offenses, such as assault (RCC § 22E-1202), menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), criminal restraint (RCC § 22E-1404), or offensive physical contact (RCC § 22E-1205). This change reduces unnecessary overlap between the revised statute and other RCC offenses against persons, including assault.

Fourth, the revised criminal abuse of a minor statute is not subject to a separate penalty enhancement as a crime committed against a minor. Under current District law, first degree child cruelty is subject to a penalty enhancement if the defendant is 18 years of age or older and is at least two years older than a complainant under the age of 18 years.[15] There is no case law interpreting this enhancement as applied to child cruelty.[16] The current child cruelty statute and the penalty enhancement significantly overlap, effectively allowing a substantial increase in penalties for the same conduct whenever the actor is an adult. In contrast, the revised criminal abuse of a minor statute does not provide an enhancement based on the complainant's status as a minor. This change improves the proportionality of the revised criminal abuse of a minor statute, and reduces unnecessary overlap.

Fifth, the revised criminal abuse of a minor statute is not subject to a separate penalty enhancement for committing the offense "while armed" or "having readily available" a dangerous weapon, and does not grade the offense by the use or display of a weapon. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of serious crimes, including first degree child cruelty, "while armed with" or "having readily available" a dangerous weapon.[17] In contrast, the revised criminal abuse of a minor statute does not

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

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

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

grade the offense based on the use or display of a dangerous weapon,[18] and is not subject to a separate while armed weapons enhancement. The focus of the offense is on the betrayal of trust to the victim and the harm suffered by the minor. Use or display of a dangerous weapon to commit conduct that satisfies the revised criminal abuse of a minor statute may be chargeable under the RCC assault statute (RCC § 22E-1202) or first degree menacing (RCC § 22E-1203(a)). Or, an individual who possesses a dangerous weapon while committing criminal abuse of a minor may be subject to liability for possessing a dangerous weapon in furtherance of a crime of violence per RCC § 22E-4104. This change improves the proportionality of the revised statute.

Beyond these five substantive changes to current District law, six other aspects of the revised criminal abuse of a minor statute may be viewed as substantive changes of law.

First, the revised criminal abuse of a minor statute specifically bases liability on "serious mental injury," a term defined in RCC § 22E-701. The current District child cruelty statute is silent as to whether it includes psychological harm. [19] DCCA case law is clear that the current child cruelty statute extends to at least serious psychological injury,[20] but the court has not articulated a precise definition of the required harm. Instead of this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" differs from the definition of "mental injury" in the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision[21] by adding the requirement that the harm be "substantial" and "prolonged." These requirements reflect DCCA case law supporting a high standard for psychological harm for child cruelty,[22]

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has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2).

[18] As is noted in the commentaries to other RCC offenses against persons, "display or use" of a dangerous weapon does not include a purely verbal reference to a dangerous weapon.

[19] D.C. Code § 22-1101.

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

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

[22] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that

but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. This change improves the clarity and completeness of the revised statute.

Second, the revised criminal abuse of a minor statute prohibits committing stalking (RCC § 22E-1801), electronic stalking (RCC § 22E-1802), menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), or criminal restraint (RCC § 22E-1404) against the complainant. The current District child cruelty statute is silent as to whether it includes psychological harm. DCCA case law is clear that the current child cruelty statute extends to at least serious psychological injury,[23] but the court has not articulated a precise definition of the required harm. Resolving this ambiguity, the revised statute reflects current case law by including "serious mental injury" in first degree and second degree criminal abuse of a minor, and by providing liability for separately codified criminal conduct that may cause comparatively less-serious psychological harms in third degree criminal abuse of a minor.[24] This change improves the clarity, consistency, and completeness of the revised statute.

Third, the revised criminal abuse of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under the age of 18 years. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a "child." There is no DCCA case law discussing the culpable mental state for this element. However, under the current penalty enhancement for certain crimes against minors, including first degree child cruelty, it is an affirmative defense that "the accused reasonably believed that the victim was not a [person under 18 years old] at the time of the offense."[25] Instead of this ambiguity, the revised criminal abuse of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under the age of 18 years. The "reckless" culpable mental state in the revised criminal abuse of a minor statute preserves the substance of this defense.[26] This change improves the clarity, completeness, and proportionality of the revised criminal abuse of a minor statute.

"maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro v. United States*, 859 A.2d 149, 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

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

[24] RCC §§ 22E-1801 (stalking), 22E-1802 (electronic stalking), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1404 (criminal restraint), 22E-1205(a) (first degree offensive physical contact).

[25] D.C. Code § 22-3611(b).

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

Fourth, the revised criminal abuse of a minor statute specifies the types of physical injury that are a basis for liability. The current first degree child cruelty statute prohibits, in part, "tortures,"[27] "beats,"[28] "maltreats,"[29] and "causes bodily injury,"[30] and second degree child cruelty prohibits, in part, "maltreats."[31] The current statute does not define these terms, however. DCCA case law suggests that "bodily injury" in the child cruelty statute is a relatively low threshold,[32] but the required amount of physical harm is unclear. Similarly, the DCCA has not determined the required amount of physical harm for "tortures," "beats," or "maltreats."[33] Resolving this ambiguity, the revised criminal abuse of a minor statute specifies the minimal degree of physical harm required for each grade of the offense. For first degree, the minimal degree of physical harm required is "serious bodily injury," and for second degree, it is "significant bodily injury." For third degree, the minimal degree of physical harm required is either "bodily injury," as required by sixth degree assault, or conduct that satisfies offensive physical contact (RCC § 22E-1205) or criminal restraint (RCC § 22E-1404). The specified types of "bodily injury" in the revised statute are defined in RCC § 22E-701 and are intended to cover conduct prohibited by the words "tortures," "beats," "maltreats," and "causes bodily injury" in the current child cruelty statute. The RCC definition of "bodily injury" in RCC § 22E-701 in particular, accords with the limited DCCA case law on "bodily injury" in the current child cruelty statute.[34] Use of the defined term "bodily injury" clarifies that not only physical contacts that result in pain are criminal under the RCC criminal abuse of a minor statute, but also potentially painless harms such as sickness[35] or impaired

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the accused would not consciously disregard a substantial risk that the complainant was under 18 years of age. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[27] D.C. Code § 22-1101(a).

[28] D.C. Code § 22-1101(a).

[29] D.C. Code § 22-1101(a).

[30] D.C. Code § 22-1101(a).

[31] D.C. Code § 22-1101(b)(1).

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

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

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

[35] Recklessly engaging in nonconsensual physical contact that transmits a disease to a complainant may suffice for criminal abuse of a minor. However, particular care should be given to the clear blameworthiness standard incorporated into the RCC definition of recklessness, which requires that the person's conscious disregard of a substantial risk, given the "nature and degree" of the risk, as well as the "nature and purpose of the person's conduct and the circumstances known to the person," have been "clearly blameworthy." RCC § 22E-206(d). For example, a sneezy parent who disregards a substantial risk that he will transmit a cold virus to a complainant under the age of 18 years by living in proximity to the complainant would not ordinarily satisfy the requirement of bodily injury. However, if a parent intentionally sneezes or blows cigarette smoke in a minor's face, there would be liability for third degree criminal abuse of a minor if pain, illness, or any impairment of the minor's physical condition results, and possibly a higher gradation depending on the facts of the case.

physical conditions.[36] This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the parental defense in RCC § 22E-408 applies to the revised criminal abuse of a minor statute, limiting liability for certain conduct undertaken with the intent of safeguarding or promoting the welfare of the complainant. The District's current child cruelty statute is silent as to whether there is a defense for parental discipline. However, while there is no case law on the applicability of a parental defense to child cruelty, the DCCA has recognized the defense for assault and has extended the parental discipline defense beyond parents to persons standing *in loco parentis* to the child.[37] The DCCA has not addressed the limits of permissible force in the parental discipline defense other than generally requiring that the force be "reasonable."[38] The parental defense in RCC § 22E-408 clarifies the scope of the parental defense as applied to RCC offenses against persons such as criminal abuse of a minor. This change improves the clarity and completeness of the law.

Sixth, the revised criminal abuse of a minor statute no longer separately criminalizes creating "a grave risk of bodily injury to a child, and thereby causes bodily injury." The current first degree child cruelty statute requires, in part, both that the defendant "engage[] in conduct which creates a graves risk of bodily injury to a child" and that the defendant "thereby cause[] bodily injury."[39] However, it is unclear whether or how this requirement differs from the alternative bases of liability in the current first degree child cruelty statute ("beats" or "maltreats" a child). No DCCA case law interprets this part of the current child cruelty statute. Resolving this ambiguity, the revised criminal abuse of a minor statute is limited to causing specific types of physical or mental harm. Conduct that results in a risk of serious bodily injury, death, significant bodily injury, or serious mental injury is criminalized by the revised criminal neglect of a minor statute (RCC § 22E-1502). The RCC criminal neglect of a minor statute does not include the risk of "bodily injury" because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. However, conduct that

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[36] For example, a parent who intentionally feeds a minor food laced with drugs would face liability under third degree criminal abuse of a minor if pain, illness, or any impairment of the minor's physical condition results, and possibly a higher gradation depending on the facts .

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

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

[39] D.C. Code § 22-1101(a).

results in a risk of physical or mental harm, including "bodily injury," may also constitute attempted criminal abuse of a minor. This change improves the clarity of the statute.

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

First, the revised criminal abuse of a minor statute codifies a culpable mental state of "reckless" for causing the specified type of physical or mental harm in first degree criminal abuse of a minor (paragraph (a)(1)) and second degree criminal abuse of a minor (paragraph (b)(2)). The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[40] While the meaning of "recklessly" is not defined in the current child cruelty statute, case law has briefly interpreted these terms[41] in a manner consistent with the Model Penal Code definitions. The revised criminal abuse of a minor statute codifies a culpable mental state of "reckless," which is defined in RCC § 22E-206. It is unnecessary to codify the higher culpable mental states of "intentionally" and "knowingly" because under the general rule of construction in RCC § 22E-206, they satisfy the lower culpable mental state of "reckless." In addition, the definition of "reckless" in RCC § 22E-206 is consistent with DCCA case law.[42] This change clarifies the statute.

Second, the revised criminal abuse of a minor statute categorizes a person under the age of 18 as a "minor" and defines the revised offense in terms of the age of the complainant. The current child cruelty statute requires that the complainant be "a child under 18 years of age."[43] Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[44] These changes improve the clarity and consistency of the revised statute.

[40] D.C. Code § 22-1101(a), (b).
[41] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").
[42] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002).
[43] D.C. Code § 22-1101(a).
[44] For example, the current child sexual abuse statutes consider a complainant under the age of 16 years to be a "child." D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

RCC § 22E-1502. Criminal Neglect of a Minor.

Explanatory Note. *The RCC criminal neglect of a minor offense proscribes a broad range of conduct in which there is a risk of harm to a minor's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a minor, the RCC criminal neglect of a minor offense prohibits failing to provide a minor with necessary items or care, as well as abandoning a minor. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised criminal abuse of a minor offense,[1] the revised criminal neglect of a minor offense replaces the child cruelty offense[2] and the failure to provide for a child offense[3] in the current D.C. Code.*

There are three degrees of criminal neglect of a minor. Each gradation requires that the accused must be "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age"[4] (paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to both the fact that the complainant has the specified responsibility to the complainant and the fact that the complainant is under 18 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant and that the complainant is under the age of 18 years. "As to the fact that" indicates that the accused must actually have the specified responsibility to the complainant and the complainant must actually be under 18 years of age.

Paragraph (a)(2) specifies additional requirements for first degree criminal neglect of a minor, the highest grade of the revised offense. The accused must have created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (a)(1) applies to this requirement. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death. "Serious bodily injury" is a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness.

Paragraph (b)(2) specifies the two types of prohibited conduct in second degree criminal neglect of a minor, the middle grade of the revised offense. Subparagraph (b)(2)(A) establishes liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC

[1] RCC § 22E-1501.
[2] D.C. Code § 22-1101.
[3] D.C. Code § 22-1102.
[4] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

§ 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Subparagraph (b)(2)(B) establishes liability for creating, or failing to mitigate or remedy, a substantial risk that a child would experience "serious mental injury." "Serious mental injury" is a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to both creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury" or "serious mental injury." "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury" or "serious mental injury."

Paragraph (c)(2) specifies the two types of prohibited conduct in third degree criminal neglect of a minor, the lowest grade of the revised offense. Subparagraph (c)(2)(A) establishes liability for leaving the complainant in any place. There are two culpable mental states for this conduct. First, the accused must "knowingly" leave the complainant in any place. "Knowingly" is a defined term in RCC § 22E-206 which, applied here, means the accused is practically certain that his or her conduct will result in leaving the complainant. Second, the accused must act "with intent to" abandon the complainant. "Intent" is a defined term in RCC § 22E-206 which, applied here, means the accused was practically certain that he or she would abandon the complainant. 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 abandonment actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that abandonment would result.

Subparagraph (c)(2)(B) establishes liability for failing to make a reasonable effort to provide, food, clothing, or other items or care for the complainant. Subparagraph (c)(2)(B) specifies that the culpable mental state for this conduct is "recklessly," a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care. Subparagraph (c)(2)(B) requires that the items or care be "essential to the physical health, mental health, or safety of the complainant." Per the rules of interpretation in RCC § 22E-207, the culpable mental state of "recklessly" also applies to this element, and requires that the accused to be aware of a substantial risk that the items or care are "essential to the physical health, mental health, or safety of the complainant."

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

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

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

Relation to Current District Law. *The revised criminal neglect of a minor statute changes current District law in five main ways.*

First, the revised criminal neglect of a minor statute prohibits leaving a complainant with intent to abandon him or her as an offense distinct from the revised

criminal abuse of a minor statute. The current second degree child cruelty statute prohibits, in relevant part, "expos[ing] a child, or aid[ing] and abet[ting] in exposing a child in any highway, street, field house, outhouse or other place, with intent to abandon the child,"[5] as well as "maltreat[ing]" a child.[6] Both these means of committing second degree child cruelty have the same maximum ten year penalty.[7] There is no case law defining the meaning of "exposing." In contrast, in the RCC, abandoning a complainant under the age of 18 years is criminalized by the criminal neglect of a minor statute instead of the revised criminal abuse of a minor statute (RCC § 22E-1501). Abandonment alone, absent any actual harm, is comparatively less serious than the physical or mental injury required in the revised criminal abuse of a minor statute. However, higher gradations of the revised criminal neglect of a minor statute or other RCC offenses may apply to abandonment that involves a risk of serious injury or any actual harm.[8] This change reduces unnecessary overlap between offenses and improves the organization and proportionality of the revised offense.

Second, the revised criminal neglect of a minor statute incorporates liability for a failure to provide certain items and care for a complainant under 18 years of age. Current D.C. Code § 22-1102 prohibits a parent or guardian of "sufficient financial ability" from refusing or neglecting to provide the "food, clothing, and shelter as will prevent the suffering and secure the safety" of a child under 14 years of age.[9] The offense has a maximum term of imprisonment of three months.[10] In contrast, in the RCC, failing to support a child is criminalized as part of the revised criminal neglect of a minor statute[11] and is no longer a separate offense. Also, unlike the current failure to support offense, which is limited to children under 14 years of age,[12] the failure to support gradation in the revised criminal neglect of a minor statute applies to any complainant under 18 years of age so that it matches the current child cruelty statute[13] and revised criminal abuse of a

[5] D.C. Code § 22-1101(b)(2).
[6] D.C. Code § 22-1101(b)(1).
[7] D.C. Code § 22-111(c)(2). In addition to abandoning a child, the current second degree cruelty statute prohibits "engag[ing] in conduct which causes a grave risk of bodily injury to a child." D.C. Code § 22-1101(b)(2). It also has a maximum term of imprisonment of ten years. D.C. Code § 22-111(c)(2).
[8] If leaving the complainant with intent to abandon him or her results in a *risk* of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to first degree or second degree criminal neglect of a minor. Moreover, if the complainant sustains physical or mental injury, or death, as a result of the abandonment, there may be liability under the revised criminal abuse of a minor statute, RCC § 22E-1501, the revised assault statute, RCC § 22E-1202, or the revised homicide statutes, RCC §§ 22E-1101 – 22E-1103.
[9] D.C. Code § 22-1102.
[10] D.C. Code § 22-1102.
[11] The specification of failing to support the complainant as third degree criminal neglect of a minor does not preclude the possibility that such failure to support may, depending on the facts of the case, be charged as a more serious gradation or offense. If failing to provide the necessary items or care results in a risk of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to first degree or second degree criminal neglect of a minor. Moreover, if the complainant sustains physical or mental injury, or death, as a result of the failure to provide, there may be liability under the revised criminal abuse of a minor statute, RCC § 22E-1501, the revised assault statute, RCC § 22E-1202, or the revised homicide statutes, RCC §§ 22E-1101 – 22E-1103.
[12] D.C. Code § 22-1102
[13] D.C. Code § 22-1101.

minor[14] statute. This change reduces unnecessary overlap between offenses and improves the consistency and proportionality of the revised statute.

Third, the revised criminal neglect of a minor statute is limited to conduct that does not actually harm the complainant. The current second degree child cruelty statute criminalizes actual "maltreatment," causing a "grave risk of bodily injury," and "exposing a child . . . with intent to abandon it," without any distinction in penalty.[15] In contrast, the revised criminal neglect of a minor statute is limited to conduct that does not actually harm the complainant. First degree and second degree of the revised criminal neglect of a minor statute prohibit endangering the complainant and third degree prohibits failing to provide for or abandoning the complainant. However, if the complainant sustains physical or mental injury as a result of the neglect, there may be liability under the revised criminal abuse of a minor statute (RCC § 22E-1501) or other RCC offenses against persons. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised criminal neglect of a minor statute partially grades the offense based on creating a risk of "serious bodily injury or death," "significant bodily injury," or "serious mental injury." The current second degree child cruelty offense prohibits, in part, creating "a grave risk of bodily injury."[16] However, the statute does not define "bodily injury." DCCA case law on the current child cruelty statute suggests "bodily injury" may have a relatively low threshold for physical harm,[17] but does not provide a general definition. With regard to mental injury, the DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children."[18] However, the DCCA has not discussed whether a risk of extreme emotional pain or suffering is sufficient for the "grave risk of bodily injury" prong of the current second degree child cruelty offense. In contrast, the revised criminal neglect of a minor statute partially grades the offense based on whether there is a risk of "serious bodily injury or death," "significant bodily injury," or "serious mental injury" and defines those terms in RCC § 22E-701. These types of "bodily injury" are consistent with the RCC assault statute (RCC § 22E-1202). This change improves the clarity and proportionality of the revised child neglect statute.

Fifth, the revised criminal neglect of a minor statute limits liability to individuals that are "reckless" as to the fact that they have "a responsibility under civil law for the health, welfare, or supervision of the complainant." The current child cruelty statute does not state any requirements for the defendant's relationship to the child, and the DCCA

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[14] RCC § 22E-1501.

[15] D.C. Code § 22-1101(b)(1), (c)(2) (second degree child cruelty statute prohibiting "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child" and providing for either basis of liability a maximum term of imprisonment of 10 years).

[16] D.C. Code § 22-111(b)(1).

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

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

has sustained second degree child cruelty convictions for creation of a "grave risk of bodily injury" when an individual has no relationship to the child.[19] There is no DCCA case law interpreting the scope of the abandonment prong of second degree child cruelty. The failure to support a child offense in D.C. Code § 22-1102, however, is limited to a "parent or guardian."[20] In contrast, all gradations of the revised criminal neglect of a minor statute require that the defendant is "reckless" as to the fact that "he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the minor (e.g., a teacher, doctor, daycare provider, or babysitter may be liable for the offense). The revised criminal neglect of a minor offense thus provides a distinct charge for individuals with responsibilities under civil law for complainants under the age of 18 years who subject to a risk of harm those they are supposed to protect. The revised statute applies a culpable mental state of "reckless" as to the fact that the defendant has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change improves the proportionality and consistency of revised offenses.

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

First, the revised criminal neglect of a minor statute requires a culpable mental state of "knowingly" for "leav[ing]" the complainant. The abandonment prong in the current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly," but also requires the conduct occur "with intent to abandon the child."[21] While the meaning of these culpable mental states is not defined in the current child cruelty statute, case law has briefly interpreted these terms[22] in a manner consistent with the Model Penal Code definitions. Instead of this ambiguity, the revised criminal neglect of a minor statute codifies a culpable mental state of "knowingly" for the element "leaves the complainant in any place" and provides that leaving the complainant must be done "with the intent of" abandoning the complainant. This change resolves the inconsistent culpable mental states in the current statute[23] and clarifies the law.

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

[20] D.C. Code § 22-1102.

[21] D.C. Code § 22-1101(b)(2).

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

[23] It is unclear in the current child cruelty statute how a person could "recklessly" abandon a child "with intent to abandon" the child. However, a knowledge requirement as to leaving the child and an intent requirement as to abandonment, as these terms are defined in the RCC, are compatible. See, generally, Commentary to RCC § 22E-206.

Second, the failure to support gradation in the revised criminal neglect of a minor statute broadly includes failures to provide "supervision, medical services, medicine, or other items or care essential for the health or safety of the child." The current failure to support a child offense in D.C. Code § 22-1102 refers only to "food, clothing, and shelter."[24] However, the DCCA has stated that "the broad sweep" of the current statute includes a duty of providing medical care.[25] Current District statutes defining a "neglected child" for civil purposes also specifically refer to a lack of parental "care or control necessary for [the child's] physical, mental, or emotional health."[26] The list of items and care in the revised third degree criminal neglect of a minor statute reflects the DCCA's expansive interpretation of current D.C. Code § 22-1102 and the broad sweep of relevant civil laws in the District. This change reduces possible gaps in the law and improves consistency with the civil statutes.

Third, the failure to support gradation of the revised criminal neglect of a minor statute requires that the defendant "fails to make a reasonable effort" to provide the specified support. The current statute in D.C. Code § 22-1102 refers only to a person "of sufficient financial ability, who shall refuse or neglect to provide…" the specified support.[27] The DCCA has not interpreted the limits of this language. In the revised statute, however, a person must only fail to make a "reasonable effort" to provide the specified support. The revised language would preclude liability where a person does not provide necessary support due, not only to insufficient financial ability, but also due to factors such as a hospitalization or other incapacity.[28] This change improves the clarity and proportionality of the revised statute.

Fourth, the revised criminal neglect of a minor statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial risk is sufficient for liability. It is unclear whether the current child cruelty statute includes failing to mitigate or remedy a risk of harm to the complainant. Current first degree child cruelty criminalizes, in part, conduct that "maltreats" the complainant or "creates a grave risk of bodily injury to a child and thereby causes bodily injury."[29] Current second degree child cruelty criminalizes, in part, conduct that "maltreats" a child,[30] as well as conduct that "causes a grave risk of bodily injury" to a child.[31] "Maltreats" is not statutorily defined and there is no DCCA case law regarding whether the current child cruelty offense extends to failing to mitigate or remedy a risk of harm. The current failure to support statute in D.C. Code § 22-1102 criminalizes the refusal or neglect to provide "food, clothing, and shelter as will prevent

[24] D.C. Code § 22-1102.
[25] *Faunteroy v. United States*, 413 A.2d 1294, 1300 (D.C. 1980).
[26] D.C. Code § 16-2301(9A).
[27] D.C. Code § 22-1102.
[28] The District's current civil statutes define "neglected child," in part as "a child:…(ii) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or custodian; (iii) whose parent, guardian, or custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity." D.C. Code § 16-2301(9)(A).
[29] D.C. Code §22-1101(a). First degree child cruelty also prohibits "tortures" and "beats" a child. *Id.*
[30] D.C. Code § 22-1101(b)(1).
[31] D.C. Code § 22-1101(b)(1).

the suffering and secure the safety of such child,"[32] but is silent as to failing to mitigate or remedy a risk and there is no case law on point. However, in the context of parental duties, the DCCA also has recognized the "unique obligation of parents to take affirmative actions for their children's benefit."[33] Resolving this ambiguity, the revised criminal neglect of a minor statute clarifies that not only creating risks to a child, but also failing to mitigate or remedy a substantial risk, is sufficient for liability. Under the general provision in RCC § 22E-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[34] However, although technically superfluous, given that neglect offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. This change clarifies the revised statute.

Fifth, the revised criminal neglect of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under 18 years of age. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a "child." There is no DCCA case law discussing if there is a culpable mental state for this element. However, under the current enhancement for certain crimes against minors it is an affirmative defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years old] at the time of the offense."[35] The "reckless" culpable mental state in the revised criminal neglect of a minor statute preserves the substance of this defense.[36] This change improves the clarity, completeness, and proportionality of the revised statute.

Sixth, for liability, the revised criminal neglect of a minor statute requires a "substantial risk" of the specified physical or mental harm. The current second degree

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[32] D.C. Code § 22-1102.

[33] *Young v. United States*, 745 A.2d 943, 948 (D.C. 2000). Similarly, the DCCA has used the common law to find that there is a common law duty of parents to provide medical care for their dependent children. *Faunteroy v. United States*, 413 A.2d at 1299-300 (D.C. 1980) ("The cases of several state courts hold there is a 'common law natural duty of parents to provide medical care for their minor dependent children. . . . Since no statute for the District operates to specifically abolish it, this duty remains the common law of this jurisdiction."). To the extent that the common law imposes a duty to aid a child, the DCCA may find a common law duty in the District. *See generally* § 6.2.Omission to act, 1 Subst. Crim. L. § 6.2 (3d ed.)

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

[35] D.C. Code § 22-3611(b).

[36] "Reckless" is defined in RCC § 22E-206 and, as applied here, means that the accused must disregard a substantial risk that the complainant was under the age of 18 years. The enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness or knowledge as to the age of the complaining witness because the accused would not consciously disregard a substantial risk (recklessness) or be practically certain (knowledge) that the complainant was under 18 years of age. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

child cruelty offense prohibits "engag[ing] in conduct which causes a grave risk of bodily injury."[37] There is no DCCA case law discussing the meaning of "grave risk." However, in an attempted second degree cruelty to children case, the DCCA affirmed a conviction based upon the defendant creating a "grave or substantial risk of bodily injury,"[38] suggesting that "grave" and "substantial" are interchangeable, equivalent terms. The revised criminal neglect of a minor statute clarifies that the required risk must be "substantial." The "substantial" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22E-206, also requires that a risk be "substantial" and the accused's conscious disregard of the risk be "clearly blameworthy." However, given that neglect offenses will often depend on the nature of the risk to the complainant, the revised statute specifies the "substantial" requirement to clarify the statute, particularly where the defendant is alleged to act knowingly, intentionally, or purposely.[39] This change improves the clarity and consistency of the revised statute.

Seventh, the revised criminal neglect of a minor statute specifically bases liability on "serious mental injury" in RCC § 22E-701. The current District child cruelty statute is silent as to whether it includes psychological harm. DCCA case law is clear that the current child cruelty statute extends at least to serious psychological injury,[40] but the court has not articulated a precise definition of the requisite psychological harm. Instead of this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" modifies the definition of "mental injury" in the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision[41] by adding the requirement that the harm be "substantial" and "prolonged." by adding the requirement

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[37] D.C. Code § 22-111(b)(1).

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

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

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

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

that the harm be "substantial" and "prolonged." The requirements of "substantial" and "prolonged" reflect DCCA case law supporting a high standard for psychological harm for child abuse,[42] but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. This change clarifies the law.

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

First, the revised criminal neglect of a minor statute codifies a culpable mental state of "recklessly" for the element "created, or failed to mitigate or remedy, a substantial risk." The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[43] While the meaning of "recklessly" is not defined in the current child cruelty statute, case law has briefly interpreted these terms,[44] in a manner consistent with the Model Penal Code definitions. The revised criminal neglect of a minor statute codifies a culpable mental state of "recklessly," which is defined in RCC § 22E-206. It is unnecessary to codify the higher culpable mental states of "intentionally" and "knowingly" because under the general rule of construction in RCC § 22E-206, they satisfy the lower culpable mental state of "recklessly." In addition, the definition of "recklessly" in RCC § 22E-206 is consistent with DCCA case law.[45] This change clarifies the revised statute.

Second, subsection (f) of the revised criminal neglect of a minor statute codifies an exception to criminal liability for surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq*. It is inconsistent for an individual who surrenders a newborn child in accordance with D.C. Code § 4-145.01 *et. seq.* to face criminal liability. Current D.C. Code § 4-1451.02 states such a person "shall not . . . be prosecuted for the surrender of the newborn."[46] This change clarifies the revised statute.

Third, the revised criminal neglect of a minor statute categorizes a person under the age of 18 as a "minor" and defines the revised offense in terms of the age of the complainant. The current child cruelty statute requires that the complainant be "a child under 18 years of age."[47] Referring to a teenager as a "child" may be misleading and

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

[43] D.C. Code § 22-1101(a), (b).

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

[45] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002).

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

[47] D.C. Code § 22-1101(a).

leads to inconsistency with other District offenses that have different definitions of "child."[48] These changes improve the clarity and consistency of the revised statute.

[48] For example, the current child sexual abuse statutes consider a complainant under the age of 16 years to be a "child." D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

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

Explanatory Note. *The RCC criminal abuse of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is harm to a vulnerable adult or elderly person's bodily integrity or mental well-being, including conduct that constitutes sixth degree assault, menacing, criminal threats, offensive physical contact, criminal restraint, stalking, or electronic stalking as those crimes are defined in the RCC.*[1] *The penalty gradations for the revised offense are primarily based on the degree of bodily harm or mental harm. Along with the revised criminal neglect of a vulnerable adult or elderly person offense,*[2] *the revised criminal abuse of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person offense and penalties;*[3] *neglect of a vulnerable adult or elderly person offense and penalties;*[4] *and the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person.*[5]

There are three degrees of criminal abuse of a vulnerable adult or elderly person. Each gradation requires that the accused must be "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is a vulnerable adult or elderly person"[6] (paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree). RCC § 22E-701 defines the terms "vulnerable adult" and "elderly person." Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to both the fact that the complainant has the specified responsibility to the complainant and the fact that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-207. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant and that the complainant is a "vulnerable adult" or "elderly person." "As to the fact that" indicates that the accused must actually have the specified responsibility to the complainant and the complainant must actually be a "vulnerable adult" or "elderly person."

Subparagraph (a)(2)(A) describes liability for one type of prohibited conduct in first degree criminal abuse of a vulnerable adult or elderly person, the highest grade of the revised offense—causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subparagraph (a)(2)(A) specifies that the culpable mental state for causing "serious mental injury" is "purposely," a term defined in RCC § 22E-206 that, applied here,

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[1] RCC §§ 22E-1202(f) (sixth degree assault), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1205 (offensive physical contact), 22E-1404 (criminal restraint), 22E-1801 (stalking), 22E-1802, 22E-1802 (electronic stalking).
[2] RCC § 22E-1504.
[3] D.C. Code §§ 22-933, 22-936.
[4] D.C. Code §§ 22-934, 22-936.
[5] D.C. Code § 22-935.
[6] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, or caretaker, depending on the facts of a case.

means the accused must consciously desire that the accused causes "serious mental injury" to the complainant.

Subparagraph (a)(2)(B) specifies the second type of prohibited conduct for first degree criminal abuse of a vulnerable adult or elderly person—causing "serious bodily injury," a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness. Subparagraph (a)(2)(B) specifies that the culpable mental state for causing "serious bodily injury" is "recklessly," a term defined in RCC § 22E-206 that, applied here, means "being aware of a substantial risk" that the accused will cause serious bodily injury to the complainant.

Subparagraph (b)(2)(A) describes liability for one type of prohibited conduct for second degree criminal abuse of a vulnerable adult or elderly person—causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subparagraph (b)(2)(B) specifies the second type of prohibited conduct for second degree criminal abuse of a vulnerable adult or elderly person—causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to both causing "serious mental injury" in subparagraph (b)(2)(A) and "significant bodily injury" in subparagraph (b)(2)(B). "Reckless" is a defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause the complainant "serious mental injury" or "significant bodily injury."

Paragraph (c)(2) describes the prohibited conduct for third degree criminal abuse of a vulnerable adult or elderly person—the accused must commit sixth degree assault, menacing, criminal threats, offensive physical contact, criminal restraint, stalking, or electronic stalking against the complainant as those crimes are defined in the RCC.[7] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subsection (d) codifies a defense to the criminal abuse of a vulnerable adult or elderly person offense. The general provision in RCC § 22E-XX establishes the burdens of proof and production for all defenses in the RCC. Subsection (d) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to paragraphs (d)(1) and (d)(2), and there is no culpable mental state requirement for any of the elements in these paragraphs. Paragraph (d)(1) requires that the actor have the complainant's effective consent to the conduct charged to constitute the offense, or the actor reasonably believes that the actor has the

[7] RCC §§ 22E-1202(f) (sixth degree assault), 22E-1203 (menacing), 22E-1204 (criminal threats), 22E-1205 (offensive physical contact), 22E-1404 (criminal restraint), 22E-1801 (stalking), 22E-1802 (electronic stalking).

complainant's effective consent to the conduct charged to constitute the offense. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. Paragraph (d)(2) requires that the conduct charged to constitute the offense is the administration of, or allowing the administration of, religious prayer alone, in lieu of medical treatment which the actor otherwise had a responsibility under civil law, to provide or allow.

Subsection (e) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised criminal abuse of a vulnerable adult or elderly person statute changes current District law in six main ways.*

First, the revised abuse of a vulnerable adult or elderly person statute includes a gradation for causing "significant bodily injury," which is defined in RCC § 22E-701. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "physical pain or injury,"[8] "serious bodily injury,"[9] or "permanent bodily harm"[10] resulted. The statute does not define any of these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[11] but there is no DCCA case law interpreting "serious bodily injury" or "permanent bodily harm." It is unclear how "serious bodily injury" and "permanent bodily harm" differ, if at all, particularly given that DCCA case law for the current aggravated assault statute includes permanent bodily injury in the definition of "serious bodily injury."[12] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute includes an additional gradation for causing "significant bodily

[8] D.C. Code § 22-933(1); D.C. Code § 22-936(a).

[9] D.C. Code § 22-936(b).

[10] D.C. Code § 22-936(c).

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

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

injury," using the revised definition for that term in RCC § 22E-701. Both the current[13] and revised[14] assault statutes use "significant bodily injury" to partially grade the offenses, and the revised definition is modified from the definition in the current assault with significant bodily injury statute.[15] This change improves the clarity, consistency, and proportionality of the revised offense.

Second, the revised criminal abuse of a vulnerable adult or elderly person statute does not recognize as a distinct basis of liability causing the death of a vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on the death of the vulnerable adult or elderly person.[16] The current statute provides a maximum term of imprisonment of 20 years for such conduct, which is inconsistent with applicable homicide penalties currently in the D.C. Code.[17] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute does not grade based on the death of the vulnerable adult or elderly person. The RCC homicide offenses, through penalty enhancements for killing a "protected person,"[18] provide enhanced liability for the death of a vulnerable adult or elderly person. This change reduces unnecessary overlap between the revised statute and RCC homicide offenses, and improves the proportionality and consistency of the revised statute.

Third, the revised criminal abuse of a vulnerable adult or elderly person statute has two grades that provide liability for causing "serious mental injury," depending on whether the conduct is done purposely or recklessly. The current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "severe mental distress" resulted.[19] Such injury requires a culpable mental state of either "intentionally" or "knowingly," without distinction in penalty,[20] and neither the current statute nor case law defines these culpable mental state terms. In contrast, the revised statute prohibits "purposely" causing "serious mental injury" in first degree criminal abuse of a vulnerable adult or elderly person and "recklessly" causing "serious mental injury" in second degree criminal abuse of a vulnerable adult or elderly person. Including a "recklessly" culpable mental state makes the revised criminal abuse of a vulnerable adult or elderly person

[13] D.C. Code § 22-404(a)(2).
[14] RCC § 22E-1202.
[15] D.C. Code § 22-404(a)(2) (assault with significant bodily injury statute defining "significant bodily injury" as an "injury that requires hospitalization or immediate medical attention.").
[16] D.C. Code § 22-936(c).
[17] Currently, the maximum penalty for first degree murder, absent aggravating circumstances, is 60 years. The maximum penalty for second degree murder, absent aggravating circumstances, is 40 years. If an aggravating circumstance is present, the maximum penalty for first and second degree murder is incarceration for life. Notably, one aggravating factor for both first and second degree murder is that the victim was "more than 60 years old." The maximum penalty for voluntary and involuntary manslaughter is 30 years.
[18] RCC §§ 22E-1101(c)(3); 22E-1102(c)(3).
[19] D.C. Code §§ 22-933, 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).
[20] D.C. Code §§ 22-933 (abuse of a vulnerable adult or elderly person statute requiring a culpable mental state of "intentionally" or "knowingly."); 22-936 (penalty statute for abuse of a vulnerable adult or elderly person statute).

statute consistent with the current[21] and revised[22] assault offenses and the current[23] and revised[24] criminal abuse of a minor statutes, which either require or have gradations for a "recklessly" culpable mental state. This change improves the consistency and proportionality of the revised statute.

Fourth, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state of "recklessly" for physical harm. The current abuse of a vulnerable adult or elderly person statute requires a culpable mental state of either "intentionally" or "knowingly."[25] Neither the current statute nor case law defines these culpable mental state terms. In contrast, the revised first degree criminal abuse of a vulnerable adult or elderly person statute requires a "recklessly" culpable mental state for causing serious bodily injury, significant bodily injury, or bodily injury. The "recklessly" culpable mental state is consistent with gradations in the current[26] and revised[27] assault offenses and the current[28] and revised[29] criminal abuse of a minor statutes. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised criminal abuse of a vulnerable adult or elderly person statute is no longer limited to "corporal means." The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means."[30] There is no case law regarding the phrase "corporal means." In contrast, the revised statute requires that the defendant "cause[]" the specified type of physical or mental injury by any means.[31] This change broadens the statute to potentially include drugging a complainant or using mechanical devices to inflict bodily injury. The

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

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

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

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

[25] D.C. Code § 22-933.

[26] *See, e.g.*, D.C. Code § 22-404(a)(2) (offense of assault with significant bodily injury requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state). The District's current simple assault statute, D.C. Code § 22-404(a)(1) does not specify a culpable mental state. Current District case law suggests that recklessness may suffice, however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. The culpable mental state for simple assault is discussed in the commentary to the RCC assault and offensive physical contact offenses (RCC §§ 22E-1202 and 22E-1205).

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

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

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

[30] D.C. Code § 22-933(1).

[31] For example, throwing a caustic substance on someone, causing burns, or mixing a toxic ingredient in someone's food.

requirement of causing injury by any means matches the current[32] and revised[33] assault statutes and the current[34] child cruelty and revised[35] criminal abuse of a minor statutes. This change reduces an unnecessary gap in the offense's coverage and improves the consistency of the statute with similar statutes.

Sixth, the revised criminal abuse of a vulnerable adult or elderly person statute limits liability to a person that reckless as to the fact that "he or she has a responsibility under civil law for the health, welfare, or supervision" of the complainant. The current abuse of a vulnerable adult or elderly person statute does not state any requirements for the defendant's relationship to the complainant.[36] As a result, the current statute significantly overlaps with the District's current assault statutes,[37] which are also subject to separate enhancements for harming an elderly person.[38] However, the current neglect of a vulnerable adult or elderly person statute requires "a duty to provide [necessary] care and services" to the vulnerable adult or elderly person statute.[39] Regarding mental states, the current abuse of a vulnerable adult or elderly person statute requires an "intentionally" culpable mental state, and the current neglect statute requires "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty."[40] There is no DCCA case law interpreting "intentionally" in the abuse statute, but the DCCA has generally found that "wanton, reckless, or willful indifference" in the neglect statute requires something similar to recklessness.[41] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute limits liability to a person that is "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the complainant (e.g., a teacher, doctor, or caretaker). The revised criminal abuse of a vulnerable adult or elderly person offense thus provides a distinct charge for individuals with responsibilities under civil law who harm those they are supposed to protect. The revised offense still overlaps in many respects with assault and other offenses that are predicates for third degree criminal abuse of a vulnerable adult or elderly person statute, but only for persons with a duty of care to the complainant they harm. Individuals who do not satisfy this requirement may still have liability under other revised offenses, such as assault (RCC § 22E-1202), menacing (RCC § 22E-1203), criminal threats (RCC § 22E-1204), criminal restraint (RCC § 22E-1404), or offensive physical contact (RCC § 22E-1205). This change reduces unnecessary

[32] *See, e.g.*, D.C. Code §§ 22-404(a)(2) ("causes significant bodily injury to another."); 22-404.01(a)(1), (2) ("causes serious bodily injury.").
[33] RCC § 22E-1202.
[34] D.C. Code § 22-1101(a) ("causes bodily injury.").
[35] RCC § 22E-1501.
[36] D.C. Code § 22-933.
[37] D.C. Code §§ 22-404; 22-404.01.
[38] D.C. Code § 22-3601.
[39] D.C. Code § 22-934.
[40] D.C. Code § 22-934.
[41] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

overlap between the revised statute and other RCC offenses against persons, including assault.

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

First, the revised criminal abuse of a vulnerable adult or elderly person statute prohibits behavior that would constitute stalking, electronic stalking menacing, criminal threats, or criminal restraint, as defined by the RCC. The current abuse of a vulnerable adult or elderly person statute prohibits, in part, conduct that "threatens to inflict physical pain or injury,"[42] uses "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening,"[43] or involves "unreasonable confinement or involuntary seclusion, including but not limited to, the forced separation from other persons against his or her will or the directions of any legal representative."[44] There is no DCCA case law interpreting the meaning of these provisions in the current statute, or how such conduct may differ from conduct covered in other current statutes that prohibit threats,[45] stalking,[46] or involuntary confinement.[47] Resolving this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute clearly states that third degree includes the RCC offenses of stalking, menacing, criminal threats, or criminal restraint. The revised stalking (RCC § 22E-1801), electronic stalking (RCC § 22E-1802), menacing (RCC § 22E-1203) and criminal threats (RCC § 22E-1204) statutes cover threats of "physical pain or injury" and "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening" in the current statute, and the revised criminal restraint statute (RCC § 22E-1404) covers conduct involving unreasonable confinement or involuntary seclusion in the current statute. This change improves the clarity of the revised offense and creates consistency between the revised offense and other closely related offenses pertaining to menacing, criminal threats, and restraint.

Second, the revised criminal abuse of a vulnerable adult or elderly person statute prohibits behavior that satisfies sixth degree assault as defined in RCC § 22E-1202(f) and offensive physical contact as defined in RCC § 22E-1205. The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means."[48] The DCCA has interpreted "physical pain or injury…or other corporal means" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[49] but did not provide a definition of the terms. The revised abuse of a

[42] D.C. Code § 22-933(1).
[43] D.C. Code § 22-933(2).
[44] D.C. Code § 22-933(3).
[45] D.C. Code §§ 22-404(a)(1); 22-1810.
[46] D.C. Code § 22-3133.
[47] D.C. Code § 22-2001.
[48] D.C. Code § 22-933(1).
[49] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the

vulnerable adult or elderly person statute establishes that, whether or not it would constitute a physical injury by corporal means, causing "bodily injury," as required sixth degree assault, or offensive physical contact is within the scope of the offense. This change clarifies and potentially fills a gap in the current statute.

Third, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state of recklessness as to the fact that the complainant is a vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a vulnerable adult or elderly person.[50] There is no DCCA case law discussing if there is a culpable mental state for this element. However, the current enhancement for certain crimes committed against senior citizens provides a defense that the accused did not know or reasonably believed that the victim was not 65 years or older.[51] To resolve these ambiguities, the revised criminal abuse of a vulnerable adult or elderly person statute consistently requires a "recklessly" culpable mental state as to the fact that the complainant is a vulnerable adult or elderly person. The "recklessly" culpable mental state matches the culpable mental state for the fact that the complaining witness is under the age of 18 years in the revised criminal abuse of a minor and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502), and the "protected person" gradations in the revised assault statute (RCC § 22E-1202). A "recklessly" culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[52] This change improves the consistency and proportionality of the revised offense.

Fourth, the effective consent defense in RCC § 22E-409 limits liability under the revised criminal abuse of a vulnerable adult or elderly person statute. District statutes do not codify general defenses to criminal conduct. The current abuse of a vulnerable adult or elderly person statute does not address whether consent of the complainant is a defense to liability, although D.C. Code § 22-935 exempts from liability anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance

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complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[50] The current neglect of a vulnerable adult or elderly person statute requires a culpable mental state of "intentionally or knowingly." D.C. Code § 22-933. Surprisingly, "vulnerable adult" or "elderly person" are not codified elements of the current criminal abuse of a vulnerable adult or elderly person offense in D.C. Code § 22-933, nor is proof that the complainant is a "vulnerable adult" or "elderly person" codified as an element in the offense's penalty provisions. D.C. Code §§ 22-933, 22-936.

[51] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Abuse of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[52] "Reckless" is defined in RCC § 22E-206 and means that the accused must disregard a substantial risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant, per the current enhancement for crimes against senior citizens, would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial risk that the complainant was 65 years of age or older. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

with a religious method of healing, in lieu of medical treatment."[53] Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[54] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[55] It is unclear whether this District case law for assault would apply to abuse of a vulnerable adult or elderly person. To resolve this ambiguity, the RCC effective consent defense clarifies when the complainant's "effective consent" or a person's belief that the complainant gave "effective consent" is a defense to RCC offenses against persons such as assault or criminal abuse of a vulnerable adult or elderly person. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fifth, the revised criminal abuse of a vulnerable adult or elderly person statute incorporates the standard definitions for the terms "serious bodily injury" and "bodily injury" in RCC § 22E-701. The District's current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "physical pain or injury" or "serious bodily injury" results.[56] The current statute, however, does not define these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[57] but did not provide a definition of either term. There is no DCCA case law interpreting "serious bodily injury" in the current abuse of a vulnerable adult or elderly person statute.[58] Resolving this ambiguity, the revised

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[53] D.C. Code § 22-935.

[54] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

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

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

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

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

criminal abuse of a vulnerable adult or elderly person statute codifies and uses standard definitions of "serious bodily injury" and "bodily injury" per RCC § 22E-701. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute[59] and would appear to encompass "permanent bodily harm" in the current abuse of a vulnerable adult or elderly person statute. It is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. The revised definition of "bodily injury" in RCC § 22E-701 encompasses the limited DCCA case law interpreting "bodily injury" for the current abuse of a vulnerable adult or elderly person statute, as well as the alternative basis for liability in the current statute, that the conduct cause "physical pain."[60] This change improves the clarity, consistency, and proportionality of the revised abuse of a vulnerable adult or elderly person statute.

Sixth, the revised criminal abuse of a vulnerable adult or elderly person statute incorporates the standardized definition of "serious mental injury" in RCC § 22E-701. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "severe mental distress" resulted,[61] but the statute does not define the term and there is no DCCA case law. Instead of this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The revised criminal abuse of a minor and criminal neglect of a minor statutes also use the term "serious mental injury," which is modified from the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision.[62] This change improves the clarity and consistency of the revised offense.

Seventh, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state as to the resulting physical or mental injury. The current abuse of a vulnerable adult or elderly person statute requires culpable mental states of

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or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

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

[60] D.C. Code § 22-933(1) ("[i]nflicts or threatens to inflict physical pain or injury . . . by corporal means.").

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

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

"intentionally or knowingly" as to the prohibited conduct.[63] However, the current offense's penalty gradations do not specify culpable mental states for whether the prohibited conduct "causes" "serious bodily injury or severe mental distress"[64] or "permanent bodily harm or death."[65] The DCCA has not determined whether there is a culpable mental state for the resulting physical or mental harm in the abuse of a vulnerable adult or elderly person statute. Unlike the current statute, the revised statute clarifies that a culpable mental state applies to the resulting physical or mental harm—either "recklessly" or "purposely." This change improves the clarity, completeness, and proportionality of the revised statute.

Eighth, the revised criminal abuse of a vulnerable adult or elderly person statute does not recognize as a distinct basis of liability causing "permanent bodily harm." The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "permanent bodily harm" resulted,[66] providing a maximum term of imprisonment of 20 years for such conduct. The current statute does not define "permanent bodily harm" and there is no comparable grade in the District's current assault statutes. However, the current aggravated assault statute does prohibit "serious bodily injury"[67] and DCCA case law includes permanent bodily injury in the definition of "serious bodily injury."[68] To resolve this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute grades, in part, on whether "serious bodily injury" occurred, as that term is defined in RCC § 22E-701. 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.

The revised criminal neglect of a vulnerable adult or elderly person statute clarifies the scope of the current defense for religious prayer in lieu of medical treatment for vulnerable adults or elderly persons. Current D.C. Code § 22-935 exempts from liability for abuse or neglect of a vulnerable adult or elderly person anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[69] However, for the spiritual healing exemption to apply, a person must have the "express consent" of

[63] D.C. Code § 22-933.
[64] D.C. Code § 22-936(b).
[65] D.C. Code § 22-936(c).
[66] D.C. Code § 22-936(c).
[67] D.C. Code § 22-404.01.
[68] The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).
[69] D.C. Code § 22-935.

the vulnerable adult or elderly person or act "in accordance with the practice of the vulnerable adult or elderly person."[70] There is no DCCA case law interpreting this exception. The revised criminal neglect of a vulnerable adult or elderly person statute clarifies that "effective consent" by the complainant, or reasonable belief that the complainant gave "effective consent," to the administration of religious prayer alone, is required. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. The general provision in RCC § 22E-XX establishes the burdens of proof and production for all defenses in the RCC. This change improves the clarity and completeness of the revised statute.

[70] D.C. Code § 22-935.

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

Explanatory Note. *The RCC criminal neglect of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is a risk of harm to a vulnerable adult or elderly person's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a vulnerable adult or elderly person, the RCC neglect of a vulnerable adult or elderly person offense prohibits failing to provide a vulnerable adult or elderly person with necessary items or care. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised criminal abuse of a vulnerable adult or elderly person offense, the revised criminal neglect of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person;*[1] *neglect of a vulnerable adult or elderly person;*[2] *and the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person.*[3]

There are three degrees of criminal neglect of a vulnerable adult or elderly person. Each gradation requires that the accused must be "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is a vulnerable adult or elderly person"[4] (paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree). RCC § 22E-701 defines the terms "vulnerable adult" and "elderly person." Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to both the fact that the complainant has the specified responsibility to the complainant and the fact that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-701. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant and that the complainant is a "vulnerable adult" or "elderly person." "As to the fact that" indicates that the accused must actually have the specified responsibility to the complainant and the complainant must actually be a "vulnerable adult" or "elderly person."

Paragraph (a)(2) specifies the prohibited conduct for first degree criminal neglect of a vulnerable adult or elderly person, the highest grade of the revised criminal neglect of a vulnerable adult or elderly person offense—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "serious bodily injury" or death. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (a)(1) applies to this requirement. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that he or she created, or failed to mitigate or remedy, a substantial risk that the complainant would experience "serious bodily injury" or death. "Serious bodily injury" is a term

[1] D.C. Code §§ 22-933, 22-936.
[2] D.C. Code §§ 22-934, 22-936.
[3] D.C. Code § 22-935.
[4] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, or caretaker, depending on the facts of a case.

defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness.

Subparagraph (b)(2)(A) specifies one type of prohibited conduct for second degree criminal neglect of a vulnerable adult or elderly person—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Subparagraph (b)(2)(B) specifies the second type of prohibited conduct for second degree criminal neglect of a vulnerable adult or elderly person—creating, or failing to mitigate or remedy, a substantial risk that a child would experience "serious mental injury." "Serious mental injury" is a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to both creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury in subparagraph (b)(2)(A) or "serious mental injury" in subparagraph (b)(2)(B). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury" or "serious mental injury."

Paragraph (c)(2) specifies the prohibited conduct for third degree criminal neglect of a vulnerable adult or elderly person—failing to make a reasonable effort to provide food, clothing, or other items or care for the complainant. Paragraph (c)(2) requires that the items or care be "essential to the physical health, mental health, or safety of the complainant." Per the rules of interpretation in RCC § 22E-207, the culpable mental state of "reckless" in paragraph (c)(1) applies to all the elements in paragraph (c)(2). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care and that the items or care are "essential to the physical health, mental health, or safety of the complainant."

Subsection (e) codifies a defense to the criminal neglect of a vulnerable adult or elderly person offense. The general provision in RCC § 22E-XX establishes the burdens of proof and production for all defenses in the RCC. Subsection (d) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to paragraphs (d)(1) and (d)(2), and there is no culpable mental state requirement for any of the elements in these paragraphs. Paragraph (d)(1) requires that the actor have the complainant's effective consent to the conduct charged to constitute the offense, or the actor reasonably believes that the actor has the complainant's effective consent to the conduct charged to constitute the offense. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of

effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. Paragraph (d)(2) requires that the conduct charged to constitute the offense is the administration of, or allowing the administration of, religious prayer alone, in lieu of medical treatment which the actor otherwise had a responsibility under civil law, to provide or allow.

Subsection (e) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised criminal neglect of a vulnerable adult or elderly person statute changes current District law in four main ways.*

First, the revised criminal neglect of a vulnerable adult or elderly person statute is limited to conduct that does not actually harm a person. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[5] The penalties for the offense, however, partially grade the offense on actual harm to the vulnerable adult or elderly person,[6] and partially on a failure to discharge the required duty.[7] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute no longer grades the offense based on whether actual harm to the vulnerable adult or elderly person resulted. The revised statute is instead limited to creating, or failing to mitigate or remedy, a risk of harm to an elderly person or vulnerable adult, or a failure to provide necessary items or care. However, if physical or mental injury or death results, there still may be liability under the revised criminal abuse of a vulnerable adult or elderly person statute (RCC § 22E-1504), the revised assault statute (RCC § 22E-1202), or the revised homicide offenses[8] (RCC §§ 22E-1101, 22E-1102, 22E-1103). This change reduces

[5] D.C. Code § 22-934.

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

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

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

The revised criminal abuse of a vulnerable adult or elderly person statute no longer specifically prohibits "unreasonable confinement or involuntary seclusion," although this conduct appears to be covered under the revised criminal restraint offense (RCC § 22E-1404). However, the RCC has a revised negligent homicide offense (RCC § 22E-1103) that may cover this conduct, and, depending on the facts of the case, the revised manslaughter offense (RCC § 22E-1102) may cover it.

unnecessary overlap between offenses and improves the consistency and proportionality of the revised offense.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute applies a recklessness requirement rather than a reasonable person standard to whether items or care are essential for the well-being of the vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute requires "that a reasonable person would deem the items or care essential for the well-being of the vulnerable adult or elderly person."[9] It is unclear under the current statute what culpable mental state, if any, applies to the fact that the items or care are essential, although the statute's "reasonable person" standard may suggest a culpable mental state of negligence for this element. DCCA case law has not specifically addressed this culpable mental state, but has generally found that "wanton, reckless or willful indifference," two other culpable mental states specified in the current criminal neglect of a vulnerable adult or elderly person statute, requires something similar to recklessness.[10] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute eliminates the current statute's reasonable person requirement and applies a "recklessly" culpable mental state as defined in RCC § 22E-206. As applied in the revised statute, "recklessly" requires that a person is aware of a substantial risk that the items or care are "essential for the health or safety of a vulnerable adult or elderly person." This change improves the clarity and proportionality of the revised offense.[11]

Third, the effective consent defense in RCC § 22E-409 limits liability under the revised criminal neglect of a vulnerable adult or elderly person statute. District statutes do not codify general defenses to criminal conduct. The current neglect of a vulnerable adult or elderly person statute does not address whether consent of the complainant is a defense to liability, although current D.C. Code § 22-935 exempts from liability anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[12] Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[13] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to

[9] D.C. Code § 22-934.

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

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

[12] D.C. Code § 22-935.

[13] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

rule on the effect of consent in other circumstances.[14] It is unclear whether this District case law for assault would apply to neglect of a vulnerable adult or elderly person. In contrast, the RCC effective consent defense in RCC § 22E-409 clarifies when the complainant's "effective consent" or a person's belief that the complainant gave "effective consent" is a defense to RCC offenses against persons such as assault or criminal neglect of a vulnerable adult or elderly person. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute no longer requires as a distinct element that the defendant fail to discharge a duty to provide necessary care and services. The current neglect of a vulnerable adult or elderly person statute requires that the defendant "fail[] to discharge a duty to provide care and services necessary to maintain the physical and mental health" of a vulnerable adult or elderly person. There is no case law regarding this phrase. Moreover, the D.C. Code does not specify any general defense for assault-type conduct committed with intent to fulfill a person's duty of care to another person, and there is no case law concerning such a general defense.[15] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute requires as an element of the offense only that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant, is reckless as to having this responsibility, and commit otherwise criminal conduct. The RCC general justification defense for parents, guardians, and others per RCC § 22E-408 limits liability when an otherwise criminal act is justifiably committed because of the actor's duty of care to the complainant. Under this defense, once an actor's minimal burden of production is satisfied, the government must prove that the actor's conduct was a violation of his or her duty of care. Specifically, in a charge of criminal neglect of a vulnerable adult or elderly person, where an actor claims his or her conduct is in accord with his duty of care under RCC § 22E-408, the government then would need to prove that his or her failure to provide essential items or care was a violation of the actor's duty of care. Consequently, the effect of removing as a distinct element of the revised statute that the defendant fail to discharge a duty to provide necessary care and services is simply that the burden of alleging that such a failure was not a violation of the actor's duty of care falls upon the actor. This change improves the clarity and consistency of the revised statute.

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

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

[15] The DCCA has recognized a "lesser-evils" or "necessity" type of justification defense, however, that may apply in situations where an actor commits an assault-type act on a complainant as part of his or her duty of care to the complainant (e.g., a caretaker who restrains his ward to keep the ward from running into traffic). *See Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) ("In essence, the necessity defense exonerates persons who commit a crime under the "pressure of circumstances," if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law.").

First, the revised criminal neglect of a vulnerable adult or elderly person statute requires a culpable mental state of recklessness as to the fact that the complainant is a vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute is silent as to what culpable mental state, if any, applies to the fact that the complainant is a vulnerable adult or elderly person. There is no DCCA case law discussing the matter. However, the current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to a vulnerable adult or elderly person, which may imply awareness of the complainant's status which is the basis of the "duty." In a related statutory provision, the current enhancement for certain crimes committed against senior citizens provides a defense that the accused did not know or reasonably believed that the victim was not 65 years or older.[16] To resolve these ambiguities, the revised criminal neglect of a vulnerable adult or elderly person statute consistently requires a "reckless" culpable mental state as to the fact that the complainant is an elderly person or a vulnerable adult. The reckless culpable mental state requirement matches the culpable mental state required as to the fact that the complainant is under the age 18 years in the revised criminal abuse and criminal neglect of a minor statutes (RCC § 22E-1501 and § 22E-1502) and the "protected person" gradations in the revised assault statute (RCC § 22E-1202). A "reckless" culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[17] This change improves the consistency and proportionality of the revised offense.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute requires a "substantial risk" of the specified physical or mental harm for liability. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[18] The penalties for the offense partially grade on a failure to discharge the

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

[17] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 223601(c). "Reckless" is defined in RCC § 22E-206 and means that the accused must disregard a substantial risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant would not satisfy the culpable mental states of recklessness or knowledge as to the age of the complaining witness. The accused would not consciously disregard a substantial risk (recklessness) or be practically certain (knowledge) that the complainant was 65 years of age or older. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.
Criminal neglect of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[18] D.C. Code § 22-934.

required duty.[19] In such a situation, it appears that an actual risk of harm may not be necessary,[20] although failure to mitigate a risk has been the basis of liability in at least one case.[21] The revised criminal neglect of a vulnerable adult or elderly person statute clarifies that the required risk must be "substantial." The "substantial" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22E-206, also requires that a risk be "substantial" and the accused's conscious disregard of the risk be "clearly blameworthy." However, given that neglect offenses will often depend on the nature of the risk to the vulnerable adult or elderly person, the revised statute specifies the "substantial" requirement to clarify the statute, particularly where the defendant is alleged to act knowingly, intentionally, or purposely.[22] This change improves the clarity and consistency of the revised statute.

Third, the revised criminal neglect of a vulnerable adult or elderly person statute incorporates the standard definitions for the terms "serious bodily injury" and "significant bodily injury" in RCC § 22E-701. The District's current neglect of a vulnerable adult or elderly person statute is graded, in part, on whether "serious bodily injury," "permanent bodily harm," or a lesser, unspecified, physical harm results.[23] The current statute, however, does not define these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[24]

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

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

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

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

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

[24] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the

but did not provide a general definition. There is no DCCA case law interpreting these terms for the current neglect of a vulnerable adult or elderly person statute. To resolve these ambiguities, the revised criminal neglect of a vulnerable adult or elderly person statute codifies and uses standard definitions of "serious bodily injury" and "significant bodily injury" per RCC § 22E-701. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute.[25] The revised definition of "serious bodily injury" would appear to encompass "permanent bodily harm" in the current neglect of a vulnerable adult or elderly person statute, but it is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute incorporates the standardized definition of "serious mental injury" in RCC § 22E-701. The current neglect of a vulnerable adult or elderly person statute grades, in part, based on whether "severe mental distress" resulted,[26] but the statute does not define the term. There is no DCCA case law interpreting "serious mental distress." RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The revised criminal abuse of a minor and criminal neglect of a minor statutes also use the term "serious mental injury," which is modified from the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision.[27] This change improves the clarity and consistency of the revised offenses.

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

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complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

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

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

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

First, the revised criminal neglect of a vulnerable adult or elderly person statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial risk is sufficient for liability. The current neglect of a vulnerable adult or elderly person statute criminalizes conduct that "fails to discharge a duty" to provide necessary care and services.[28] The revised statute clarifies that not only creating risks to a vulnerable adult or elderly person, but also failing to mitigate or remedy a substantial risk, is sufficient for liability. Under the general provision in RCC § 22E-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[29] However, although technically superfluous, given that neglect of a vulnerable adult or elderly person offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. The change clarifies the revised statute.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute clarifies the scope of the current defense for religious prayer in lieu of medical treatment for vulnerable adults or elderly persons. Current D.C. Code § 22-935 exempts from liability for abuse or neglect of a vulnerable adult or elderly person anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[30] However, for the spiritual healing exemption to apply, a person must have the "express consent" of the vulnerable adult or elderly person or act "in accordance with the practice of the vulnerable adult or elderly person."[31] There is no DCCA case law interpreting this exception. The revised criminal neglect of a vulnerable adult or elderly person statute clarifies that "effective consent" by the complainant, or reasonable belief that the complainant gave "effective consent," to the administration of religious prayer alone, is required. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. The general provision in RCC § 22E-XX establishes the burdens of proof and production for all defenses in the RCC. This change improves the clarity and completeness of the revised statute.

Third, the revised criminal neglect of a vulnerable adult or elderly person statute requires that the defendant have a "responsibility under civil law for the health, welfare, or supervision" of the vulnerable adult or elderly person and applies a recklessly culpable mental state to this element. The current neglect of a vulnerable adult or elderly person

[28] D.C. Code § 22-934.

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

[30] D.C. Code § 22-935.

[31] D.C. Code § 22-935.

statute requires that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. The extent of such care and services, however, is unclear under the statute, and "duty to provide care and services" is not statutorily defined. In addition, it is unclear as to whether any of these culpable mental states apply to the fact that the defendant has a duty to provide such care and services. There is no DCCA case law on point, but the DCCA has generally found that "wanton, reckless, or willful indifference" requires a mental state similar to recklessness.[32] To resolve these ambiguities, the revised statute requires that the defendant is reckless as to the fact he or she has a "responsibility under civil law for the health, welfare, or supervision" of the vulnerable adult or elderly person. While generally corresponding to the language of the current statute, including duties pertaining to "supervision" may slightly expand liability for failure to provide services or care. The RCC also applies a culpable mental state of recklessness to the fact that the complainant has a responsibility under civil law for the health, welfare, or supervision of the complainant because this matches the culpable mental state as to the fact that the complainant is a vulnerable adult or elderly person. Logically, the mental state as to the duty of care should match the mental state as to the attribute that gives rise to the duty. This change improves the clarity and completeness of the revised statute.

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute codifies a "reckless" culpable mental state, defined in RCC § 22E-206, with respect to creating or failing to mitigate or remedy a risk, or to provide essential care or items. The current neglect of a vulnerable adult or elderly person statute prohibits failing to discharge a duty to provide necessary care and services "willfully or through wanton, reckless or willful indifference,"[33] but does not define any of these terms. The DCCA in *Tarpeh v. United States* discussed the meaning of "reckless" under the statute and said that it is a "state of mind that falls somewhere between simple negligence . . . and an intentional or willful decision to cause harm to a person."[34] The court stated that to prove "reckless indifference" in the neglect of a vulnerable adult or elderly person statute, "the evidence, as found by the trier of fact, must show not only that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of risks involved in light of known alternative courses of action."[35] In *Tarpeh,* the DCCA explicitly referred to the Model Penal Code definition of "reckless," which requires the defendant to "consciously disregard[] a substantial and *unjustified* risk that the material element exists or will result from his conduct."[36] The revised criminal neglect of a vulnerable adult or elderly person applies a "reckless" culpable mental state

[32] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).
[33] D.C. Code § 22-934.
[34] *Tarpeh*, 62 A.2d at 1270.
[35] *Tarpeh*, 62 A.2d at 1270.
[36] *Tarpeh*, 62 A.2d at 1270 (emphasis in original).

as defined in RCC § 22E-206, which is similar to the Model Penal Code.[37] This change improves the clarity of the revised statute.

Fifth, the revised criminal neglect of a vulnerable adult or elderly person statute requires a "recklessly" culpable mental state as to the risk of physical or mental injury. The current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. However, the statute is unclear as to whether any of these culpable mental states applies to the fact that, per the penalty gradations, the neglect causes "serious bodily injury or severe mental distress"[38] or "permanent bodily harm or death."[39] DCCA case law has not specifically addressed whether a culpable mental state applies to the penalty gradations, but has found that "reckless indifference" with respect to the failure to provide care and services in the current offense requires something similar to recklessness.[40] The revised statute provides that the standard culpable mental state of "recklessly" applies to the resulting risk of physical or mental harm. This change improves the clarity and proportionality of the revised statute

[37] See Commentary to RCC § 22E-206.
[38] D.C. Code § 22-936(b).
[39] D.C. Code § 22-936(c).
[40] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

RCC § 22E-1401. Kidnapping.

Explanatory Note. *This subsection establishes the kidnapping offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly interfering with another person's freedom of movement, and with intent: to hold that person for ransom; to hold that person as a hostage or shield; to facilitate commission of any felony or flight thereafter; to inflict bodily injury or commit a sexual assault; to cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense; or to permanently deprive a parent who is responsible for the general care and supervision of the complainant, or a court appointed guardian, of custody of the complainant. Along with criminal restraint statute,[1] the revised kidnapping statute replaces the kidnapping[2] statute in the current D.C. Code. The statute also includes an aggravated form of the offense, which requires that the accused commits kidnapping with recklessness as to the fact that the complainant is a protected person; with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official; or by knowingly displaying or using a dangerous weapon or imitation dangerous weapon.*

Subsection (a) specifies the elements of aggravated kidnapping. Paragraph (a)(1) specifies that aggravated kidnapping requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving another person can include either moving a person against his or her will, such as by tying up and carrying away a person, or by causing the person to move by means of a threat or deception. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining or moving a person need not involve force, threats, or other forms of coercion.

Paragraph (a)(1) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[3] confinement or movement is insufficient. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial.

Paragraph (a)(2) specifies two means of committing aggravated kidnapping. Subparagraph (a)(2)(A) requires that the actor is, in fact, over the age of 18, and confines or moves a person, with recklessness as to the fact that the complainant is under the age of 12 and that a person with legal authority over the complainant would not give effective consent to the movement or confinement, regardless of whether the complainant does so.[4] "In fact" a defined term specifies that there is no culpable mental

[1] RCC § 22E-1404.

[2] D.C. Code § 22-2001.

[3] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.

[4] For example, a person can commit kidnapping by carrying away a child without the parent's consent, even if the child wants to be carried away.

state required as to the actor's age. "Person with legal authority over the complainant" is a defined under RCC § 22E-701.[5] This subparagraph requires that the actor was reckless as to the fact that the complainant was under the age of 12, and that a person with legal authority over the complainant would not give effective consent to the confinement or movement. This element can be satisfied if the person with legal authority over the complainant is unaware of the confinement or movement, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[6] The subparagraph specifies that a "reckless" culpable mental state defined in RCC § 22E-206, which requires here that the accused consciously disregarded a substantial risk that the complainant was under the age of 12, and that a person with legal authority would not have consented to the interference.[7]

Subparagraph (a)(2)(B) requires that the actor move or confine the complainant without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to confine or move the complainant.

Subparagraph (a)(2)(B) also requires that the actor satisfies at least one of the elements in (a)(2)(B)(i)-(iii). Sub-subparagraph (a)(2)(B)(i) requires that the actor was reckless as to the complainant being a protected person. The term "protected person" is defined under RCC § 22E-701, which includes a person who is "under 18 years of age, when, in fact the actor is 18 years of age or older and at least 4 years older than the other person," "65 years or older, when, in fact, the actor is under 65 years of age," "a vulnerable adult," "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," or "a District official." Under sub-subparagraph (a)(2)(B)(i), the actor must have been reckless as to the complainant being a protected person, a culpable mental state defined in RCC § 22E-206, meaning the accused must consciously disregard a substantial risk that the complainant is a "protected person," and that disregard of that risk is clearly blameworthy.

Sub-subparagraph (a)(2)(B)(ii) requires that the actor has the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public

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[5] "Person with legal authority over the complainant" means:

(A) When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person;

(B) When the complainant is an incapacitated individual, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian.

[6] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[7] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

safety employee, or public official. This requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[8] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[9] "Law enforcement officer," "public safety employee," and "public official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" 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. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Sub-subparagraph (a)(2)(B)(iii) requires that the accused commits kidnapping by knowingly displaying or using a dangerous weapon or imitation weapon. The phrase "by displaying or using a dangerous weapon or imitation dangerous weapon" should be broadly construed to include kidnappings in which the accused only momentarily displays such a weapon, or slightly touches the complainant with such a weapon.[10] The term "use" is intended to include making physical contact with the weapon, and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[11] The terms "dangerous weapon" or "imitation weapon," are defined in RCC § 22E-701. Sub-subparagraph (a)(2)(B)(iii) specifies that a "knowing" culpable mental state applies to this element, which requires that the actor was practically certain that he or she would display or use a dangerous weapon or imitation weapon. However, the sub-subparagraph also uses the term "in fact,"[12] to specify that no culpable mental state required as to whether the implement used or displayed was a dangerous weapon or imitation dangerous weapon.

Paragraph (a)(3) specifies that the accused must confine or move another person "with intent to" accomplish one of the goals listed in subparagraphs (a)(3)(A)-(G). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause one of the goals listed in subparagraphs (a)(3)(A)-(G). 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 one

[8] For example, a defendant who kidnaps an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing kidnapping with the purpose of harming the decedent due to his status as a law enforcement officer.

[9] For example, confining or moving a person without consent may constitute harm, even if no bodily injury occurs, because it is an interference with the person's freedom of movement.

[10] For example, assuming the other elements of the offense are proven, rearranging one's coat to provide a momentary glimpse of part of a knife, or holding a sharp object to someone's back without actually causing injury, may be sufficient for liability under paragraph (a)(3).

[11] For further detail on what conduct constitutes "using" a dangerous weapon, see Commentary to menacing, RCC § 22E-1203.

[12] RCC § 22E-207.

of the goals actually occurred, just that the defendant believed to a practical certainty that one of the goals would occur.[13]

Subparagraph (a)(3)(A) specifies that kidnapping includes acting "with intent to" hold the complainant for ransom or reward. Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant.

Subparagraph (a)(3)(B) specifies that kidnapping includes acting "with intent to" use the complainant as a shield or hostage. Holding a person as a shield or for hostage requires using the person's body as defense against potential attack, or to demand fulfillment of any condition in exchange for the person's release.

Subparagraph (a)(3)(C) specifies that kidnapping includes acting "with intent to" facilitate the commission of a felony or the flight thereafter. The confinement or movement of the person must aid the commission or flight from the felony.[14] Many offenses, such as robbery or sexual assaults, often involve confining or moving a person with intent to facilitate that offense. Although confinement or movement in the course of another offense may satisfy the elements of kidnapping per subparagraph (a)(3)(C), liability in these cases is limited by subsection (e), discussed below.

Subparagraph (a)(3)(D) specifies that kidnapping includes acting "with intent to" inflict bodily injury. "Bodily injury" is a defined term under RCC § 22E-701.

Subparagraph (a)(3)(E) specifies that kidnapping includes acting "with intent to" commit a sexual offense, as defined under Chapter 13 of Title 22E, against the complainant.[15]

Subparagraph (a)(3)(F) specifies that kidnapping includes acting "with intent to" cause any person to believe that the complainant will not be released without suffering significant bodily injury[16] or a sex offense as defined in Chapter 13 of Title 22E. This element may be satisfied if any person believes the complainant will not be released at all, or will only be released after having suffered significant physical injury or being subjected to a sex offense. This element does not require that the actor actually intends to inflict significant bodily injury or to commit a sex offense.

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[13] For example, an actor who confines another with intent to commit a sexual offense against that person may be convicted of kidnapping even if the actor does not actually commit the sexual offense.

[14] For example, a bank robber who seizes and drives off with a security guard to prevent the guard from calling for help may be convicted of kidnapping.

[15] There is some overlap between subsection (b)(4)(C) and subsection (b)(4)(E). For example, a defendant who interferes with another person's freedom of movement in order to commit a felony sexual offense could be prosecuted for kidnapping under both subsections. However, subsection (b)(4)(E) is both broader and narrower than subsection (b)(4)(C). It is broader in that intent to facilitate misdemeanor assault or sexual assaults would not suffice under (a)(3)(C). It is narrower however in that it requires intent to commit a sexual offense, but other means of facilitating misdemeanor assaults or sexual assaults would not be covered.

[16] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

Subparagraph (a)(3)(G) specifies that kidnapping includes acting "with intent to" permanently deprive a deprive a person with legal authority over the complainant of custody of the complainant.[17] The term "person with legal authority over the complainant" is defined in RCC § 22E-701. Intent to temporarily interfere with lawful custody is insufficient.

Subsection (b) defines the elements of kidnapping. Paragraph (b)(1) specifies that kidnapping requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving a person requires causing that person to move to another location when that person would not have done so absent the actor's intervention. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining or moving a person per this subsection need not involve force, threats, or other forms of coercion.[18]

Paragraph (b)(1) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[19] confinement or movement is insufficient. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial. The element under (b)(1) is identical to the element under paragraph (a)(1).

Paragraph (b)(2) specifies three means of committing kidnapping. Subparagraph (b)(2)(A) requires that the actor move or confine the complainant without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to confine or move the complainant.

Subparagraph (b)(2)(B) requires that the actor was reckless as to the complainant being an incapacitated individual, and that a person with legal authority over the complainant would not give effective consent to the confinement or movement,

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[17] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

[18] For example, a person who invites a guest to his home for dinner has "moved" and "confined" the guest, as the guest would not have gone to and remained at the person's home absent the dinner invitation. However, this would not constitute kidnapping, as the movement and confinement were consensual.

[19] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.

regardless of whether the complainant does so.[20] "Person with authority over the complainant" is a defined term in RCC § 22E-701 which means, in relevant part, "[w]hen the complainant is incapacitated, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian."[21] This element can be satisfied if the person with authority over the complainant is unaware of the interference, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[22] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused consciously disregarded a substantial risk that the complainant is incapacitated, and that a person with authority would not have consented to the interference, and that the actor's conduct was clearly blameworthy.[23]

Subparagraph (b)(3)(B) requires that the actor is 18 years or older, and acts with recklessness that the complainant is under the age of 16, and at least 4 years younger than the actor, and that a person with authority over the complainant would not give effective consent to the interference, regardless of whether the complainant does so.[24] "In fact" a defined term specifies that there is no culpable mental state required as to the actor's age. "Person with authority over the complainant" is a defined under RCC § 22E-701, which means in relevant part "[w]hen the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person."[25] This element can be satisfied if the person with authority over the complainant is unaware of the interference, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[26] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused disregarded a substantial risk that the complainant was under the age of 16, and 4 years younger than the actor, and that a person with authority would not have consented to the interference.[27]

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[20] For example, a person can commit kidnapping by leading away an incapacitated person, without his or her guardian's consent, even if the incapacitated person wants to be led away.

[21] RCC § 22E-701.

[22] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[23] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

[24] For example, a person can commit kidnapping by leading away a child without the parent's consent, even if the child wants to be led away, provided the actor is at least 18 years of age, and at least 4 years older than the complainant.

[25] RCC § 22E-701.

[26] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[27] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may

Paragraph (b)(3) specifies that the accused must confine or move another person "with intent to" accomplish one of the goals listed in subparagraphs (b)(3)(A)-(G). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause one of the goals listed in subparagraphs (b)(3)(A)-(G). 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 one of the goals actually occurred, just that the defendant believed to a practical certainty that one of the goals would occur.[28] The elements under sub-paragraphs (b)(3)(A)-(G) are identical to those under sub-paragraphs (a)(3)(A)-(G) as required for aggravated kidnapping.

Subsection (c) provides an exception to liability for aggravated kidnapping under subparagraph (a)(3)(G) or kidnapping under subparagraph (b)(3)(G) when the actor is either: a "close relative" of the complainant, who acts with intent[29] to assume full responsibility for the care and supervision of the complainant; or a person who reasonably believes he or she is acting at the direction of a close relative who acts with the intent that the close relative will assume full responsibility for the care and supervision of the complainant. In addition, Paragraph (c)(2) requires that the actor did not cause bodily injury or threaten to cause bodily injury to the complainant, or cause or threaten to cause the complainant to engage in a sexual act or sexual contact. The term "close relative" is defined in RCC §22E-701 to mean the complainant's parents, grandparents, siblings, children, cousins, aunts, or uncles. More distant relatives are not included within the definition, and cannot rely on this exception to liability.

Subsection (d) specifies relevant penalties for kidnapping and aggravated kidnapping.

Subsection (e) provides that a person may not be convicted of kidnapping or aggravated kidnapping and a separate offense if the confinement or movement was incidental to the commission of the other offense. Confinement or movement is incidental to another offense when the actor's primary purpose in confining or moving the other person was to commit the other offense, provided that the movement or confinement did not exceed what is normally associated with the other offense.[30] The

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take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

[28] For example, an actor who confines another with intent to commit a sexual offense against that person may be convicted of kidnapping even if the actor does not actually commit the sexual offense.

[29] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain he or she would assume full responsibility for the care and supervision of the complainant. 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 actor assumed full responsibility for the care and supervision of the complainant, only that he or she believed to a practical certainty that he or she would do so.

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.

[30] This provision is intended to re-instate D.C. Court of Appeals (DCCA) case law prior to *Parker v. United States*, 692 A.2d 913 (D.C. 1997). Prior to *Parker*, District courts employed a fact-based inquiry to determine whether convictions for kidnapping and other offenses that arise from a single act or course of conduct should merge. In *Parker*, the DCCA held that instead of a fact-based inquiry, courts should only

subsection specifies that, consistent with RCC § 22E-214, multiple convictions are barred only after the time for judgment for appeal has expired, or after the appeal from the judgment of conviction has been decided.

Subsection (f) cross-references definitions found elsewhere in the RCC.

Relation to Current District Law. *The revised kidnapping statute changes current District law in seven main ways.*

First, the revised kidnapping offense requires that the actor confines or moves another person with intent to hold the person for ransom, inflict bodily injury, or commit other particularly harmful or dangerous acts. The current kidnapping statute requires that the defendant hold a person "for ransom, reward, *or otherwise*[.]"[31] The D.C. Court of Appeals (DCCA) has interpreted the "or otherwise" language broadly and held that "[t]he motive behind the kidnapping is unimportant, so long as the act was done with the expectation of benefit to the transgressor."[32] By contrast, the RCC divides the current kidnapping offense into two primary offenses, with criminal constraint providing liability for confining or moving a person, while the revised kidnapping requires an added wrongful intent that makes the confinement or movement especially dangerous, harmful, or terrifying. Under the revised kidnapping statute, confining or moving another with intent to enact revenge or to seek companionship, or other purpose would not constitute kidnapping, unless the actor had with intent to achieve one of the goals listed in subparagraphs (a)(3)(A)-(G) or (b)(3)(A)-(G).[33] Codifying a new kidnapping offense based on the actor's intent improves the proportionality of the RCC by separately labeling and penalizing more harmful and dangerous forms confinement or movement.[34]

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use a *Blockburger* elements test to determine if convictions for kidnapping and separate offenses should merge. The restraint need not be necessarily associated with commission of the other offense. For example, a person who commits robbery by forcing a person to walk into an adjacent room to locate valuables would not be guilty of kidnapping because the movement was incidental to the robbery. However, a person who confines another for a full day in order to facilitate commission of a robbery may still be convicted of kidnapping because the duration of the confinement far exceeded what would normally be associated with a robbery. *See e.g., Sinclair v. United States*, 388 A.2d 1201 (D.C. 1978) (kidnapping was not incidental to robbery when the defendant held a person at gunpoint in a car and drove 25 blocks away); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978) (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[31] D.C. Code § 22-2001;

[32] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (quoting *United States v. Wolford*, 144 U.S.App.D.C. 1, 5-6, 444 F.2d 876, 880-81 (1971) (internal quotations omitted). For example, restraining another person in order to enact revenge, or out of a desire for companionship could sustain a kidnapping conviction under current law. *See Walker*, 617 A.2d at 527.

[33] For example, a person who confines another with intent to enact revenge may have intent to cause bodily injury, or intent to cause another person to believe that the complainant will not be released without suffering significant bodily injury.

[34] For example, a person who in the heat of the moment blocks a door to prevent his significant other to leave in the midst of an argument may be guilty of kidnapping under current law, and subject to the same penalty as a person who, after substantial planning, forcibly seizes a person, transports them to another location, and holds them for ransom on fear of death. Under the RCC, these two types of conduct would be penalized differently, as a criminal restraint and kidnapping.

Second, the RCC kidnapping offense provides an exclusion to liability under subsection (c) if the actor is a "close relative" of a complainant and had intent to assume full responsibility for the care and supervision of the complainant, or if the actor reasonably believed he or she was acting at the direction of a close relative, with intent that the close relative would assume full responsibility for care and supervision of the complainant. In addition, the exclusion requires that the actor did not cause or threaten to cause bodily injury to the complainant, or cause or threaten to cause the complainant to engage in a sexual act or sexual contact. The current kidnapping statute provides an exception to liability if the victim is a minor, and the defendant is the victim's parent. However, the current statute does not specify any further conditions for the exception, and it is unclear whether the current statute's parental exception applies in all kidnapping cases or is inapplicable if the parent uses force or threats to restrain the child. Case law has not resolved this ambiguity.[35] By contrast, the revised kidnapping statute's exception applies to close relatives[36] not just parents of the complainant. However, the exception requires that the actor had intent to assume full responsibility for the care and supervision of the complainant and that the actor did not cause bodily injury or threaten to cause bodily injury. The exception does not apply if the actor confined or moved another person without that person's consent, by causing or threatening to cause bodily injury.[37] The exception also does not apply if the actor had any intent other than to assume full responsibility for the care and supervision of the complainant.[38] The exception under subsection (c) recognizes the diminished culpability and risk to the complainant in cases where the actor is related to the complainant, and no force or threats were used.[39] However, the District's parental kidnapping statute[40] may still provide liability in such conduct by a relative. Changing the parental exception to include a broader array of relatives but limiting the defense to cases in which the actor did not cause bodily injury or threaten to cause bodily injury, improves the proportionality of the revised offenses.

Third, the RCC kidnapping statute bars sentencing for the kidnapping or aggravated kidnapping if the confinement or movement was incidental to the commission of any other offense.[41] Under current DCCA case law a defendant may be convicted of

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[35] In *Byrd v. United States*, 705 A.2d 629, 633 (D.C. 1997), the DCCA held that a person acting *in loco parentis* may not rely on the parental exception if "the defendant has engaged in separate felonious conduct during the kidnapping which exposes the child to a serious risk of death or bodily injury." However, the DCCA explicitly declined to decide "whether a biological parent may similarly forfeit the protection of the exception." *Id*. at 634 n. 7.

[36] As defined in RCC § 22E-701, which includes a parent, grandparent, sibling, child cousin, aunt, or uncle.

[37] For example, a non-custodial parent that uses force to restrain a child with intent to assume custody of that child may still be convicted of kidnapping under the revised statute.

[38] For example, a parent who holds his own child for ransom may still be convicted of kidnapping under the revised statute.

[39] *See*, *Byrd*, 705 A.2d at 633 (noting that the current kidnapping statute was with the intent that "a parent who kidnapped a child, however misguidedly, out of affection and disagreement over custody should not be prosecuted for that act alone").

[40] D.C. Code § 16-1022.

[41] By barring sentences for kidnapping, the revised statute allows for the possibility that convictions for kidnapping and the other offense may be entered for purposes of appeal. If the conviction for the other offense is reversed on appeal, the appellate court may order a lower court to sentence the defendant for the surviving kidnapping conviction.

both kidnapping and another offense that arise from the same act or course of conduct, as long as kidnapping and the other offense each include "at least one element which the other one does not."[42] By contrast, the RCC kidnapping statute reinstates the fact-based test applied by the DCCA prior to *Parker v. United States*,[43] which required courts to make a determination in each case as to whether the kidnapping was merely incidental to another offense.[44] Where, as is common,[45] the confinement or movement is incidental to another offense,[46] the authorized punishment for the other offense is sufficient. The RCC kidnapping sentencing provision improves the proportionality of the offense.

Fourth, the RCC aggravated kidnapping offense incorporates multiple penalty enhancements based on the status of the complainant, and the use of a dangerous weapon or imitation dangerous weapon, into a new kidnapping gradation, capping the effect of these enhancements. The D.C. Code currently provides multiple penalty enhancements for the commission of a kidnapping offense,[47] without specifying whether or how these enhancements may be combined or "stacked" when multiple enhancements are applicable to a single charge. DCCA case law has not addressed whether most combinations of these penalty enhancements can be combined, but the combination of at least some of these enhancements has been upheld.[48] By contrast, under the aggravated kidnapping offense, the penalty for kidnapping cannot be enhanced more than once based on any of the listed aggravating factors.[49] While multiple aggravating factors may be charged, proof of just one is sufficient for an aggravated kidnapping conviction and proof of others does not change the maximum statutory penalty for the crime.[50] Capping the effect of penalty enhancements improves the proportionality of the District law by preventing

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[42] *Malloy v. United States*, 797 A.2d 687, 691 (D.C. 2002)

[43] 692 A.2d 913 (D.C. 1997). In *Parker*, the DCCA applied a new test for how to determine, in the absence of legislative intent, whether charged offenses should merge. The *Parker* ruling applied the new "elements" test the DCCA first adopted in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (en banc) because there was no legislative intent discernible as to whether kidnapping should merge with murder.

[44] *E.g., West v. United States*, 599 A.2d 788, 793 (D.C. 1991); *Vines v. United States*, 540 A.2d 1107, 1109 (D.C. 1988); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978).

[45] Many offenses against persons commonly involve some type of significant, non-consensual confinement or movement. For example, victims of robberies, assaults, sexual assaults, and homicides are frequently subjected to threats or physical restraint that prevent them from fleeing. Under current District law, such offenses against persons typically would provide the basis for a kidnapping charge. In practice, however, kidnapping charges are not typically brought in cases with such offenses against persons.

[46] *E.g., Robinson*, 388 A.2d at 1212–13 (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[47] *See*, e.g., D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-4502 (enhanced penalty for committing kidnapping "while armed" or with a dangerous weapon "readily available").

[48] Convictions have been upheld applying multiple enhancements. *C.f. Forte v. United States*, 856 A.2d 567 (D.C. 2004) (holding that "double enhancement" under senior citizen penalty enhancement statute and repeat offender statute was proper).

[49] For instance, the status of the complainant and the defendant's use of a weapon.

[50] The existence of more than one aggravating factors may be a significant factor in sentencing, however.

aggravated forms of the offense from being penalized the same as much more serious offenses.[51]

Fifth, the RCC aggravated kidnapping offense provides new, heightened penalties based on recklessness as to the status of the complainant as a protected person, which includes on-duty law enforcement officers, on-duty public safety employee, on-duty transportation workers. The current kidnapping statute has no gradations and does not reference the status of the complainant, but multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[52] Currently, the D.C. Code does not enhance crimes based on the status of the complainant as an on-duty law enforcement officer, public safety employee, or on-duty transportation workers. By contrast, through its use of the term "protected person," the RCC aggravated kidnapping offense authorizes heightened penalties if the accused is reckless as to the fact the complainant is an on-duty law enforcement officer, on duty public safety employee, or on-duty transportation worker. Such penalties are consistent with enhancements for assault-type,[53] robbery[54], and homicide offenses,[55] and reflect some unique vulnerabilities of such complainants.[56] Requiring a reckless culpable mental state is also consistent with many current statutes that authorize enhanced penalties based on the complainant's status.[57] Including recklessness as to the complainant being an on-duty law enforcement officer, public safety employee, a vulnerable adult, or on-duty transportation worker as an element of aggravated kidnapping removes a possible gap in current law, and improves the consistency and proportionality of the revised code.

Sixth, the aggravated kidnapping offense provides new, heightened penalties based on the offense being committed for the purpose of harming the complainant

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[51] For example, under current law the unarmed kidnapping of a 65 year old taxi cab driver is subject to two penalty enhancements under D.C. Code § 22-3601, and § 22-3751, each of which permits a sentence 1 ½ times the maximum sentence otherwise allowed. Kidnapping ordinarily carries a maximum sentence of 30 years. If these enhancements are both applied, kidnapping a 65 year old taxi driver would be subject to a maximum 60 year sentence, the same as first degree murder. D.C. Code § 22-2104.

[52] D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-3611 (minors); D.C. Code § 22-3601 (persons over 65 years of age); D.C. Code §§ 22-3751; 22-3752 (taxicab drivers); and D.C. Code §§ 22-3751.01; 22-3752 (transit operators and Metrorail station managers); and D.C. Code § 22-3602 (members of a citizen patrol).

[53] RCC § 22E-1202

[54] RCC § 22E-1201.

[55] RCC §§ 22E-1101 - 1102.

[56] For example, on-duty law enforcement and public safety officers performing investigative duties and private vehicle-for-hire services drivers may often enter situations where they are isolated with persons in enclosed places and more susceptible to unwanted interference with their personal movements; vulnerable adults may be targeted due to their limited ability to evade interference with their freedom of movement.

[57] Under current District law it is a defense to the senior citizen complainant enhancement that "the accused knew or reasonably believed the complainant was not 65 years old or older at the time of the offense, or could not have known or determined the age of the complainant because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, under the current minor complainant enhancement, it is a defense that "the accused reasonably believed that the complainant was not a minor [person less than 18 years old] at the time of the offense." D.C. Code § 22-3611(b). The current assault of a law enforcement officer offense requires that the defendant was

because of his or her status as a law enforcement officer, public safety employee, or District official. The current kidnapping statute has no gradations and does not reference a purpose of harming the complainant because of the status of the complainant, although multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[58] By contrast, the aggravated kidnapping offense includes as an element committing kidnapping for the purpose of harming another person due to that person's status as a law enforcement officer, public safety employee, or District official. In practice, this change only affects law enforcement officers and public safety employees who are not District employees, as kidnapping of any District employee is subject to more severe statutory penalties under current District law.[59] Authorizing heightened penalties for committing kidnapping with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official removes a possible gap in current law, and improves the consistency and proportionality of penalties.

Seventh, the aggravated kidnapping offense incorporates penalty enhancements for "displaying or using" a dangerous weapon or imitation dangerous weapon. Current D.C. Code § 22-4502 provides enhanced penalties for committing kidnapping "while armed" or "having readily available" a dangerous weapon. District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[60] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[61] provided that the accused also constructively possessed the weapon.[62] There is no requirement under D.C. Code § 22-4502 that the accused actually used the weapon to commit kidnapping.[63] By contrast, the revised aggravated kidnapping statute requires

[58] D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee);

[59] D.C. Code § 22-851. Subsection (a)(2)(B)(ii) of the RCC aggravated kidnapping offense provides liability for kidnapping committed with the purpose of harming the complainant because of the complainant's status as a District official.

[60] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).

[61] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).

[62] *Cox v. United State*s, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

[63] *See*, *Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).

that the actor actually displayed or used[64] a dangerous weapon or imitation dangerous weapon. Merely possessing or having a weapon or imitation weapon readily available is insufficient to satisfy the element under sub-subparagraph (a)(2)(B)(iii) for aggravated kidnapping, although such conduct is criminalized elsewhere in current law and the RCC as a separate offense with a lower penalty.[65] Including use of a dangerous weapon or imitation dangerous weapon within the kidnapping statute as an element of the aggravated kidnapping improves the proportionality of punishment by matching more severe penalties to kidnapping in which the actor actually uses or displays a weapon.

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

First, the RCC kidnapping statute specifies that the actor must have "knowingly" confined or moved another person. The current kidnapping statute references as one means of committing the offense that the actor had "intent to hold or detain,"[66] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. In one case the DCCA stated that the current kidnapping statute requires that the actor had "specific intent to detain the complainant"[67] although it is unclear whether the DCCA in that case was referring only to the defendant's motive rather than their awareness of the objective elements of the offense. Current District practice appears to treat the kidnapping as a "general intent" offense.[68] The revised kidnapping statute specifies that a "knowingly" culpable mental state applies to the element of confining or moving the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[69] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the RCC kidnapping offense requires that the complainant did not effectively consent to the interference, other than in cases involving complainants under the age of 16, or who are incapacitated. The current kidnapping statute is silent as to whether and by what means the actor must confine or move the complainant. The current statute broadly states that a person commits kidnapping by "seizing, confining,

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[64] "Using" a weapon includes physically touching another person with the weapon. For example, if all other offense elements are satisfied, placing a knife or firearm to the complainant's back and telling them to walk to another location may constitute aggravated kidnapping.

[65] *See* D.C. Code § 22-4514(b); RCC § 22E-4102.

[66] *See* D.C. Code § 22-2001 ("…holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise…").

[67] *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for 'ransom or reward or otherwise' and that such detention was involuntary or by use of coercion; the detention may be for any purpose that the defendant believes might benefit him.").

[68] Redbook § 4.303 Kidnapping requires that the accused acted "voluntarily and on purpose, and not by mistake or accident," which accords with the jury instructions treatment of "general intent," not "specific intent" offenses. See Redbook § 3.100 Defendant's State of Mind.

[69] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual",[70] but none of these terms are statutorily defined. The DCCA has generally recognized that kidnapping requires an "involuntary seizure,"[71] which includes forcible seizures[72], or restraining a person by threat of force.[73] Current District practice also recognizes that a person can commit kidnapping by "seiz[ing], confin[ing], abduct[ing], or carr[ying] away [the complainant] against his/her will"[74] The revised kidnapping statute specifies that the confinement or movement must be without effective consent of the complainant, except in cases where the complainant is under the age of 16 or incapacitated. The revised language improves the clarity and proportionality of the offense.

Third, the RCC kidnapping statute requires that the actor must "substantially" confine or move the complainant. The current kidnapping statute does not explicitly include any substantiality element, and the DCCA has never discussed in a published opinion whether momentary or trivial confinement or movement suffices under the current kidnapping statute.[75] By contrast, the revised kidnapping statute requires that the actor must "substantially" confine or move the complainant. This excludes momentary or trivial confinement or movement. The precise effect on current law is somewhat unclear, as there is no case law on point. Requiring that the actor "substantially" confine or move the complainant improves the proportionality of the RCC by excluding cases that only involve trivial or momentary interference.[76]

Fourth, when the complainant is under the age of 16[77] or is incapacitated, the RCC kidnapping statute requires that the actor be reckless as to the fact that a person with

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[70] The current statute states that a person can commit kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[,]" D.C. Code § 22-2001.

[71] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (noting that "involuntary seizure is the very essence of the crime of kidnapping"); *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for "ransom or reward or otherwise" and that such detention was involuntary or by use of coercion[.]")

[72] *E.g.*, *Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (holding that evidence showing defendant grabbed victim by the hair and pushing her into a changing room was sufficient to prove that she had been seized and detained involuntarily).

[73] *E.g.*, *Battle v. United States*, 515 A.2d 1120 (D.C. 1986) (defendant committed kidnapping by displaying a gun, got into complainant's car, and drove the car away to a different location where the complainant would be held).

[74] D.C. Crim. Jur. Instr. § 4.303 Kidnapping.

[75] DCCA case law discussing whether kidnapping should merge with other offenses has suggested that relatively brief interference with another person's freedom of movement can constitute kidnapping. *E.g.*, *Sinclair v. United States*, 388 A.2d 101, 1204 (D.C. 1978) (noting that "victims of [rape or robbery] are detained against their will while the criminal is accomplishing his objective"). This case law implies that even the brief detention associated with an ordinary street robbery is sufficient for kidnapping. However, the DCCA has never specifically decided whether on its own, such a brief detention would satisfy the elements of kidnapping.

[76] If a defendant intended to interfere with a person's freedom of movement to a substantial degree but failed to do so and was only able to interfere in an insubstantial manner, attempt liability may still be applicable depending on the facts of the case.

[77] This form of kidnapping also requires that the actor is 18 years of age or older, and at least four years older than the complainant.

legal authority over the complainant would not effectively consent to the confinement or movement. The current kidnapping statute does not specify when confining or moving a person who is under the age of 16 or is incapacitated constitutes kidnapping, and there is no relevant DCCA case law on point.[78] It is unclear under current law whether, and under what circumstances, a person would be guilty of kidnapping for confining or moving a person without effective consent of a person with legal authority over the complainant. The revised statute resolves this ambiguity by requiring that the actor at least be reckless as to whether a person with legal authority over the complainant would effectively consent to the confinement or movement. This change improves the clarity, completeness, and perhaps the proportionality, of the revised statute.

Fifth, the RCC kidnapping statute requires that the actor confines or moves another person. The current kidnapping statute criminalizes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[.]"[79] With the exception of "enticing," discussed below, replacing these verbs with "confines" and "moves" does not appear to change current District law. The verbs "seizing," "confining," "kidnapping," "abducting," "concealing," and "carrying away" all constitute confining or moving another person. However, it is possible that "inveigling" and "decoying" a person includes conduct not covered by confining and moving another.[80] The terms "inveigling" and "decoying" are not defined in the current statute, and there is no DCCA case law defining these terms, and it is unclear how omitting these terms changes the scope of the offense. The RCC kidnapping statute resolves this ambiguity by requiring that the actor confine or move another person, without that person's effective consent.[81] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the kidnapping statute.[82]

Sixth, the RCC's kidnapping statute omits the word "entices." The current kidnapping statute states that a person commits kidnapping by "enticing . . . any individual . . . with intent to hold or detain such individual for ransom, reward, or otherwise[.]"[83] Under a plain language reading, the current kidnapping statute provides

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[78] *But see*, *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005) (holding that convictions for kidnapping and enticing a minor do not merge, noting that "the kidnapping statute requires . . . that the complainant was seized involuntarily through the defendant's use of mental or physical coercion; however, consent is never a valid defense to child enticement, and therefore the government is not required to show that the child was taken involuntarily."). This language suggests that kidnapping requires, even in the case of minors, that the defendant seize another person "involuntarily", and that kidnapping does not criminalize moving or confining a minor by means of enticement.

[79] D.C. Code § 22-2001.

[80] For example, the word "inveigles" may include causing a person to move by means of flattery. Under the RCC kidnapping offense, the mere use of flattery to confine or move someone would be insufficient.

[81] Or without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated individual, or under the age of 16.

[82] Since the RCC kidnapping statute requires intent to achieve one of the goals under paragraph (b)(3), it is unlikely, though possible, that a defendant could satisfy all the elements of kidnapping without using physical force, coercive threats, or deception. For example, it is unlikely a person would hold another person hostage or for ransom without using physical force, coercive threats, or deception.

[83] D.C. Code § 22-2001.

liability for merely enticing a person with intent to hold or detain that person for some personal benefit, even if the person was never actually held. However, the DCCA has never discussed in a published opinion whether such conduct would actually constitute kidnapping, and such an interpretation would run counter to case law requiring the kidnapping to be "involuntary" in nature.[84] The RCC's kidnapping statute resolves this ambiguity by providing that kidnapping requires actually confining or moving a person without that person's effective consent. A person cannot commit kidnapping merely by offering some reward, without actually confining or moving another person.[85] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the kidnapping statute.[86]

Seventh, the RCC kidnapping statute does not separately criminalize a conspiracy to commit kidnapping. The District's current kidnapping statute specifically provides that any person who conspires to commit kidnapping "shall be deemed to have violated the provisions of this section."[87] The current kidnapping statute's reference to a conspiracy, however, does not specify what culpable mental states, if any, apply to the conspiracy. By contrast, under the RCC kidnapping statute, conspiracy to commit kidnapping is subject to the RCC's general conspiracy statute. The RCC's general conspiracy statute details the culpable mental state and other requirements for proof of a conspiracy in a manner broadly applicable to all offenses. To the extent that the RCC's general conspiracy provision differs from the law on conspiracy as applied to the current kidnapping statute, relying on the RCC's general conspiracy provision may constitute a change in current law.[88] 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 RCC kidnapping statute does not contain special provisions regarding jurisdiction. The current kidnapping statute states that "[t]his section shall be held to have been violated if the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of

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[84] *C.f. Walker*, 617 A.2d at 527 (noting that "involuntary seizure is the very essence of the crime of kidnapping").

[85] However, a person can commit kidnapping by initially enticing another person with offer of some benefit as a means of luring the other person to move to or remain in a particular location as long as the actor confines or moves a person without effective consent.

[86] Since the RCC kidnapping statute requires intent to achieve one of the goals under subsection (b)(3), it is unlikely, though possible, that a defendant could satisfy all the elements of kidnapping without using force, threat of force, or deception. For example, it is unlikely a person would hold another person hostage or for ransom without using force, threat of force, or deception.

[87] D.C. Code § 22-2001. "If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01."

[88] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy.

Columbia."[89] This language apparently is intended to ensure that District courts have jurisdiction over kidnappings that do not occur entirely within the District of Columbia. However, it is unclear whether this language changes the scope of jurisdiction that a District court would otherwise have over kidnapping cases. The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[90] Consequently, although the DCCA has not applied this rule to kidnapping cases, it seems that District courts would have jurisdiction over any case in which a person was seized or held within the District, regardless of whether the person was initially seized outside of the District, or if the person were seized within the District and transported out of the District.[91] The RCC kidnapping statute eliminates jurisdiction language specific to kidnapping. In addition to general case law providing authority for offenses if "one of several constituent elements to the complete offense" occurs within the District,"[92] RCC § 22E-303 specifically provides jurisdiction for conspiracies formed within the District when the object of the conspiracy is engage in conduct outside of the District if the conduct would constitute a crime under D.C. Code.[93] District courts would therefore have jurisdiction over conspiracies to commit kidnapping outside of the District. Omitting special jurisdiction language from the kidnapping statute improves the law's clarity by omitting unnecessary language and making the offense more consistent with other offenses.

[89] D.C. Code § 22-2001.
[90] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).
[91] For example, a person who attempts to lure a person in another jurisdiction into the District for purposes of kidnapping that person may be guilty of attempted kidnapping, assuming that the defendant's conduct satisfied the dangerous proximity test.
[92] *Baish*, 460 A.2d at 40–41.
[93] RCC § 22E-303(c).

RCC § 22E-1402. Criminal Restraint.

Explanatory Note. *This section establishes the criminal restraint offense for the Revised Criminal Code. This offense criminalizes knowingly confining or moving a person without that person's effective consent. The offense is identical to the RCC's kidnapping offense, except that criminal restraint does not require intent to hold that person for ransom or another specified purpose [1] Along with the revised kidnapping[2] offense, the revised criminal restraint offense replaces the kidnapping offense in the current D.C. Code. The statute also includes an aggravated form of the offense, which requires that the accused commits criminal restraint with recklessness as to the fact that the complainant is a protected person; with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official; or by knowingly displaying or using a dangerous weapon or imitation dangerous weapon.*

Subsection (a) specifies the elements of aggravated criminal restraint. Paragraph (a)(1) specifies that criminal restraint requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving a person requires causing that person to move to another location when that person would not have done so absent the actor's intervention. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining or moving a person per this subsection need not involve force, threats, or other forms of coercion.[3]

Paragraph (a)(1) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[4] confinement or movement is insufficient. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial.

Paragraph (a)(2) specifies two means of committing aggravated criminal restraint.

Subparagraph (a)(2)(A) requires that the actor, who is in fact over the age of 18, confines or moves a person, with recklessness as to the fact that the complainant is under the age of 12 and that a person with legal authority over the complainant would not give effective consent to the movement or confinement, regardless of whether the complainant actually does so.[5] "In fact," a defined term in RCC § 22E-207, specifies that there is no

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[1] *See* RCC § 22E-1402.

[2] RCC § 22E-1402.

[3] For example, a person who invites a guest to his home for dinner has "moved" and "confined" the guest, as the guest would not have gone to and remained at the person's home absent the dinner invitation. However, this would not constitute kidnapping, as the movement and confinement were consensual.

[4] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.

[5] For example, a person can commit criminal restraint by carrying away a young child without the parent's consent, even if the child wants to be carried away.

culpable mental state required as to the actor's age. "Person with legal authority over the complainant" also is a defined term, under RCC § 22E-701.[6] This subparagraph requires that the actor was reckless as to the fact that the complainant was under the age of 12, and that a person with legal authority over the complainant would not give effective consent to the confinement or movement. This element can be satisfied if the person with legal authority over the complainant is unaware of the confinement or movement, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[7] The subparagraph specifies that a "reckless"[8] culpable mental state applies, which requires here that the accused consciously disregarded a substantial risk that the complainant was under the age of 12, and that a person with legal authority would not have consented to the interference.[9]

Subparagraph (a)(2)(B) requires that the actor move or confine the complainant without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to confine or move the complainant.

Subparagraph (a)(2)(B) also requires that the actor satisfies at least one of the elements in (a)(2)(B)(i)-(iii). Sub-subparagraph (a)(2)(B)(i) requires that the actor was reckless as to the complainant being a protected person. The term "protected person" is defined under RCC § 22E-701, which includes a person who is "under 18 years of age, when, in fact the actor is 18 years of age or older and at least 4 years older than the other person," "65 years or older, when, in fact, the actor is under 65 years of age," "a vulnerable adult," "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," or "a District official." Under sub-subparagraph (a)(2)(B)(i), the actor must have been reckless as to the complainant being a protected person, a culpable mental state defined in RCC § 22E-206, meaning the accused must consciously disregard a substantial risk that the complainant is a "protected person," and that disregard of that risk is clearly blameworthy.

Sub-subparagraph (a)(2)(B)(ii) requires that the actor has the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public

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[6] "Person with legal authority over the complainant" means:

(C) When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person;

(D) When the complainant is an incapacitated individual, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian.

[7] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[8] RCC § 22E-206.

[9] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

safety employee, or public official. This requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[10] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[11] "Law enforcement officer," "public safety employee," and "public official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" 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. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Sub-subparagraph (a)(2)(B)(iii) requires that the accused commits criminal restraint by knowingly displaying or using a dangerous weapon or imitation weapon. The phrase "by displaying or using a dangerous weapon or imitation dangerous weapon" should be broadly construed to include criminal restraints in which the accused only momentarily displays such a weapon, or slightly touches the complainant with such a weapon.[12] The term "use" is intended to include making physical contact with the weapon, and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[13] The terms "dangerous weapon" or "imitation weapon," are defined in RCC § 22E-701. Sub-subparagraph (a)(2)(B)(iii) specifies that a "knowing" culpable mental state applies to this element, which requires that the actor was practically certain that he or she would display or use a dangerous weapon or imitation weapon. However, the sub-subparagraph also uses the term "in fact," a defined term in RCC § 22E-207, to specify that there is no culpable mental state required as to whether the implement used or displayed was a dangerous weapon or imitation dangerous weapon.

Subsection (b) defines the elements of criminal restraint. Paragraph (b)(1) specifies that criminal restraint requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving another person can include either moving a person against his or her will, such as by tying up and carrying away a person, or by causing the person to move by means of a threat or deception. Confining a person requires causing that person to remain in a location when that person would not have done so absent the

[10] For example, a defendant who engages in restraint of an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing criminal restraint with the purpose of harming the decedent due to his status as a law enforcement officer.

[11] For example, confining or moving a person without consent may constitute harm, even if no bodily injury occurs, because it is an interference with the person's freedom of movement.

[12] For example, assuming the other elements of the offense are proven, rearranging one's coat to provide a momentary glimpse of part of a knife, or holding a sharp object to someone's back without actually causing injury, may be sufficient for liability under paragraph (a)(3).

[13] For further detail on what conduct constitutes "using" a dangerous weapon, see Commentary to menacing, RCC § 22E-1203.

actor's intervention. Confining or moving a person need not involve force, threats, or other forms of coercion.

Paragraph (b)(1) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[14] confinement or movement is insufficient. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial. The element under (b)(1) is identical to the element under paragraph (a)(1).

Paragraph (b)(2) specifies three alternate means of committing criminal restraint. Subparagraph (b)(2)(A) requires that the accused interfere with the complainant's freedom of movement without effective consent of the complainant. The term "effective consent" is defined under RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain the he or she lacked effective consent to interfere with the complainant's freedom of movement.

Subparagraph (b)(2)(B) requires that the actor was reckless as to the complainant being an incapacitated individual, and that a person with legal authority over the complainant would not give effective consent to the confinement or movement, regardless of whether the complainant does so.[15] "Person with authority over the complainant" is a defined under RCC § 22E-701, which means in relevant part "[w]hen the complainant is incapacitated, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian."[16] This element can be satisfied if the person with authority over the complainant is unaware of the interference, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[17] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused disregarded a substantial risk that the complainant is incapacitated, and that a person with authority would not have consented to the interference.[18]

Subparagraph (b)(3)(B) requires that the actor is 18 years or older, and acts with recklessness that the complainant is under the age of 16, and at least 4 years younger than the actor, and that a person with authority over the complainant would not give effective

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[14] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.

[15] For example, a person can commit criminal restraint by leading away an incapacitated person, without his or her guardian's consent, even if the incapacitated person wants to be led away.

[16] RCC § 22E-701.

[17] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[18] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

consent to the interference, regardless of whether the complainant does so.[19] "In fact" a defined term specifies that there is no culpable mental state required as to the actor's age. "Person with authority over the complainant" is a defined under RCC § 22E-701, which means in relevant part "[w]hen the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person."[20] This element can be satisfied if the person with authority over the complainant is unaware of the interference, as long as the actor is reckless as to whether the person with authority would not have given effective consent had he or she been informed.[21] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused disregarded a substantial risk that the complainant was under the age of 16, and 4 years younger than the actor, and that a person with authority would not have consented to the interference.[22]

Subsection (c) provides four exceptions to liability. Paragraph (c)(1) provides an exclusion if the actor lacked effective consent to confine or move the complainant due to the use of deception, unless the actor had intent to[23] proceed by the infliction of bodily injury or an explicit or implicit coercive threat[24] if the deception should fail. Under this exclusion, criminal restraint premised on deception requires proof that the actor would have immediately attempted to obtain consent by causing bodily injury or using a coercive threat if the deception had failed.[25] The term "coercive threat" is defined in RCC § 22E-701. Paragraph (c)(2) provides three additional exclusions to liability when the complainant is under the age of 18. Subparagraph (c)(2)(A) provides an exception if the complainant is under 18 years of age, and the actor is a person with legal authority

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[19] For example, a person can commit criminal restraint by leading away a child without the parent's consent, even if the child wants to be led away, provided the actor is at least 18 years of age, and at least 4 years older than the complainant.

[20] RCC § 22E-701.

[21] The determination of whether the actor was reckless as to whether the person with authority over the complainant would have given effective consent is a fact-specific inquiry. The complainant's age, the nature and purpose of the interference, and any other relevant circumstances may be taken into account.

[22] Whether there was a substantial risk that a person with authority would not have consented, and whether the actor's conduct grossly deviated from the ordinary standard of care is a fact based analysis that may take into account the complainant's age, the nature and purpose of the interference, or any other relevant facts.

[23] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would proceed by the infliction of bodily injury or a coercive threat if the deception should fail. 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 actor proceeded with the infliction of bodily injury or a coercive threat, only that the actor believed to a practical certainty that he or she would do so if the deception failed.

[24] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, depending on the context, saying "it would be a shame if anything happened to your store," may constitute an implicit threat of property damage.

[25] Deception can fail either by the complainant realizing that he or she has been deceived, or by a third party intervening on behalf of the complainant. The defendant's motive for deceiving the other person, whether the defendant was armed, or an actual attempt to use force or threats may all be relevant to determinations of the defendant's willingness to resort to force or threats should the deception fail.

over the complainant. The term "person with legal authority over the complainant" is defined in RCC § 22E-701. Subparagraph (c)(2)(B) provides an exclusion to liability when the complainant is under the age of 18, and the actor is a close relative or a former legal guardian with authority to control the complainant's freedom of movement who acts "with intent to"[26] assume full responsibility for the care and supervision of the complainant, and does not cause bodily injury or use a coercive threat. Subparagraph (c)(2)(C) provides an exclusion to liability if the actor reasonably believes he or she is acting at the direction of a close relative. In addition, the actor must act with intent that the close relative will assume full responsibility for the care and supervision of the complainant, and did not cause bodily injury or use an explicit or implicit coercive threat. The term "close relative" is defined in RCC § 22E-701, and means a parent, grandparent, child, sibling, aunt, or uncle. The exceptions under subsection (c) do not preclude criminal liability under any other offenses.[27]

Subsection (d) specifies relevant penalties for the criminal restraint and aggravated criminal restraint.

Subsection (e) provides that a person may not be convicted of criminal restraint or aggravated criminal restraint and a separate offense if the confinement or movement was incidental to the commission of the other offense. Confinement or movement is incidental to another offense when the actor's primary purpose in confining or moving the other person was to commit the other offense, provided that the movement or confinement did not exceed what is normally associated with the other offense.[28] The subsection specifies that, consistent with RCC § 22E-214, multiple convictions are barred

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[26] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain he or she would assume full responsibility for the care and supervision of the complainant. 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 actor assumed full responsibility for the care and supervision of the complainant, only that he or she believed to a practical certainty that he or she would do so.
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.

[27] For example, although the exception under paragraph (c)(2)(A) bars criminal restraint liability when a parent confines his own child, confining one's own child may constitute child abuse under RCC § 22E-1501, provided the elements of that offense are satisfied.

[28] This provision is intended to re-instate DCCA case law prior to *Parker v. United States*, 692 A.2d 913 (D.C. 1997). Prior to *Parker*, District courts employed a fact-based inquiry to determine whether convictions for kidnapping and other offenses that arise from a single act or course of conduct should merge. In *Parker*, the DCCA held that instead of a fact-based inquiry, courts should only use a *Blockburger* elements test to determine if convictions for kidnapping and separate offenses should merge. The restraint need not be necessarily associated with commission of the other offense. For example, a person who commits robbery by forcing a person to walk into an adjacent room to locate valuables would not be guilty of criminal restraint because the movement was incidental to the robbery. However, a person who confines another for a full day in order to facilitate commission of a robbery may still be convicted of a criminal restraint because the duration of the confinement far exceeded what would normally be associated with a robbery. *See, e.g. Sinclair v. United States*, 388 A.2d 1201 (D.C. 1978) (kidnapping was not incidental to robbery when the defendant held a person at gunpoint in a car and drove 25 blocks away); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978) (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

only after the time for judgment for appeal has expired, or after the appeal of the judgment of conviction has been decided.

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

Relation to Current District Law. *The revised criminal restraint offense changes current District law in seven main ways.*

First, the RCC criminal restraint offense codifies as a separate offense confining or moving another person when the motive of the perpetrator is not ransom, the infliction of bodily injury, or other particularly harmful or dangerous acts. The current kidnapping statute requires that the defendant hold a person "for ransom, reward, *or otherwise*[.]"[29] The D.C. Court of Appeals (DCCA) has interpreted the "or otherwise" language broadly and held that "[t]he motive behind the kidnapping is unimportant, so long as the act was done with the expectation of benefit to the transgressor."[30] By contrast, the RCC divides the current kidnapping offense into two primary offenses, with criminal constraint providing liability for confining or moving another person while the revised kidnapping requires an added wrongful intent that makes the confinement or movement especially dangerous, harmful, or terrifying. Codifying a new criminal restraint offense improves the proportionality of the RCC by separately labeling and penalizing less harmful and dangerous forms of confinement or movement.[31]

Second, the criminal restraint offense provides exceptions to liability when the complainant is under the age of 18, and the actor is either a person with legal authority over the complainant, or a close relative or a former legal guardian with authority to control the complainant's freedom of movement.[32] The current kidnapping statute provides an exception to liability if the victim is a minor, and the actor is the victim's parent. By contrast, the RCC criminal restraint statute extends the exception to all persons with legal authority over the complainant, and in certain circumstances, to close relatives and former legal guardians. The revised criminal restraint statute recognizes that certain authority figures may lawfully confine or move a child under their supervision,[33] and that under certain circumstances, a close relative or former legal guardian may lawfully confine or move a child. Extending the parental exception to include other authority figures improves the proportionality of the revised offense.

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[29] D.C. Code § 22-2001.

[30] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (quoting *United States v. Wolford*, 144 U.S.App.D.C. 1, 5-6, 444 F.2d 876, 880-81 (1971) (internal quotations omitted). For example, restraining another person in order to enact revenge, or out of a desire for companionship could sustain a kidnapping conviction under current law. *See Walker*, 617 A.2d at 527.

[31] For example, a person who in the heat of the moment blocks a door to prevent his significant other to leave in the midst of an argument may be guilty of kidnapping under current law, and subject to the same penalty as a person who, after substantial planning, forcibly seizes a person, transports them to another location, and holds them for ransom on fear of death. Under the RCC, these two types of conduct would be penalized differently, as a criminal restraint and kidnapping.

[32] When the actor is a close relative or former legal guardian, the exception also requires that the actor acts with intent to assume full responsibility for the care and supervision of the complainant, and does not cause bodily injury or use a coercive threat.

[33] For example, a parent forcing his child to stay in his room under threat of spanking does not warrant criminal liability, even though this conduct otherwise satisfies the elements of criminal restraint.

Third, the RCC criminal restraint statute bars multiple convictions for criminal restraint or aggravated criminal restraint and any other offense if the interference was incidental to the commission of the other offense.[34] Under current DCCA case law a person may be convicted of both kidnapping and another offense that arise from the same act or course of conduct, as long as kidnapping and the other offense each include "at least one element which the other one does not."[35] By contrast, the RCC criminal restraint statute reinstates the fact-based test applied by the DCCA prior to *Parker v. United States*,[36] which required courts to make a determination in each case as to whether the interference with the other person's freedom of was merely incidental to another offense.[37] Where, as is common,[38] such interference with a person's freedom of movement is incidental to another offense,[39] the authorized punishment for the other offense is sufficient. The RCC criminal restraint sentencing provision improves the proportionality of the offense.

Fourth, the RCC aggravated criminal restraint offense incorporates multiple penalty enhancements based on the status of the complainant into a new criminal restraint gradation, capping the effect of these enhancements. The D.C. Code currently provides multiple penalty enhancements for the commission of a kidnapping offense,[40] without specifying whether or how these enhancements may be combined or "stacked" when multiple enhancements are applicable to a single charge. DCCA case law has not addressed whether most combinations of these penalty enhancements can be combined,

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[34] By barring sentences for kidnapping, the revised statute allows for the possibility that convictions for kidnapping and the other offense may be entered for purposes of appeal. If the conviction for the other offense is reversed on appeal, the appellate court may order a lower court to sentence the defendant for the surviving kidnapping conviction.

[35] *Malloy v. United States*, 797 A.2d 687, 691 (D.C. 2002)

[36] 692 A.2d 913 (D.C. 1997). In *Parker*, the DCCA applied a new test for how to determine, in the absence of legislative intent, whether charged offenses should merge. The *Parker* ruling applied the new "elements" test the DCCA first adopted in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (*en banc*) because there was no legislative intent discernible as to whether kidnapping should merge with murder.

[37] *E.g., West v. United States*, 599 A.2d 788, 793 (D.C. 1991); *Vines v. United States*, 540 A.2d 1107, 1109 (D.C. 1988); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978).

[38] Many offenses against persons commonly involve some type of significant, non-consensual interference with another person's freedom of movement. For example, victims of robberies, assaults, sexual assaults, and homicides are frequently subjected to threats or physical restraint that prevent them from fleeing. Under current District law, such offenses against persons typically would provide the basis for a kidnapping charge. In practice, however, kidnapping charges are not typically brought in cases with such offenses against persons.

[39] *E.g., Robinson*, 388 A.2d at 1212–13 (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[40] *See*, e.g., D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-4502 (enhanced penalty for committing kidnapping "while armed" or with a dangerous weapon "readily available").

but the combination of at least some of these enhancements has been upheld.[41] By contrast, under the aggravated criminal restraint offense, the penalty for criminal restraint cannot be enhanced more than once based on any of the listed aggravating factors.[42] While multiple aggravating factors may be charged, proof of just one is sufficient for an aggravated criminal restraint conviction and proof of others does not change the maximum statutory penalty for the crime.[43] Capping the effect of penalty enhancements improves the proportionality of the District law by preventing aggravated forms of the offense from being penalized the same as much more serious offenses.[44]

Fifth, the RCC aggravated criminal restraint offense provides new, heightened penalties based on recklessness as to the status of the complainant as a protected person, which includes on-duty law enforcement officers, on-duty public safety employee, on-duty transportation workers. The current kidnapping statute has no gradations and does not reference the status of the complainant, but multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[45] Currently, the D.C. Code does not enhance crimes based on the status of the complainant as an on-duty law enforcement officer, public safety employee, or on-duty transportation workers. By contrast, through its use of the term "protected person," the RCC aggravated criminal restraint offense authorizes heightened penalties if the accused is reckless as to the fact the complainant is an on-duty law enforcement officer, on-duty public safety employee, or on-duty transportation worker. Such penalties are consistent with enhancements for assault-type,[46] robbery[47], and homicide offenses,[48] and reflect some unique vulnerabilities of such complainants.[49] Requiring a reckless culpable mental state is also consistent with many current statutes that authorize enhanced penalties based on the complainant's status.[50] Including recklessness as to the

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[41] Convictions have been upheld applying multiple enhancements. *C.f. Forte v. United States*, 856 A.2d 567 (D.C. 2004) (holding that "double enhancement" under senior citizen penalty enhancement statute and repeat offender statute was proper).

[42] For instance, the status of the complainant and the defendant's use of a weapon.

[43] The existence of more than one aggravating factors may be a significant factor in sentencing, however.

[44] For example, under current law the unarmed kidnapping of a 65 year old taxi cab driver is subject to two penalty enhancements under D.C. Code § 22-3601, and § 22-3751, each of which permits a sentence 1 ½ times the maximum sentence otherwise allowed. Kidnapping ordinarily carries a maximum sentence of 30 years. If these enhancements are both applied, kidnapping a 65 year old taxi driver would be subject to a maximum 60 year sentence, the same as first degree murder. D.C. Code § 22-2104.

[45] D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-3611 (minors); D.C. Code § 22-3601 (persons over 65 years of age); D.C. Code §§ 22-3751; 22-3752 (taxicab drivers); and D.C. Code §§ 22-3751.01; 22-3752 (transit operators and Metrorail station managers); and D.C. Code § 22-3602 (members of a citizen patrol).

[46] RCC § 22E-1202.

[47] RCC § 22E-1201.

[48] RCC §§ 22E-1101 - 1102.

[49] For example, on-duty law enforcement and public safety officers performing investigative duties and private vehicle-for-hire services drivers may often enter situations where they are isolated with persons in enclosed places and more susceptible to unwanted interference with their personal movements; vulnerable adults may be targeted due to their limited ability to evade interference with their freedom of movement.

[50] Under current District law it is a defense to the senior citizen complainant enhancement that "the accused knew or reasonably believed the complainant was not 65 years old or older at the time of the offense, or could not have known or determined the age of the complainant because of the manner in which the offense

complainant being an on-duty law enforcement officer, public safety employee, a vulnerable adult, or on-duty transportation worker as an element of aggravated criminal restraint removes a possible gap in current law, and improves the consistency and proportionality of the revised code.

Sixth, the aggravated criminal restraint offense provides new, heightened penalties based on the crime being committed for the purpose of harming the complainant because of his or her status as a law enforcement officer, public safety employee, or District official. The current kidnapping statute has no gradations and does not reference a purpose of harming the complainant because of the status of the complainant, although multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[51] By contrast, the aggravated criminal restraint offense includes as an element committing criminal restraint for the purpose of harming another person due to that person's status as a law enforcement officer, public safety employee, or District official. In practice, this change only affects law enforcement officers and public safety employees who are not District employees, as kidnapping of any District employee is subject to more severe statutory penalties under current District law.[52] Authorizing heightened penalties for criminal restraint with the purpose of harming the complainant because of the complainant's status as a law enforcement officer or public safety employee removes a possible gap in current law, and improves the consistency and proportionality of penalties.

Seventh, the aggravated criminal restraint offense incorporates penalty enhancements for "displaying or using" a dangerous weapon or imitation dangerous weapon. Current D.C. Code § 22-4502 provides enhanced penalties for committing kidnapping "while armed" or "having readily available" a dangerous weapon. District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[53] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[54] provided that the accused also constructively possessed the weapon.[55] There

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was committed." D.C. Code § 22-3601(c). Similarly, under the current minor complainant enhancement, it is a defense that "the accused reasonably believed that the complainant was not a minor [person less than 18 years old] at the time of the offense." D.C. Code § 22-3611(b). The current assault of a law enforcement officer offense requires that the defendant was

[51] D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee);

[52] D.C. Code § 22-851. Subparagraph (a)(3)(B) of the RCC aggravated criminal restraint offense provides liability for criminal restraints with the purpose of harming the complainant because of the complainant's status as a District employee.

[53] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).

[54] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).

[55] *Cox v. United State*s, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was

is no requirement under D.C. Code § 22-4502 that the accused actually used the weapon to commit kidnapping.[56] By contrast, the revised aggravated criminal restraint statute requires that the actor actually displayed or used[57] a dangerous weapon or imitation dangerous weapon. Merely possessing or having a weapon readily available is insufficient to satisfy the element under sub-subparagraph (a)(2)(B)(iii) for aggravated criminal restraint, although such conduct is criminalized elsewhere in current law and the RCC as a separate offense with a lower penalty.[58] Including use of a dangerous weapon or imitation dangerous weapon within the aggravated criminal restraint statute as an element of the offense improves the proportionality of punishment by matching more severe penalties to criminal restraints in which the defendant actually uses a weapon.

Beyond these seven changes to current District law, eight other aspects of the revised criminal restraint offense may constitute substantive changes to current District law.

First, the RCC criminal restraint statute specifies that the actor must have "knowingly" confined or moved another person. The current kidnapping statute references as one means of committing the offense that the actor had "intent to hold or detain,"[59] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. In one case the DCCA stated that the current kidnapping statute requires that the actor had "specific intent to detain the complainant"[60] although it is unclear whether the DCCA in that case was referring only to the defendant's motive rather than their awareness of the objective elements of the offense. Current District practice appears to treat the kidnapping as a "general intent" offense.[61] The revised criminal restraint statute specifies that a "knowingly" culpable mental state applies to the element of confining or moving the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American

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required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

[56] *See, Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).

[57] "Using" a weapon includes physically touching another person with the weapon. For example, if all other offense elements are satisfied, placing a knife or firearm to the complainant's back and telling them to walk to another location may constitute aggravated kidnapping.

[58] *See* D.C. Code § 22-4514(b); RCC § 22E-4102; 22E-4104.

[59] *See* D.C. Code § 22-2001 ("…holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise…").

[60] *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for 'ransom or reward or otherwise' and that such detention was involuntary or by use of coercion; the detention may be for any purpose that the defendant believes might benefit him.").

[61] Redbook § 4.303 Kidnapping requires that the accused acted "voluntarily and on purpose, and not by mistake or accident," which accords with the jury instructions treatment of "general intent," not "specific intent" offenses. See Redbook § 3.100 Defendant's State of Mind.

jurisprudence.[62] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the RCC criminal restraint offense requires that the complainant did not effectively consent to the interference, other than in cases involving complainants under the age of 16, or who are incapacitated. The current kidnapping statute is silent as to whether and by what means the actor must confine or move the complainant. The current statute broadly states that a person commits kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual",[63] but none of these terms are statutorily defined. The DCCA has generally recognized that kidnapping requires an "involuntary seizure,"[64] which includes forcible seizures[65], or restraining a person by threat of force.[66] Current District practice also recognizes that a person can commit kidnapping by "seiz[ing], confin[ing], abduct[ing], or carr[ying] away [the complainant] against his/her will"[67] The revised criminal restraint statute specifies that the confinement or movement must be without effective consent of the complainant, except in cases where the complainant is under the age of 16 or incapacitated. The revised language improves the clarity and proportionality of the offense.

Third, the RCC criminal restraint statute requires that the actor must "substantially" confine or move the complainant. The current kidnapping statute does not explicitly include any substantiality element, and the DCCA has never discussed in a published opinion whether momentary or trivial confinement or movement suffices under the current kidnapping statute.[68] By contrast, the revised criminal restraint statute requires that the actor must "substantially" confine or move the complainant. This excludes momentary or trivial confinement or movement. The precise effect on current

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[62] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[63] The current statute states that a person can commit kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[,]" D.C. Code § 22-2001.

[64] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (noting that "involuntary seizure is the very essence of the crime of kidnapping"); *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for "ransom or reward or otherwise" and that such detention was involuntary or by use of coercion[.]")

[65] *E.g., Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (holding that evidence showing defendant grabbed victim by the hair and pushing her into a changing room was sufficient to prove that she had been seized and detained involuntarily).

[66] *E.g., Battle v. United States*, 515 A.2d 1120 (D.C. 1986) (defendant committed kidnapping by displaying a gun, got into complainant's car, and drove the car away to a different location where the complainant would be held).

[67] D.C. Crim. Jur. Instr. § 4.303 Kidnapping.

[68] DCCA case law discussing whether kidnapping should merge with other offenses has suggested that relatively brief interference with another person's freedom of movement can constitute kidnapping. *E.g., Sinclair v. United States*, 388 A.2d 101, 1204 (D.C. 1978) (noting that "victims of [rape or robbery] are detained against their will while the criminal is accomplishing his objective"). This case law implies that even the brief detention associated with an ordinary street robbery is sufficient for kidnapping. However, the DCCA has never specifically decided whether on its own, such a brief detention would satisfy the elements of kidnapping.

law is somewhat unclear, as there is no case law on point. Requiring that the actor "substantially" confine or move the complainant improves the proportionality of the RCC by excluding cases that only involve trivial or momentary interference.[69]

Fourth, when the complainant is under the age of 16 or is incapacitated, the RCC criminal restraint statute requires that the actor be reckless as to the fact that a person with legal authority over the complainant would not effectively consent to the confinement or movement. The current kidnapping statute does not specify when confining or moving a person who is under the age of 16 or is incapacitated constitutes kidnapping, and there is no relevant DCCA case law on point.[70] It is unclear under current law whether, and under what circumstances, a person would be guilty of kidnapping for confining or moving a person without effective consent of a person with legal authority over the complainant. The revised statute resolves this ambiguity by requiring that the actor at least be reckless as to whether a person with legal authority over the complainant would effectively consent to the confinement or movement. This change improves the clarity, completeness, and perhaps the proportionality, of the revised statute.

Fifth, the RCC criminal restraint statute requires that the actor confines or moves another person. The current kidnapping statute criminalizes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[.]"[71] With the exception of "enticing," discussed below, replacing these verbs with "confines" and "moves" does not appear to change current District law. The ordinary definitions of the verbs "seizing," "confining," "kidnapping," "abducting," "concealing," and "carrying away" all constitute confining or moving another person. However, it is possible that "inveigling" and "decoying" a person includes conduct not covered by confining and moving another.[72] The terms "inveigling" and "decoying" are not defined in the current statute, and there is no DCCA case law defining these terms. The RCC criminal restraint statute resolves this ambiguity by requiring that the actor confine or move another person, without that person's effective consent.[73] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense.

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[69] If a defendant intended to interfere with a person's freedom of movement to a substantial degree but failed to do so and was only able to interfere in an insubstantial manner, attempt liability may still be applicable depending on the facts of the case.

[70] *But see*, *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005) (holding that convictions for kidnapping and enticing a minor do not merge, noting that "the kidnapping statute requires . . . that the complainant was seized involuntarily through the defendant's use of mental or physical coercion; however, consent is never a valid defense to child enticement, and therefore the government is not required to show that the child was taken involuntarily."). This language suggests that kidnapping requires, even in the case of minors, that the defendant seize another person "involuntarily", and that kidnapping does not criminalize moving or confining a minor by means of enticement.

[71] D.C. Code § 22-2001.

[72] For example, the word "inveigles" may include causing a person to move by means of flattery. Under the RCC criminal restraint offense, the mere use of flattery to confine or move someone would be insufficient.

[73] Or without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated individual, or under the age of 16.

Sixth, the RCC's criminal restraint statute omits the word "entices." The current kidnapping statute states that a person commits kidnapping by "enticing . . . any individual . . . with intent to hold or detain such individual for ransom, reward, or otherwise[.]"[74] Under a plain language reading, the current kidnapping statute provides liability for merely enticing a person with intent to hold or detain that person for some personal benefit, even if the person was never actually held. However, the DCCA has never discussed in a published opinion whether such conduct would actually constitute kidnapping, and such an interpretation would run counter to case law requiring the kidnapping to be "involuntary" in nature.[75] The RCC's criminal restraint statute resolves this ambiguity by providing that the offense requires actually confining or moving a person without that person's effective consent. A person cannot commit criminal restraint merely by offering some reward, without actually confining or moving another person.[76] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the criminal restraint statute.

Seventh, the RCC criminal restraint statute bars liability when the actor obtained consent by deception, unless the actor had intent to obtain consent by inflicting bodily injury or making a coercive threat if the deception should fail. The current D.C. Code kidnapping statute does not reference use of "deception," but it does include the terms "inveigle" and "decoy" which, at least considered alone, may allow for kidnapping liability for the use of deception.[77] The DCCA has never discussed in a published opinion whether deception that causes a person to change how they otherwise would exercise their freedom of movement can alone constitute kidnapping, absent proof that the defendant would have resorted to force or threats should the deception fail.[78] Federal courts interpreting an analogous federal kidnapping statute[79] are split as to whether

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[74] D.C. Code § 22-2001.

[75] *C.f. Walker*, 617 A.2d at 527 (noting that "involuntary seizure is the very essence of the crime of kidnapping").

[76] However, a person can commit kidnapping by initially enticing another person with offer of some benefit as a means of luring the other person to move to or remain in a particular location as long as the actor confines or moves a person without effective consent.

[77] D.C. Code § 22-2001. ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years."). One meaning of "inveigle" is "to win over by wiles." Merriam Webster Dictionary Online, at https://www.merriam-webster.com/dictionary/inveigle. However, in addition to "inveigle," the plain text of the current statute also to requires "holding or detaining, or with the intent to hold or detain…" which suggests that mere substantial movement or confinement by deception may be inadequate for liability.

[78] *Miller v. United States*, 138 F.2d 258, 260 (8th Cir.1943) (defendant initially deceived complainant by lying about taking her to see her dying grandfather, then enslaved complainant and kept her in servitude by using beatings and death threats).

[79] *United States v. Wolford*, 444 F.2d 876, 879-80 (D.C. Cir. 1971) ("For all practical purposes, the conduct prohibited by section 2101 is identical to that proscribed by the Federal Kidnaping Act, as presently worded, 18 U.S.C. 1201 (1964),[6] with the exception of the requirement of the federal statute that the complainant be transported in interstate or foreign commerce. For this reason, and because both statutes were enacted by Congress, decisions construing the meaning and application of the Federal Kidnaping Act

deception alone can constitute kidnapping.[80] The revised statute clarifies this ambiguity, making deception alone an insufficient basis for criminal restraint liability. The revised language improves the clarity and proportionality[81] of the offense.

Eighth, the revised statute does not separately criminalize a conspiracy to commit criminal restraint. The District's current kidnapping statute specifically provides that any person who conspires to commit kidnapping "shall be deemed to have violated the provisions of this section."[82] The current kidnapping statute's reference to a conspiracy, however, does not specify what culpable mental states, if any, apply to the conspiracy. By contrast, under the RCC criminal restraint statute, conspiracy to commit criminal restraint is subject to the RCC's general conspiracy statute. The RCC's general conspiracy statute details the culpable mental state and other requirements for proof of a conspiracy in a manner broadly applicable to all offenses. To the extent that the RCC's general conspiracy provision differs from the law on conspiracy as applied to the current kidnapping statute, relying on the RCC's general conspiracy provision may constitute a change in current law.[83] This change improves the clarity and consistency of the revised offense.

One other change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The RCC criminal restraint statute does not contain special provisions regarding jurisdiction. The current kidnapping statute states that "[t]his section shall be held to have been violated if the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia."[84] This language apparently is intended to ensure that District courts have

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may be resorted to as an aid in determining the meaning of the similar language employed in the District statute.); D.C. Crim. Jur. Instr. § (noting that the District's kidnapping statute is "intended to cover the same acts as the federal kidnapping statute 18 U.S.C. § 1201 (a)(1)").

[80] *United States v. Corbett*, 750 F.3d 245, 246 (2d Cir. 2014) ("Other circuits differ as to whether a defendant who first "takes" control of his victim by "decoy" or trick must intend to back up his pretense with physical or psychological force in order to "hold" the unwilling victim under the statute. *Compare United States v. Boone*, 959 F.2d 1550, 1555 & n. 5 (11th Cir.1992) (requiring that the defendant "ha[ve] the willingness and intent to use physical or psychological force to complete the kidnapping in the event that his deception fail[s]"), *with United States v. Hoog*, 504 F.2d 45, 50–51 (8th Cir.1974) (finding the evidence to be sufficient where the defendant promised the victim a ride and then kept her in his car by inventing an emergency detour).").

[81] Absent the RCC specification that consent by deception must be accompanied by an intent to use bodily injury or threat of bodily injury if necessary, a broad range of otherwise accepted, legal conduct may fall within the scope of the RCC criminal restraint and current kidnapping statute. For example, if a defendant lures another person to a location, and convinces the person to remain in that location by false promise of employment, the defendant could be convicted of criminal restraint even if the defendant had no intent to use force or threats to compel the person to remain.

[82] D.C. Code § 22-2001. ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[83] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy.

[84] D.C. Code § 22-2001.

jurisdiction over kidnappings that do not occur entirely within the District of Columbia. However, it is unclear whether this language changes the scope of jurisdiction that a District court would otherwise have over kidnapping cases. The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[85] Consequently, although the DCCA has not applied this rule to kidnapping cases, it seems that District courts would have jurisdiction over any case in which a person was seized or held within the District, regardless of whether the person was initially seized outside of the District, or if the person were seized within the District and transported out of the District.[86] The RCC criminal restraint statute eliminates jurisdiction language specific to kidnapping and criminal restraint. In addition to general case law providing authority for offenses if "one of several constituent elements to the complete offense" occurs within the District,"[87] RCC § 22E-303 specifically provides jurisdiction for conspiracies formed within the District when the object of the conspiracy is engage in conduct outside of the District if the conduct would constitute a crime under D.C. Code.[88] District courts would therefore have jurisdiction over conspiracies to commit criminal restraint outside of the District. Omitting special jurisdiction language from the criminal restraint statute improves the law's clarity by omitting unnecessary language and making the offense more consistent with other offenses.

[85] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).
[86] For example, a person who attempts to lure a person in another jurisdiction into the District for purposes of kidnapping that person may be guilty of attempted kidnapping, assuming that the defendant's conduct satisfied the dangerous proximity test.
[87] *Baish*, 460 A.2d at 40–41.
[88] RCC § 22E-303(c).

RCC § 22E-1403. Blackmail.

Explanatory Note. *This section establishes the blackmail offense for the Revised Criminal Code (RCC). The offense criminalizes compelling a person to act, or refrain from acting, by means of certain coercive threats. While some RCC crimes explicitly address commission by use of a coercive threat,*[1] *and many more RCC crimes may be committed by using a coercive threat,*[2] *the RCC blackmail statute is intended to criminalize various types of conduct that are not otherwise addressed. The revised blackmail statute does not apply to the use of coercive threats to make a complainant transfer, use, give control over, or allow the actor to damage property; to allow the actor to enter or remain on property; or to remain in or move to a particular location. and categorically excludes ordinary, legal employment actions. Due to its breadth, the social harm addressed by the blackmail statute overlaps with several other offenses that involve the use of coercive threats to compel a person to act or refrain from acting in a particular manner.*[3] *The general merger provision under RCC § 22E-214 applies to blackmail and these other offenses when they arise from the same act or course of conduct. The RCC blackmail statute also includes a defense that precludes criminal liability in certain cases where the defendant acted with a socially desirable purpose. The revised statute replaces the current blackmail statute in D.C. Code § 22-3252.*

Paragraph (a)(1) specifies that blackmail requires that the accused purposely causes a person to engage in, or refrain from any act. This requires that the other person acts, or refrains from acting, in a way that the person would not have absent the accused's intervention. The subsection specifies that a "purposely" culpable mental state applies, which requires that the actor consciously desired that he or she would cause the other person to act, or refrain from acting. A threat that does not cause another person to act or refrain from acting, or an actor who does not consciously desire that the threat causes the complainant to engage in or refrain from an action, does not commit blackmail.

Paragraph (a)(2) specifies that the actor must have caused another person to act or refrain from acting by threatening that any person will commit any of the acts listed in subparagraphs (a)(2)(A)-(G). The threat may come in the form of a verbal or written communication, however gestures or other conduct may suffice.[4] In addition, the threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may constitute a threat under this section.[5] Per the rule of

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[1] These RCC offenses include: extortion RCC § 22E-2301, forced labor RCC § 22E-1601; and sexual assault RCC § 22E-1301. Unlike extortion, which requires that the actor uses coercive threats to obtain property of another, blackmail broadly criminalizes the use of coercive means to compel a person to engage in or refrain from engaging in any conduct.

[2] These RCC offenses include criminal restraint, RCC § 22E-1402, and many other offenses that require conduct occur without the complainant's effective consent. The term "effective consent" includes consent obtained by means of a coercive threat.

[3] For example, sexual assault RCC § 22E-1301; forced labor or services, RCC § 22E-1601; forced commercial sex, RCC § 22E-1602.

[4] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a threat, if it communicates that harm will continue in the future.

[5] For example, depending on the context, saying "it would be a shame if anything happened to your store," may constitute an implicit threat of property damage.

interpretation under RCC § 22E-207, the "purposely" mental state also applies to this element. The actor must consciously desire that the other person would fear that if he or she does not conform his or her behavior to the actor's demands, then any person will resort to the coercive means listed in subparagraphs (a)(2)(A)-(D).

Subparagraph (a)(2)(A) specifies that blackmail includes threatening to take or withhold action as a government official, or to cause a government official to take or withhold action. This form of threat includes threats to cite someone for violation of a regulation, make an arrest, or deny the award of a government contract or permit.[6]

Subparagraph (a)(2)(B) specifies that blackmail incudes threatening to accuse another person of a crime. Under this form of threat, it is immaterial whether the accusation is accurate.[7]

Subparagraph (a)(2)(C) specifies that blackmail includes threatening to expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate hatred, contempt, ridicule, or other significant injury to personal reputation, or a significant injury to credit or business reputation. This subparagraph does not require that the asserted secret or fact be true or false. Threats to reveal minimally embarrassing information would not suffice under this form of blackmail. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.[8] This form of blackmail also includes threats to expose secrets, assert facts, etc., that would tend to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. A person who is already subject to hatred, contempt, and ridicule may still be the target of this form of threat.[9]

Subparagraph (a)(2)(D) specifies that blackmail includes threatening to impair the reputation of a deceased person. This subparagraph does not include threats to impair a deceased person's reputation to a trivial degree. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.[10]

Subparagraph (a)(2)(E) specifies that blackmail includes threatening to notify a federal, state, or local government agency or official of, or to publicize, another person's immigration or citizenship status.

Subparagraph (a)(2)(F) specifies that blackmail includes threatening to restrict a person's access to a controlled substance that the person owns, or to prescription medication that the person owns. As this form of blackmail requires that the other person already owns the controlled substance or prescription medication, a threat to refuse to sell or provide a controlled substance or prescription medication does not constitute blackmail under this subparagraph.

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[6] In some cases, threatening to take official action may fall under the defense under subsection (d).

[7] However, when the actor believes the accusation is accurate, the defense under subsection (d) may apply.

[8] D.C. Code § 22-3252.

[9] For example, even if it is well known that a person has engaged in numerous acts of infidelity, a threat to reveal an additional act of infidelity may still constitute blackmail under this paragraph.

[10] D.C. Code § 22-3252.

Subparagraph (a)(2)(G) specifies that blackmail includes threatening that any other person will engage in conduct that constitutes a criminal offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E. This form of blackmail does not include threats to commit any other types of criminal offenses.[11] The use of "in fact" indicates that no culpable mental state is required as to whether the threatened conduct constitutes an offense against persons or a property offense. However, it must be proven that the actor threatened that a person would engage in conduct that satisfies all elements of an offense against persons or property offense, including any culpable mental states.

Subsection (b) establishes four exclusions to liability. Paragraph (b)(1) specifies that threats of ordinary and legal employment or business actions are not a basis for liability under the revised blackmail statute. This exclusion recognizes that ordinary and legal employment and business relationships may involve threats to reveal embarrassing information in order to coerce another party to act or refrain from acting in a particular way[12], and such conduct does not constitute a crime under this section.[13]

Paragraph (b)(2) specifies that blackmail does not include causing a person to do any of the acts listed under subparagraphs (b)(2)(A)-(C). The blackmail offense provides broad liability for use of threats to compel a person to engage in any act, but is not intended to replace or add liability to those RCC offenses that already specifically address the use of threats to compel a person to act in a particular way.[14] Consequently, this paragraph eliminates liability under the revised blackmail statute when a more narrowly-tailored RCC offense addresses the actor's conduct.[15] Subparagraph (b)(2)(A) excludes causing a person to transfer, use, give control over property, or to give consent to damage property. The term "use" is intended to include use of both tangible[16] and intangible property.[17] This subparagraph prevents extortion, robbery, criminal damage to property, and other offenses that involve taking, using, controlling, or damaging

[11] For example, threatening to engage in disorderly conduct, a public order offense would not satisfy this element.

[12] For example, a manager may threaten to reveal an employee's malfeasance in the workplace to upper management unless the employee changes his behavior.

[13] Threats that go beyond ordinary and legal employment or business actions are subject to liability. For example, if a business owner threatens to reveal highly embarrassing personal information unless another business owner agrees to provide services for free, this exclusion to liability would not apply.

[14] For example, sexual assault specifically addresses the use of coercion to compel a person to engage in a sexual act or sexual contact. The revised criminal code's extortion RCC § 22E-2301 and forced labor RCC § 22E-1601 offenses also specifically address commission of those crimes by means of coercive threats.

[15] The harm in coercing a person to act is largely determined by the nature of the coerced act; coercing a person to engage in a sexual act is more wrongful than coercing a person to pay a small sum of money. The RCC recognizes this by defining various offenses based on the type of conduct that the complainant is coerced into performing. Sexual assault is a more serious offense than 5th degree extortion. Blackmail is a residual offense, which can include compelling a person to perform an act that could be quite harmful. When the RCC has specified particular coerced acts as warranting less severe penalties, such as 5th degree extortion, it would be inappropriate to convict the person for blackmail, which is intended to cover potentially much more harmful conduct.

[16] For example, using threats to cause a person to allow the actor to operate a motor vehicle would fall under this inclusion.

[17] For example, using threats to cause a person to allow a person to make copies of audio recordings would fall within this exception.

property[18] being prosecuted as blackmail. Subparagraph (b)(2)(B) excludes causing a person to remain in or move to a location. This subparagraph is intended to prevent conduct that constitutes criminal restraint or kidnapping from being prosecuted as blackmail.[19] Subparagraph (b)(2)(C) excludes causing a person to consent to another person entering or remaining in a location. This subparagraph is intended to prevent trespass or burglary from being prosecuted as blackmail.[20]

Subsection (c) provides a defense to blackmail under particular circumstances, and specifies the burden of proof. Paragraph (c)(1) defines the element of the defense. This defense recognizes that criminal liability is not appropriate under certain circumstances when the actor causes a person to act or refrain from acting for certain benign purposes. The defense is only available to prosecutions under subparagraphs (a)(2)(B)-(F). The defense has two main components. First, under subparagraph (c)(1)(A), the actor must genuinely believe that the accusation or assertion was true[21], that the official action was justified,[22] or that the photograph, video, or audio recording was authentic.[23] Second, under subparagraph (c)(1)(B) the actor must have acted with the purpose to compel another person to desist or refrain from criminal[24] or tortious activity[25], or behavior harmful to any person's physical mental health[26]; to take reasonable action related to the wrong that is the subsection of the accusation[27],

[18] Numerous property offenses can be committed by means of a coercive threat, and are intended to be excluded from the revised blackmail statute. These offenses include: unauthorized use of property, RCC § 22E-2102; unauthorized use of a motor vehicle, RCC § 22E-2103; unlawful creation or possession of a recording, RCC § 22E-2105; unlawful operation of a recording device in a motion picture theater, RCC § 22E-2106; payment card fraud, RCC § 22E-2202; identity theft, RCC § 22E-2205; financial exploitation of a vulnerable adult, RCC § 22E-2208; and criminal graffiti, RCC § 22E-2504.

[19] Criminal restraint and kidnapping both require that the actor *substantially* confines or moves the complainant. RCC §§ 22E-1401, 1402. The exclusion under this subparagraph applies even if the confinement or movement is not substantial.

[20] For example, if a person obtains consent to enter another person's property by threatening to reveal the property owner's humiliating secret, trespass liability would apply instead of blackmail.

[21] An actor who threatened to accuse a person of a criminal offense believing that the person had not actually committed the offense would not be able to claim this defense.

[22] An actor who threatened to rescind a business license believing that rescinding the license was not actually warranted would not be able to claim this defense.

[23] An actor who threatened to publish a photograph that had been doctored to portray another person engaged in a sexually explicit act would not be able to claim this defense.

[24] For example, a passenger riding in a car with a drunk driver threatening to report the person's drunk driving to authorities unless he pulls over.

[25] For example, threatening to expose a person's embarrassing secret in order to prevent that person from committing the tort of intentional infliction of emotional distress.

[26] For example, threatening to reveal an embarrassing secret about another person in order to coerce that person into obtaining necessary emergency medical care.

[27] Whether an action is reasonably related to the wrong depends on the totality of the circumstances, including the nature of the harm sought to be addressed, the effort and cost imposed on the coerced person, and the availability of alternative means of addressing the wrong. For example, if a prosecutor threatens to charge a defendant with an additional criminal offense unless the defendant agrees to plead guilty to a separate charge, the threat of the additional charge may be reasonably related to the wrong that is the subject of the accusation. Even when the demanded action is clearly related to the subject of the wrong, the demand must still be reasonable. For example, threatening to accuse a person of theft unless that person returns the stolen property to its rightful owner may be reasonable. However, an unreasonable demand

assertion[28], or invocation of official action[29]; or to refrain from taking any action or responsibility that the defendant believes the other unqualified.[30] Although people often act with mixed motives, the defense is only available if the actor would not have acted absent one of the benign purposes listed in this subsection. If the actor coerces another person and inadvertently brings about one of the benign ends listed in this subsection, the defense is not available. Paragraph (c)(2) specifies the burden of proof for the defense.

Subsection (d) specifies relevant penalties for the offense.

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

Relation to Current District Law. *The RCC's revised blackmail statute replaces the blackmail statute in the current D.C. Code.*[31] *The revised blackmail statute makes five substantive changes to current District law that improve the clarity and proportionality of the code, fills gaps in the current code, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised blackmail offense requires that the actor actually compels another person to engage in, or refrain from, any act. The current blackmail offense only requires threats *with intent* to cause another to do or refrain from doing any act.[32] By contrast, the revised offense requires that the accused actually succeed in compelling another person to act or refrain from acting.[33] Requiring that the defendant actually compel another person to act or refrain from acting improves the proportionality of the RCC, and is consistent with the RCC's extortion offense,[34] which requires that the defendant actually takes, obtains, transfers, or exercises control over property of another.

Second, the revised blackmail offense changes the scope of threats as compared to the current blackmail statute. The current blackmail statute includes threats to accuse any person of a crime; to expose a secret or publicize an asserted fact tending to subject any person to hatred, contempt, or ridicule; to impair the reputation of any person, including a deceased person; to distribute a photograph, video, or audio recording tending to subject another person to hatred contempt, ridicule, embarrassment, or other injury to reputation; or to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status.[35] By contrast, the revised blackmail

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would include threatening to accuse another of theft unless the other person pays the original property owner an amount several times the value of the stolen property.

In addition, threatening to publish nude or sexually explicit photographs, videos, or audio recordings unless the person provides additional nude or sexually explicit photographs, videos or recordings would not satisfy this element of the defense.

[28] For example, threatening to reveal that a person has been having an extra-marital affair unless that person agrees to put an end to the affair.

[29] For example, a health inspector threatening to repeal a restaurant's license unless the owners bring their restaurant into compliance with health codes.

[30] For example, threatening to reveal prior corrupt acts of prospective political candidate unless that person declines to run for office.

[31] D.C. Code § 22–3252.

[32] D.C. Code § 22-3252.

[33] Even if the accused fails to compel the other person to act or refrain from acting, attempt liability may apply depending on the specific facts of the case.

[34] RCC § 22E-2301.

[35] D.C. Code § 22-3252.

offense also includes four additional threats: (1) to commit an offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E; (2) to assert a fact about another person that would tend to impair that person's credit or business repute; (3) to take or withhold action as an official; or (4) to restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns. This change closes a gap in current District law, and makes the revised blackmail offense more consistent with the revised extortion offense.[36]

Third, the revised blackmail offense excludes liability when the actor's threats constituted normal and legal employment or business practices. The current D.C. Code blackmail statute does not include an exclusion for ordinary and legal employment or businesses practices, and there is no District case law on point. By contrast, the revised blackmail statute excludes threats that are part of ordinary and legal employment or business practices and involve threats to reveal embarrassing information in order to coerce another party to act or refrain from acting in a particular way.[37] Such conduct may have social benefits and criminalization would be inappropriate.[38] This change improves the proportionality of the revised statutes.

Fourth, the revised blackmail offense recognizes three exclusions to liability for conduct covered more specifically by other revised offenses. First, the revised offense does not include use of threats to cause a person to transfer, use, give control over, or consent to damage property. The current D.C. Code blackmail statute includes the use of various types of threats to obtain property of another, or to cause a person to do any act, and potentially overlaps with the several other D.C. Code offenses such as extortion and robbery.[39] Similarly, the revised blackmail statute also overlaps with numerous property

[36] RCC § 22E-2301. The revised extortion statute covers obtaining property of another by means of a "coercive threat," a defined term which includes several types of threats. The revised blackmail offense includes all types of threats included in the definition of "coercive threat," except for the catch-all provision, which includes any threats to "cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." RCC § 22E-701. The revised blackmail statute does not include a catch-all provision, because blackmail includes compelling a person to commit or refrain from any act. Including a catch-all provision in the revised blackmail statute would be overbroad and criminalize minor negotiations that are part of everyday life.

[37] For example, a manager may threaten to reveal an employee's malfeasance in the workplace to upper management unless the employee changes his behavior.

[38] Threats that go beyond ordinary and legal employment or business actions are subject to liability. For example, if a business owner threatens to reveal highly embarrassing personal information unless another business owner agrees to provide services for free, this exclusion to liability would not apply.

[39] Numerous property offenses in the current D.C. Code criminalize taking or using property without consent. These offenses may include taking or using property when the consent was obtained by one of the threats enumerated in the current blackmail statute. For example, the current unauthorized use of a motor vehicle offense may include compelling a person to grant permission to use an automobile by threatening to reveal an embarrassing secret about that person. Other similar current offenses that may overlap with the current blackmail statute include: credit card fraud, D.C. Code § 22-3223; identity theft, unlawful operation of a recording device in a motion picture theater, D.C. Code § 22–3214.02; financial exploitation of a vulnerable adult or elderly person, D.C. Code § 22-933.01.

offenses.[40] By contrast, to address this overlap, the revised blackmail statute excludes uses of threats to cause a person to transfer, use, give control over, or consent to damage property.[41] This limitation on liability prevents multiple convictions for offenses addressing the same social harm. Second, the revised offense excludes causing a person to remain in or move to a location. The current D.C. Code blackmail statute does not include this limitation, and there is no District case law on point. The current blackmail potentially overlaps with the D.C. Code kidnapping offenses.[42] By contrast, the revised statute includes this limitation to prevent the less serious offense of criminal restraint from being charged as blackmail. Third, the revised offense excludes causing another person to consent to allow a person to enter or remain in a location.[43] The current blackmail statute does not include this limitation. By contrast, the revised statute includes this limitation to prevent the less serious offense of trespass from being charged as blackmail. These exclusions to liability address overlap between the revised blackmail offense and other lesser offenses, and improves the clarity and proportionality of the revised criminal code.

Fifth, the revised blackmail offense includes a defense that the actor believed the accusation, assertion, or secret to be true, and acted with certain benign purposes. The current blackmail statute does not include any defenses, and there is no relevant D.C. Court of Appeals (DCCA) case law. By contrast, the revised blackmail offense includes a defense, which allows an actor to use certain threats to compel another person to act or refrain from acting in cases when criminal liability would be inappropriate. This revision improves the clarity and proportionality of the revised criminal code.

Beyond these five main changes to current District law, three other aspects of the revised blackmail statute may constitute substantive changes of law.

First, the revised blackmail offense requires a culpable mental state of purpose. The current blackmail statute does not specify a culpable mental state as to threatening another, but requires that the actor did so "with intent to obtain property of another or to cause another to do or refrain from doing any act."[44] The term "intent" as used in the

[40] Numerous property offenses can be committed by means of a coercive threat, and are intended to be excluded from the revised blackmail statute. These offenses include: unauthorized use of property, RCC § 22E-2102; unauthorized use of a motor vehicle, RCC § 22E-2103; unlawful creation or possession of a recording, RCC § 22E-2105; unlawful operation of a recording device in a motion picture theater, RCC § 22E-2106; payment card fraud, RCC § 22E-2202; identity theft, RCC § 22E-2205; financial exploitation of a vulnerable adult, RCC § 22E-2208; and criminal graffiti, RCC § 22E-2504.

[41] Many other property offenses may overlap with blackmail. For example, using a coercive threat to compel a person to consent to use copy a sound recording could constitute unlawful creation or possession of a recording under RCC § 22E-2105.

[42] The current blackmail statute criminalizes causing a person to engage in, or refrain from, any act, by use of certain enumerated threats. The current kidnapping statute includes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual *by any means whatsoever*[.]" It is possible that confining a person under threat of revealing a deeply embarrassing secret would constitute both kidnapping and blackmail under the current D.C. Code.

[43] The current blackmail statute criminalizes causing a person to engage in, or refrain from, any act, by use of certain enumerated threats. The current unlawful entry offense criminalizes entering property "without lawful authority[.]" Entering property with consent obtained by threat could constitute entering "without lawful authority," creating overlap between the current blackmail and unlawful entry statutes.

[44] D.C. Code § 22-3252 (a).

current statute is not defined, and there is no relevant DCCA case law. To resolve this ambiguity, the revised statute applies the RCC standardized definition of "purposely." Applying at least a knowing culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[45] Using the purposeful culpable mental state is justified due to the breadth of the revised blackmail statute, which includes causing a person to do, or refrain from doing, any act. Since people routinely, and legally, engage in threatening behavior in everyday life, not desiring to cause fear but knowing the behavior will do so,[46] criminalization would be inappropriate. However, requiring only a knowing mental state would criminalize a broad array of cases in which the actor merely knew that, due to the otherwise legal threat, another person would react in some manner.[47] Requiring a purposeful mental state improves the proportionality of the revised criminal code.

Second, the revised blackmail offense includes threats that any person will engage in the conduct specified in subparagraphs (a)(2)(A)-(G). The current blackmail statute does not specify whether it includes threats that another person will carry out the threatened conduct, and there is no DCCA case law on point. Specifying that blackmail includes threats that any person will carry out the threatened conduct improves the clarity of the revised criminal code, and make the offense consistent with the revised extortion statute.[48]

Third the revised blackmail statute, through application of the general merger provision under RCC § 22E-214, prevents multiple convictions for blackmail and other offenses that address more specific instances of coercive threats causing harms, or address the same basic social harm. The current D.C. Code does not include a general merger provision, and the DCCA has held that offenses merge if the elements of one offense are necessarily included in the elements of the other offense.[49] There is no District case law that squarely addresses whether blackmail merges with other overlapping offenses, however in dicta the DCCA has suggested that a person may be convicted of both blackmail and a separate offense that involves blackmail.[50] Resolving this ambiguity, the RCC general merger provision provides that multiple convictions for

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[45] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[46] For example, telling someone that if they don't stop illegal conduct they will be reported the activity to the police may be perceived as a threat, but the purpose is to cause a person to cease further criminal activity.

[47] For example, it is legal to threaten to accuse a person of a crime. In most cases a person making such a threat will *know* that the other person will act in some manner that he or she would not have absent the threat. However, this knowledge alone should not create criminal liability. Only when the person makes the threat with the *purpose* of causing the other person to act is criminal liability justified.

[48] RCC § 22E-2301. The revised extortion statute criminalizes taking property of another by means of a "coercive threat." The term "coercive threat" is defined as a threat that "any person" will engage in one of the enumerated types of conduct. RCC § 22E-701.

[49] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

[50] *See, Hall v. United States*, 343 A.2d 35, 39 (D.C. 1975) (holding that convictions for simple assault and obstructing justice do not merge, because it is possible to commit obstructing justice without necessarily committing a simple assault. The DCCA noted that "acts such as blackmail and unfulfilled threats of violence could support an obstructing justice charge.").

2 or more offenses arising from the same act or course of conduct merge whenever one offense is "defined to prohibit a designated kind of conduct generally, and the other is defined to prohibit a specific instance of such conduct,"[51] or when "one offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each[.]"[52] Numerous offenses in the RCC criminalize use of coercive threats to compel another person to act in specific manner. For example, sexual assault[53] criminalizes compelling a person to engage in or submit to a sexual act or contact; forced labor or services[54] criminalizes compelling a person to perform labor or services, and forced commercial sex[55] criminalizes compelling a person to engage in commercial sex acts. In most cases, a person who commits these offenses will also satisfy the elements of blackmail.[56] If the other offense and blackmail arise from the same act or course of conduct, the offenses will merge as provided in RCC § 22E-214. Other offenses criminalize use of coercion to compel a person to act in a specific manner, whereas blackmail more broadly criminalizes compelling a person to engage in, or refrain from, any act. The authorized penalties for these offenses reflect the relative seriousness of being coerced to engage in the specific acts required for each offense.[57] It would be disproportionately severe for an actor to be convicted of both the separate offense and blackmail based on the same act or course of conduct. This change improves the clarity and proportionality of the revised criminal code.

[51] RCC § 22E-214 (a)(2)(C).
[52] RCC § 22E-214 (a)(4).
[53] RCC § 22E-1301.
[54] RCC § 22E-1601.
[55] RCC § 22E-1602.
[56] It is possible to commit these offenses without satisfying the elements of blackmail, and therefore the offenses do not merge under a strict *Blockburger* elements test under current DCCA case law and codified in RCC § 22E213 (a)(1). Each of these offenses includes the use of a "coercive threat." The term "coercive threat" is defined in RCC § 22E-701, and includes threats to "cause harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." This catch-all provision in the "coercive threat" definition is not included in the blackmail statute. A person committing these offenses using a threat that satisfies the catch-all, but not the threats specified in the blackmail statute, would not be guilty of blackmail.
[57] For example, forced commercial sex and criminal restraint may both be committed using identical threats. However, the penalties for forced commercial sex are significantly higher than for criminal restraint, due to the particular harmfulness of coercing someone into engaging in commercial sex acts.

RCC § 22E-1601. Forced Labor or Services.

Explanatory Note. *This section establishes the forced labor or services offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing another person to engage in labor or services either by means of coercive threat or debt bondage. This offense replaces the forced labor offense in the current D.C. Code,[1] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[2]*

Paragraph (a)(1) specifies that forced labor or services requires that an actor knowingly causes a person to engage in labor or services. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[3] which requires that the accused was practically certain that he or she would cause a person to engage in labor or services. The terms "labor" and "services" are defined under RCC § 22E-701.[4]

Paragraph (a)(2) specifies that forced labor or services requires that the accused cause another person to engage in labor or services either by means of an explicit or implicit coercive threat[5] or debt bondage. "Coercive threat" is defined under RCC § 22E-701, and is comprised of seven different forms of threats. "Debt bondage" is also defined under RCC § 22E-701, and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[6] Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The accused must be practically certain both that he or she is using coercive threats or debt bondage, and that the coercive or debt bondage *causes* the other person to engage in labor or services.

Subsection (b) specifies that threats of legal employment actions are not a basis for liability under the forced labor or services statute. Such threats, which otherwise might satisfy the requirement of a coercive threat, may be a sufficient basis for other human trafficking offenses.[7]

Subsection (c)(1) specifies relevant penalties for the offense.

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[1] D.C. Code § 22-1832.

[2] D.C. Code § 22-1837.

[3] RCC § 22E-206(b).

[4] For further discussion on these terms, see Commentary to RCC § 22E-701.

[5] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

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

[7] Threats that go beyond ordinary and legal employment actions are subject to liability. For example, the exception under this provision would not apply to a store manager who threatens to fire an employee unless that employee agrees to work for 24 hours without respite.

Paragraph (c)(2) provides penalty enhancements applicable to this offense. Subparagraph (c)(2)(A) specifies that if a person commits forced labor or services and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[8] here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Subparagraph (c)(2)(B) specifies that if the actor held the complainant or caused the complainant to provide labor or services for a total of more than 180 days, the offense classification may be increased in severity by one class.[9] Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in subparagraph (c)(2)(A) applies to the conduct in subparagraph (c)(2)(B). Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under paragraph (c)(2) shall be applied in addition to any general penalty enhancements under this title.

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

Relation to Current District Law. *The revised forced labor or services statute changes current District law in three main ways.*

First, by reference to the RCC's "coercive threats" definition, the forced labor or services statute does not provide liability for causing another to provide labor or services by fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[10] and by extension the current forced labor or services statute includes using fraud or deception to cause a person to provide labor or services. By contrast, the RCC's "coercive threats" definition does not include fraud or deception,[11] and such conduct is not a sufficient basis for forced labor or services liability. A person who uses deception or fraud to cause another person to engage in labor or services has not committed forced labor or services unless that person also uses one of the other coercive means listed in the RCC's definition or holds another person in debt bondage.[12] While using deception to cause another to engage in labor or services is wrongful, it does not warrant equal punishment to using coercive threats or debt bondage and could provide major felony liability for common employment disputes.[13] Rather, a person who causes another to provide labor or services through fraud or deception may still be liable under the RCC's

[8] RCC § 22E-206 (d).

[9] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

[10] D.C. Code § 22-1831 (3)(D).

[11] RCC § 22E-701.

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

[13] For instance, under the current statutory definition of "coercion," a person may be liable for forced labor or services, subject to a 20 year maximum imprisonment, for falsely stating the terms of an employee's advancement eligibility or scope of work duties at the time of hiring.

revised fraud[14] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised offense.

Second, by reference to the RCC's "coercive threats" definition, the revised forced labor or services offense criminalizes restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised forced labor or services offense only provides liability for threatening to restrict a person's access to controlled substances that the person owns or prescription medication that the person owns.[15] Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[16] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[17] and precludes arguments that an employer's attempts to limit an employee's access to legal and readily available addictive substances like tobacco or alcohol constitute forced labor or services.[18] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[19] Eliminating the facilitation of access to any addictive substance as a form of coercive threat prevents the possibility of criminalizing relatively less coercive conduct.[20] This change improves the clarity and proportionality of the revised statute.

Third, the revised forced labor or services offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age. The current forced labor offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of

[14] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

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

[16] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

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

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

[19] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

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

violence" committed against persons under the age of 18, but forced labor is not currently listed in the definition of a "crime of violence."[21] By contrast, the revised forced labor or services offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

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

First, by reference to the RCC's definitions of "labor" and "services", the revised forced labor or services offense specifically excludes causing a person to engage in commercial sex acts. The current D.C. Code forced labor statute and relevant definitions refer generally to labor and services without specifying whether commercial sex acts are included. Neither DCCA case law nor legislative history addresses the matter.[22] However, it is notable that the D.C. Code human trafficking statutes sometimes appear to use the term "labor" as if it did not include commercial sex acts.[23] By contrast, the revised definitions of "labor" and "services" explicitly exclude commercial sex acts, and the revised forced labor or services statute's use of those definitions explicitly excludes the use of coercion or debt bondage to cause another to engage in commercial sex acts. Such conduct instead is criminalized under the RCC's forced commercial sex offense.[24] This change improves the clarity and consistency of the revised offenses, and reduces unnecessary overlap.

Second, by reference to the RCC's definition of "coercive threats," forced labor or services includes causing a person to engage in labor or services by threatening that any person will commit an offense against persons or a property offense.[25] The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force" and "threats of physical restraint," conduct that appears to constitute the criminal offenses of assault, kidnapping, or criminal restraint. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[26] The revised definition of "coercive threats" and the RCC crime of forced labor or services together specify that a threat to commit any criminal offense against persons is categorically a basis for liability, even if it would otherwise be unclear whether the crime

[21] D.C. Code § 22-1331 (4).
[22] At least one federal circuit court has held that the federal forced labor statute includes coercing another person into engaging in commercial sex acts. *United States v. Kaufman*, 546 F.3d 1242, 1260 (10th Cir. 2008) (holding that the term "labor" as used in the federal forced labor statute includes induced nudity and sexual acts recorded on video).
[23] *E.g.*, D.C. Code § 22-1833, entitled "Trafficking in labor or commercial sex acts" includes as an element that, "Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act". The specification of both "labor" and "commercial sex act" in the offense suggests the former does not include the latter.
[24] RCC § 22E-1602.
[25] RCC § 22E-701.
[26] D.C. Code § 22-1831 (7).

would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Third, the revised statute specifies that threats of ordinary and legal employment actions are not a basis for liability under the forced labor or services statute. The current D.C. Code "coercion" definition includes "serious harm," which is defined as "any harm . . . that is sufficiently serious under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[27] There is no relevant DCCA case law as to whether legal employment actions could be sufficient to compel a reasonable person to perform labor or services. The revised statute prevents liability for forced labor or services where the coercion consists only of ordinary and legal employer demands. Such conduct does not warrant criminalization as a serious felony. This change improves the clarity and proportionality of the revised statute.

Fourth, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[28] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days exceeds that180. This change clarifies and may improve the proportionality of the revised statute.

Fifth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[29] However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code provisions concerning repeat offender enhancements,[30] hate crime enhancements,[31] and pretrial release penalty enhancements.[32] To resolve this ambiguity, the revised statute

[27] *Id.*

[30] D.C. Code §§ 22-1804; 22-1804a.
[31] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[32] D.C. Code § 23-1328.

specifies that the revised statute's penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Limitations on Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Hate Crime Penalty Enhancement, or § 22E-608 Pretrial Release Penalty Enhancements. This change improves the clarity and may improve the proportionality of the revised statute.

One other change to the forced labor statute is clarificatory, and is not intended to change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[33] "Actor" is a defined term[34], which means "a person accused of any offense." The term "person" is also a defined term[35], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[33] D.C. Code § 22-1832.
[34] RCC § 22E-701.
[35] RCC § 22E-701.

RCC § 22E-1602. Forced Commercial Sex.

Explanatory Note. *This section establishes the forced commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing a person to engage in a commercial sex act by means of coercive threat, or through debt bondage. There is no analogous offense under the current human trafficking chapter, although conduct constituting forced commercial sex may violate the current forced labor statute. This offense also replaces aspects of several offenses in chapter 27 of the current D.C. Code, including: conduct to "compel" or attempt to compel a person into prostitution under the pandering statute;*[1] *compelling an individual to live life or prostitution against his or her will;*[2] *and causing a spouse or domestic partner "by force, fraud, coercion, or threats…to lead a life of prostitution."*[3] *To the extent that certain statutory provisions authorizing extended periods of supervised release*[4] *apply to the current forced labor or services statute, these provisions are replaced in relevant part by the revised offensive forced commercial sex offense.*

Paragraph (a)(1) specifies that forced commercial sex requires that an actor knowingly causes the complainant to engage in a commercial sex act with another person.[5] The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would cause another

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

[2] D.C. Code § 22-2706. This statute makes it a crime to "by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact." This conduct may also be criminalized under the RCC's kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.

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

[4] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current forced labor or services offense covers sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

[5] An actor who uses a coercive threat to compel a person to engage in a commercial sex act with *the actor* himself or herself may be subject to liability under sex assault offenses defined under Chapter 13.

person to engage in a commercial sex act. The term "commercial sex act" is defined under RCC § 22E-701.[6]

Paragraph (a)(2) specifies that forced commercial sex requires that the actor cause the complainant to engage in a commercial sex act by means of an explicit or implicit coercive threat[7] or debt bondage. "Coercive threat" is defined under RCC § 22E-701 and includes multiple per se types of threats, as well as a flexible standard referring to a threat of any harm sufficiently serious to cause a reasonable person in the complainant's situation to comply.[8] "Debt bondage" is also defined under RCC § 22E-701 and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[9] Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The accused must be practically certain both that he or she is using coercive threats or debt bondage, and that the coercive threat or debt bondage *causes* the other person to engage in a commercial sex act. Paragraph (a)(2) also specifies that the actors must cause the complainant to engage in a commercial sex act with someone other than the actor. This element may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct.[10]

Subsection (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(2)(A) specifies that if a person commits forced commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[11] here requiring that the accused was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, subparagraph (b)(2)(A) also specifies that if a person commits forced commercial sex, and in fact, the complainant is under the age of 12, an enhancement of one penalty class applies. The term "in fact" specifies that no culpable mental state is required as to the complainant being under the age of 12. Subparagraph (b)(2)(B) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one

[6] For further discussion of these terms, see Commentary to RCC § 22E-1601.

[7] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

[8] For further discussion of this term, see Commentary to RCC § 22E-701.

[9] For further discussion of this term, see Commentary to RCC § 22E-701.

[10] Masturbation is not explicitly included in the definition of "commercial sex act." However, the term "commercial sex act" is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."

[11] RCC § 22E-206.

class.[12] Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement. Even if more than one penalty enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (b) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The RCC's forced commercial sex offense changes current District law in three main ways.*

First, RCC forced commercial sex act creates a standardized penalty and enhancements for coercing or using debt bondage to cause a person to engage in a commercial sexual act. Although the current human trafficking chapter does not have a separate forced commercial sex offense, conduct constituting forced commercial sex could be charged under several current Chapter 27 offenses, with maximum sentences ranging from five years[13] to twenty years.[14] In contrast, the revised forced commercial sex act provides a single penalty, with applicable enhancements. This change improves the consistency and proportionality of the revised statutes.

Second, by reference to the RCC's "coercive threats" definition, the forced commercial sex statute criminalizes restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the forced commercial sex offense only provides liability for threatening to restrict a person's access to controlled substances that the person owns or prescription medication that the person owns.[15] Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[16] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[17] and precludes

[12] This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

[13] D.C. Code § 22-2705.

[14] D.C. Code § 22-2706.

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

[16] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

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

arguments that an actor's attempts to limit an another person's access to legal and readily available addictive substances like tobacco or alcohol constitute forced commercial sex.[18] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[19] Eliminating the facilitation of access to any addictive substance as a form of coercive threats prevents the possibility of criminalizing relatively less coercive conduct.[20] This change improves the clarity and proportionality of the revised statute.

Third, the revised forced commercial sex offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age, or if the complainant was, in fact, under 12 years of age. It is unclear if the current forced labor and services statute criminalizes forced commercial sex acts, but even if it does, the current forced labor and services statute offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but forced labor or services is not currently a "crime of violence."[21] By contrast, the revised trafficking in commercial sex offense provides a penalty enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

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

First, by reference to the RCC's definition of "coercive threats," the forced commercial sex statute does not provide liability for causing another to engage in commercial sex by fraud or deception. The current forced labor offense criminalizes using "coercion to cause person to provide labor or services"[22] and "coercion" is defined to include "fraud or deception."[23] If commercial sex acts fall within the definition of "labor or services," then under current law using fraud or deception to cause a person to engage in commercial sex acts constitutes forced labor. However, the current code does not specify whether "labor or services" includes commercial sex acts, and there is no relevant DCCA case law. The RCC's "coercive threats" definition does not include fraud or deception,[24] and such conduct is not a sufficient basis for forced commercial sex

[18] For example, an actor who limits a person's access to tobacco or alcohol may be liable for "controlling" the person's access to the substance.

[19] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

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

[21] D.C. Code § 22-1331 (4).

[22] D.C. Code § 22-1832.

[23] D.C. Code § 22-1831.

[24] RCC § 22E-1601.

liability. A person who uses deception or fraud to cause another person to engage in commercial sex has not committed forced commercial sex unless that person also uses one of the other coercive means listed in the RCC's definition or holds another person in debt bondage.[25] While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for what amount to disputes over payments for consensual commercial sex.[26] Rather, a person who causes another to engage in commercial sex through fraud or deception may still be liable under the RCC's revised fraud[27] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statutes.

Second, by reference to the RCC's definition of "coercive threats" the forced commercial sex offense includes causing a person to engage in a commercial sex act by threatening that any person will commit an offense against persons, or property offense.[28] The current "coercion" definition does not explicitly include threats to commit any "an offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[29] By contrast, the revised definition of "coercive threats" and the RCC crime of forced commercial sex together specify that a threat to commit any offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the current coercion definition. This change improves the clarity and consistency of the revised statutes.

Third, by reference to the revised definitions of "coercive threats" and "debt bondage," the RCC forced commercial sex act offense specifies what types of conduct constitute a crime when used to compel a person to engage in prostitution. Various offenses under Chapter 27 of the current D.C. Code make it a crime to "compel" a person to "engage in prostitution"[30]; "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"[31]; to "compel any individual, to reside with him or her or with any other person for the

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

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

[27] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

[28] RCC § 22E-701.

[29] D.C. Code § 22-1831 (7).

[30] D.C. Code § 22-2705.

[31] D.C. Code § 22-2706.

purposes of prostitution or a sexual act or sexual contact"[32]; or to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"[33] The current D.C. Code does not define the terms "threats," "duress," "detain," "force," "fraud," or "intimidation" for the as used in Chapter 27, and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the RCC precisely defines the meaning of coercive threats and debt bondage, and clearly defines what means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of the revised statutes.

Fourth, the RCC forced commercial sex offense requires a person to act with a "knowing" culpable mental state. Statutes under Chapter 27[34] that are replaced in whole or in part by the RCC's forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC forced commercial sex act offense specifies one consistent, defined culpable mental state. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[35] This change improves the clarity, consistency, and proportionality of the revised statutes.

Fifth, the RCC forced commercial sex offense requires only a single commercial sexual act for liability. Offenses under Chapter 27 criminalize detaining a person "for the purpose of prostitution,"[36] or compelling a person to "lead a life or prostitution,"[37] and make no reference to the number of occasions in which a person is compelled to engage in prostitution. There is no relevant DCCA case law on the unit of prosecution for these offenses, and it appears that compelling a person to engage in prostitution numerous times may constitute only a single violation of these statutes. In addition, it is possible that coercing a person to engage in a commercial sex act may constitute forced labor under the current statute.[38] However, the current forced labor statute does not specify whether commercial sex acts constitute labor or services, and if they do, whether multiple commercial sex acts may be prosecuted as more than one instance of forced labor. In contrast, the RCC forced commercial sex act offense provides liability for each separate commercial sexual act. This change improves the clarity and proportionality of the revised statutes.[39]

Sixth, the RCC forced commercial sex statute requires that the accused caused the complainant to engage in a commercial sex act with a person other than the actor. It is

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[32] *Id*.
[33] D.C. Code § 22-2708.
[34] D.C. Code § 22-2705; D.C. Code § 22-2706; D.C. Code 22-2708.
[35] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[36] D.C. Code § 22-2706.
[37] *Id*.
[38] D.C. Code § 22-1832.
[39] Under the revised offense, a person who uses a coercive threat or debt bondage to compel another person to engage in more than one commercial sex act may be convicted for multiple counts of forced commercial sex. However, whether multiple convictions are permitted in a given case is governed by the merger analysis set for under RCC § 22E-214.

unclear if the current forced labor or services statute criminalizes coerced commercial sex, and if it does, whether the accused must have caused the complainant engage in a commercial sex act with someone other than the accused. There is no relevant DCCA case law. To resolve this ambiguity, the revised statute specifies that the offense requires that the accused caused the person to engage in a commercial sex act with another person. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Seventh, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[40] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

Eighth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[41] However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code provisions concerning repeat offender enhancements,[42] hate crime enhancements,[43] and pretrial release penalty enhancements.[44] To resolve this ambiguity, the revised statute specifies that the revised statute's penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Limitations on Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Hate Crime Penalty Enhancement, or § 22E-608 Pretrial Release Penalty Enhancements. This change improves the clarity and may improve the proportionality of the revised statute.

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

First, the forced commercial sex offense explicitly criminalizes as a human trafficking offense causing a person to engage in commercial sex acts by means of

[42] D.C. Code §§ 22-1804; 22-1804a.
[43] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[44] D.C. Code § 23-1328.

coercive threat or debt bondage. It is unclear whether the current forced labor statute criminalizes the use of coercion or debt bondage to cause a person to engage in commercial sex acts. The current forced labor offense requires that the accused "use coercion to cause a person to provide labor or services" or to "keep any person in debt bondage."[45] However, the current D.C. Code does not specify whether "labor or "services" include commercial sex acts. "Labor" is currently defined as "work that has economic or financial value," and "services" is currently defined as "legal or illegal duties or work done for another, whether or not compensated." [46] There is no relevant D.C. DCCA case law. The current D.C. Code, however, contains several prostitution-related offenses that do appear to criminalize coercing a person to engage in commercial sex acts.[47] The revised statute, however, specifies that the use of coercive threats to cause a person to engage in commercial sex is not only criminal, but a human trafficking offense. There is no clear justification for distinguishing the harm of using coercive threats to cause a person perform commercial sex when the complainant is a person who other times chooses to engage in commercial sex work from someone who has not engaged in such work. This change improves the clarity, organization, and proportionality of the revised statutes.

Second, the RCC defines a "commercial sex act" as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person."[48] Chapter 27 defines "prostitution" as "a sexual act or contact with another person in return for giving or receiving anything of value."[49] The RCC's definition of "commercial sexual act" definition is essentially equivalent to the current Chapter 27 definition of prostitution. The RCC's definition of "commercial sex act" is not intended to differ in any substantive way from the current code's definition of "prostitution."

Third, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[50] "Actor" is a defined term[51], which means "a person accused of any offense." The term "person" is also a defined term[52], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[45] D.C. Code § 22-1832.
[46] D.C. Code § 22-1831.
[47] D.C. Code §22-2705; D.C. Code §22-2706; D.C. Code §22-2708.
[48] RCC § 22E-701.
[49] D.C. Code § 22-2701.01(3).
[50] D.C. Code § 22-1832.
[51] RCC § 22E-701.
[52] RCC § 22E-701.

RCC § 22E-1603. Trafficking in Labor or Services.

Explanatory Note. *This section establishes the trafficking in labor or services offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, anyone will cause that person to provide labor or services by means of coercive threat or debt bondage. Trafficking persons for commercial sex acts is criminalized under the separate trafficking in commercial sex offense. The RCC's trafficking in labor or services offense, along with the RCC's trafficking in commercial sex offense*[1]*, replaces the trafficking in labor or commercial sex acts statute*[2] *under the current D.C. Code.*

Paragraph (a)(1) specifies that trafficking in labor or services requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, a person. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would entice, house, transport, provide, obtain, and maintain a person.

Paragraph (a)(2) specifies that the person must have acted "with intent that" the trafficked person will be caused, as a result, to provide labor or services by means of an explicit or implicit coercive threat[3] or debt bondage. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the trafficked person will be caused, as a result, to provide labor or services by means of a coercive threat or debt bondage. Per RCC § 22E-205, the object of the phrase "with intent that" 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 trafficked person actually performs labor or services, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the labor or services that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to provide labor or services by means of coercive threat or debt bondage.[4]

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[1] RCC § 22E-1604.

[2] D.C. Code § 22-1833.

[3] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

[4] For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor or services.

Paragraph (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(1)(A) specifies that if a person commits trafficking in labor or services and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[5] here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Subparagraph (b)(2)(B) specifies that if the complainant was held or provides services for more a total of more than 180 days, the offense classification may be increased in severity by one class.[6] Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement. Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (b) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The trafficking in labor or services offense changes current District law in six main ways.*

First, by reference to the RCC's definitions of "labor" and "services", the revised offense excludes liability for trafficking persons who will engage in commercial sex acts. The current trafficking in labor or commercial sex acts offense criminalizes trafficking persons who will engage in labor, services, *or* commercial sex acts.[7] In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses. This change improves the organization of the revised offense.

Second, by reference to the RCC's "coercive threat" definition, the trafficking in labor or services statute does not provide liability for trafficking a person who will be caused to provide labor or services by fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[8] and by extension the current trafficking in labor or commercial sex acts statute references using fraud or deception to cause a person to provide labor or service. By contrast, the RCC's "coercive threat" definition does not include fraud or deception,[9] and trafficking a person who will be tricked into performing labor or services is not a sufficient basis for liability under the revised trafficking in labor or services offense. The revised offense only provides liability for trafficking a person who will be caused to provide labor or services under threat of one of the means listed in the RCC's definition of "coercive threats," or by subjecting the person to debt bondage.[10] While using deception to cause another to

[5] RCC § 22E-206 (d).

[6] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

[7] D.C. Code § 22-1833.

[8] D.C. Code § 22-1831 (3)(D).

[9] RCC § 22E-701.

[10] Trafficking in labor or services may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a laborer knowing that he or she was initially lured with the

engage in labor or services is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for common employment disputes and those engaged in such schemes.[11] Rather, a person who encourages or assists a person who causes another to provide labor or services through fraud or deception may still be liable as an accomplice[12] under the RCC's revised fraud[13] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC's "coercive threat" definition, the revised trafficking in labor or services offense criminalizes trafficking when the coercion at issue is restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in labor or services offense only provides liability for trafficking a person who will caused to provide labor or services under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[14] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[15] and precludes arguments that trafficking an employee knowing that an employer seeks to limit the employee's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in labor or services.[16] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[17]

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false promise of high wages, and will be coerced into providing labor under threat of bodily injury could be convicted under the RCC's trafficking in labor or services statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

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

[12] RCC § 22E-210.

[13] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

[14] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

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

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

[17] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.[18] This change improves the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in labor or services offense requires that the accused acted *with intent* that the trafficked person will be caused to provide labor or services by means of coercive threat or debt bondage. The current statute includes acting "with reckless disregard of the fact that" coercion will be used to cause the person to provide labor or services. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to perform labor or services by means of a coercive threat or debt bondage.[19] Requiring that the accused was at least practically certain that the person will be caused to provide labor or services by means of coercive threat or debt bondage may avoid disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.[20] This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in labor or services offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide labor or services. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.[21] The current D.C. Code statute also states that it applies when "coercion will be used or is being used."[22] By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing labor or services. The actor's trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to a future result.[23] This revision excludes persons who may provide assistance to a

[18] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[19] For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing labor or services, the driver is not guilty of trafficking in labor or services if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging labor or services.

[20] Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to provide labor or services by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into providing labor or services, with the purpose of avoiding criminal liability.

[21] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor or services.

[22] D.C. Code § 22-1833.

[23] The result may be imminent or in the distant future, so long as the actor's conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District work

complainant (e.g. housing, meals) that are unrelated to the coerced acts.[24] This change improves the proportionality of the revised criminal code.

Sixth, the revised trafficking in labor or services offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor is currently not a "crime of violence."[25] By contrast, the revised trafficking in labor or services offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

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

First, by reference to the RCC's definition of "coercive threat," trafficking in labor or services includes causing a person to engage in labor or services by threatening that any person will "commit any criminal offense against persons" or any "property offense."[26] The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[27] The revised definition of "coercive threat" and the RCC crime of trafficking in labor or services together specify that trafficking a person with intent that any person will use threats to commit any criminal offense against persons or property offense to compel labor or services is categorically a basis for liability, even if it would otherwise be unclear whether the threat would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in labor or services statute replaces the word "harbor" with "houses." The current D.C. Code trafficking statute refers to "harboring" as one of many types of predicate conduct, including "recruit, entice, harbor, transport, provide, obtain, or maintain." "Harboring" is not statutorily defined, and there is no

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site and believes to a practical certainty that as a result they will perform commercial labor or services by coercive threats, either immediately or weeks later, may be guilty of trafficking in labor or services.

[24] For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform labor or services under coercive threat later that week. Also, there would not be a causal link to a future act of labor or services, or liability for trafficking in labor or services for a shelter driver who transports persons known to have performed labor or services by coercive threats to a shelter.

[25] D.C. Code § 22-1331 (4).

[26] RCC § 22E-701.

[27] D.C. Code § 22-1831 (7).

relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word "houses" replaces the word "harbor." The RCC reference to "houses" may be narrower than "harbor,"[28] although the term "houses" is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

Third, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code trafficking in labor or services statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[29] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

One other change to the trafficking in labor or services statute is clarificatory, and is not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[30] "Actor" is a defined term[31], which means "a person accused of any offense." The term "person" is also a defined term[32], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[28] The verb form of the word "harbor" is defined by Meriam-Webster's Dictionary as, "to give shelter or refuge to[.]" https://www.merriam-webster.com/dictionary/harbor
[29] D.C. Code §22-1837 (a)(2).
[30] D.C. Code § 22-1832.
[31] RCC § 22E-701.
[32] RCC § 22E-701.

RCC § 22E-1604. Trafficking in Commercial Sex.

Explanatory Note. *This section establishes the trafficking in commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage. The RCC's trafficking in commercial sex offense, along with the RCC's trafficking in labor or services offense[1], replaces the trafficking in labor or commercial sex acts statute[2] under the current D.C. Code. The revised offense also replaces portions of the pandering statute[3] the compelling an individual to live life or prostitution against his or her will statute,[4] and the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute[5] in Chapter 27 of the current D.C. Code. To the extent that certain statutory provisions authorizing extended periods of supervised release[6] apply to the current trafficking in labor or commercial sex acts statute, these provisions are replaced in relevant part by the revised trafficking in commercial sex acts statute.*

Paragraph (a)(1) specifies that trafficking in commercial sex requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, the complainant. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would entice, house, transport, provide, obtain, or maintain the complainant.

Paragraph (a)(2) specifies that the actor must have acted with intent that the complainant will be caused, as a result, to provide a "commercial sex act" by means of a coercive threat or debt bondage. The term "commercial sex act" is a defined term.[7]

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[1] RCC § 22E-1603.

[2] D.C. Code § 22-1833.

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

[4] D.C. Code § 22-2706. This statute makes it a crime to "by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact." This conduct may also be criminalized under the RCC's kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.

[5] D.C. Code § 22-2704.

[6] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . **(A)** Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current trafficking in labor or commercial sex acts offense involves sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

[7] RCC § 22E-701.

"Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant will be caused to perform a commercial sex act by means of an explicit or implicit coercive threat[8] or debt bondage. Per RCC § 22E-205, the object of the phrase "with intent that" 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 trafficked person actually performs a commercial sex act, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the labor or services that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to provide labor or services by means of coercive threat or debt bondage.[9] Paragraph (a)(2) also specifies that the actors must cause the complainant to engage in a commercial sex act with someone other than the actor.[10] This element may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct.[11]

Subsection (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(2)(A) specifies that if a person commits trafficking in commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[12] here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, subparagraph (b)(2)(A) also specifies that if a person commits trafficking in commercial sex, the complainant was, in fact, under the age of 12, an enhancement of one penalty class applies. The term "in fact" specifies that no culpable mental state is required if the complainant was under the age of 12. Paragraph (b)(2)(B) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one

[8] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

[9] For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor or services.

[10] An actor who traffics a person with intent that the person engage in a commercial sex act *with the actor* by means of a coercive threat or debt bondage may be subject to liability under sex assault offenses defined under Chapter 13.

[11] Masturbation is not explicitly included in the definition of "commercial sex act." However, the term "commercial sex act" is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."

[12] RCC § 22E-206.

class.[13] Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement. Even if more than one penalty enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under paragraph (b)(2) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The trafficking in commercial sex statute changes current District law in seven main ways.*

First, the RCC trafficking in commercial sex offense is codified in a separate and distinct manner from the offense of trafficking in labor or services. The D.C. Code currently criminalizes in one statute trafficking persons who will engage in labor, services, *or* commercial sex acts.[14] In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses and clarifies that commercial sex acts are not part of the revised definitions of "labor" and "services." This change improves the organization of the revised offenses.

Second, by reference to the RCC's "coercive threats" definition, the trafficking in commercial sex statute does not provide liability for trafficking a person who will be caused to engage in a commercial sex act by means of fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[15] and by extension the current trafficking in in labor or commercial sex acts statute references using fraud or deception to cause a person to engage in a commercial sex act. By contrast, the RCC's "coercive threat" definition does not include fraud or deception,[16] and trafficking a person will be tricked into performing commercial sex is not a sufficient basis for liability under the revised trafficking in commercial sex offense. The revised offense only provides liability for trafficking a person who will be caused to engage in a commercial sex act under threat of one of the means listed in the RCC's definition of "coercive threat," or by subjecting the person to debt bondage.[17] While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage.[18] Rather, a person who encourages or

[13] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.
[14] D.C. Code § 22-1833.
[15] D.C. Code § 22-1831 (3)(D).
[16] RCC § 22E-701.
[17] Trafficking in commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a worker knowing that he or she was initially lured with the false promise of high wages, and will also be coerced into engaging in commercial sex acts under threat of bodily injury may be convicted under the RCC's trafficking in commercial sex statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).
[18] For instance, under the current statutory definition of "coercion," a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.

assists a person who causes another to provide commercial sex through fraud or deception may still be liable as an accessory[19] under the RCC's revised fraud[20] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC's "coercive threat" definition, the revised trafficking in commercial sex offense criminalizes trafficking when the coercion at issue is restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any addictive substance, and by extension the current trafficking in labor or commercial sex acts statute references facilitating or controlling access to addictive substances to cause a person to engage in a commercial sex act. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in commercial sex offense only provides liability for trafficking a person who will caused to provide a commercial sex act under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of coercive threat.[21] Restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of coercive threat. This change eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[22] and precludes arguments that trafficking a person knowing that someone will seek to limit that person's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in commercial sex acts.[23] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[24] Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.[25] These changes improve the clarity and proportionality of the revised statute.

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[19] RCC § 22E-210.

[20] RCC § 22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

[21] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

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

[23] For example, a person who recruits someone to perform commercial sex acts, knowing that another will predicate performance of the commercial sex work on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and may be liable for trafficking.

[24] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[25] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to [] years imprisonment. In addition, although alcohol is an

Fourth, the revised trafficking in commercial sex offense requires that the accused acted *with intent* that the complainant will be caused to engage a commercial sex act by means of coercive threat or debt bondage. The current statute includes acting "with reckless disregard of the fact that" coercion or debt bondage will be used to cause the person to engage in a commercial sex act. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to engage in a commercial sex act by means of a coercive threat or debt bondage.[26] Requiring that the accused was at least practically certain that the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage avoids disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.[27] This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in commercial sex offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide a commercial sex act. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.[28] The current D.C. Code statute also states that it applies when "coercion will be used or is being used."[29] By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing a commercial sex act. The actor's trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to such a future result.[30] This revision excludes persons who may provide assistance to a complainant (e.g. housing, meals) that are unrelated to the coerced acts.[31] This change improves the proportionality of the revised criminal code.

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addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[26] For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing a commercial sex act, the driver is not guilty of trafficking in commercial sex if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging in a commercial sex act.

[27] Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into engaging a commercial sex act, with the purpose of avoiding criminal liability.

[28] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing a commercial sex act, if there is no relationship between that errand and the commercial sex act that the person will perform, the taxi driver cannot be held liable for trafficking in commercial sex.

[29] D.C. Code § 22-1833.

[30] The result may be imminent or in the distant future, so long as the actor's conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District house and believes to a practical certainty that as a result they will perform commercial sex acts by coercive threats, either immediately or weeks later, may be guilty of trafficking in commercial sex.

[31] For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform a

Sixth, the revised trafficking in commercial sex offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age, or if the complainant was, in fact, under 12 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor or commercial sex acts is not currently a "crime of violence."[32] By contrast, the revised trafficking in commercial sex offense provides a penalty enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

Seventh, by reference to the revised definitions of "coercive threat" and "debt bondage," the RCC trafficking in commercial sex offense specifies what types of conduct are sufficient to "compel" a person to engage in prostitution.[33] Under Chapter 27, the current code makes it a crime "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"[34] or to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact,"[35] or to "forcibly abduct a child under 18 from his or her home or usual abode, or from the custody and control of the child's parents or guardian."[36] The current code also makes it a crime to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"[37] The current code does not define the terms "threats," "duress," "detain," "force," "forcibly," "fraud," or "intimidation," and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the RCC trafficking in commercial sex act offense precisely defines the meaning of coercive threat or debt bondage, and clearly define what means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of revised statutes.

Eighth, the RCC trafficking in commercial sex offense requires a person to act with a "knowing" culpable mental state. Statutes under Chapter 27[38] that are replaced in whole or in part by the RCC's trafficking in commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC forced commercial sex act offense specifies one consistent, defined culpable mental state of knowing. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in

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commercial sex act under coercive threat later that week. Also, there would not be a causal link to a future commercial sex act, or liability for trafficking in commercial sex for a shelter driver who transports persons known to have performed commercial sex acts by coercive threats to a shelter.

[32] D.C. Code § 22-1331 (4).

[33] D.C. Code § 22-2706.

[34] *Id*.

[35] *Id*.

[36] D.C. Code §22-2704.

[37] D.C. Code § 22-2708.

[38] D.C. Code § 22-2704; D.C. Code § 22-2705; D.C. Code 22-2706.

American jurisprudence.[39] This change improves the clarity and consistency of the criminal code, and improves the proportionality of penalties.

Ninth, the RCC trafficking in commercial sex offense creates a standardized penalty and enhancements. The offenses under Chapter 27 that are replaced by the RCC's trafficking in commercial sex offense allow for a variety of penalties. Depending on which Chapter 27 offense a defendant was prosecuted under, conduct that would constitute trafficking in commercial sex could be subject to maximum penalties ranging from 5 years[40] to 20 years.[41] In contrast, the RCC forced commercial sex offense applies a consistent penalty and enhancements. This change improves the consistency of the criminal code, and proportionality of the revised statutes.

Beyond these nine changes to current District law, four other aspects of the revised trafficking in commercial sex acts may constitute a substantive change to current District law.

First, by reference to the RCC's definition of "coercive threat," trafficking in commercial sex includes trafficking a person, with intent that, as a result, the person will be compelled to engage in a commercial sex act under threat that any person will commit an offense against persons or a property offense."[42] The current "coercion" definition does not explicitly include threats to commit any offenses against persons or property offenses but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[43] The revised definition of "coercive threats" and the RCC crime of forced commercial sex together specify that a threat to commit any criminal offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in commercial sex statute replaces the word "harbor" with "houses." The current D.C. Code trafficking statute refers to "harboring" as one of many types of predicate conduct, including "recruit, entice, harbor, transport, provide, obtain, or maintain." "Harboring" is not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word "houses" replaces the word "harbor." The RCC reference to

[39] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[40] D.C. Code § 22-2705.
[41] D.C. Code § 22-2704.
[42] RCC § 22E-701.
[43] D.C. Code § 22-1831 (7).

"houses" may be narrower than "harbor,"[44] although the term "houses" is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

Third, the revised trafficking in commercial sex statute requires that the accused had intent that the complainant would be caused to engage in a commercial sex act with a person other than the actor. The current statute does not specify whether the accused must have intent that the complainant engage in a commercial sex act with someone other than the accused, and there is no relevant DCCA case law. In contrast, the revised statute specifies that the actor must have had intent that the complainant would engage in a commercial sex act with someone other than the actor. This change improves the clarity of the revised criminal code, and reduces unnecessary overlap.

Fourth, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code trafficking in labor or commercial sex statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[45] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

In addition, one change to the trafficking in commercial sex statute is clarificatory, and not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[46] "Actor" is a defined term[47], which means "a person accused of any offense." The term "person" is also a defined term[48], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[44] The verb form of the word "harbor" is defined by Meriam-Webster's Dictionary as, "to give shelter or refuge to[.]" https://www.merriam-webster.com/dictionary/harbor
[45] D.C. Code §22-1837 (a)(2).
[46] D.C. Code § 22-1832.
[47] RCC § 22E-701.
[48] RCC § 22E-701.

RCC § 22E-1605. Sex Trafficking of a Minor.

Explanatory Note. *This section establishes the sex trafficking of a minor offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act, and with recklessness as to that person being under the age of 18. The revised sex trafficking in minors offense replaces the current sex trafficking of children statute[1] and part of the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute.[2] To the extent that certain statutory provisions authorizing extended periods of supervised release[3] apply to the current sex trafficking of children statute, these provisions are replaced in relevant part by the revised sex trafficking of a minor statute.*

Paragraph (a)(1) specifies that sex trafficking of a minor requires that a person knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, another person. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word houses is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would entice, house, transport, provide, obtain, or maintain another person.

Paragraph (a)(2) specifies that sex trafficking of a minor requires that the accused acted "with intent that" the trafficked person, as a result, would be caused to engage in a commercial sex act with another person. The term "commercial sex act" is a defined term.[4] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant would be caused to engage in a commercial sex act with another person. Per RCC § 22E-205, the object of the phrase "with intent that" 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 trafficked person actually performs a commercial sex act, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the commercial sex act that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to engage in a commercial

[1] D.C. Code § 22-1834.
[2] D.C. Code § 22-2704.
[3] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . **(A)** Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current sex trafficking of children offense offense covers sexual acts or contacts with a minor, D.C. Code § 22-403.01 may authorize an extended period of supervised release.
[4] RCC § 22E-701.

sex act.[5] This paragraph also specifies that the actor must cause the complainant to engage in a commercial sex act with someone other than the actor.[6] This element may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct.[7]

Paragraph (a)(3) specifies that sex trafficking of a minor requires that the accused was reckless as to the trafficked person being under the age of 18. This paragraph specifies that a "reckless" culpable mental state applies, which requires that the accused consciously disregarded a substantial risk that the trafficked person is under the age of 18.

Subsection (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides a penalty enhancement applicable to this offense. If the accused recklessly held the complainant, or caused the complainant to provide commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[8] The penalty enhancement under paragraph (b)(2) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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

Relation to Current District Law. *The RCC's sex trafficking of a minor offense changes current District law in one main way with respect to the current sex trafficking of children offense. Also, to the extent it replaces current D.C. Code § 22-2704, the revised sex trafficking of a minor offense changes current District law in three main ways.*

First, the revised sex trafficking of a minor statute requires proof that a person was reckless as to the person trafficked being under 18. Subsection (a) of the current sex trafficking of children offense requires the actor to be "knowing or in reckless disregard of the fact that the person has not attained the age of 18 years," but does not define the culpable mental state terms.[9] However, subsection (b) of the current statute further states that "In a prosecution… in which the defendant had a reasonable opportunity to observe the person recruited, enticed… or maintained, the government need not prove that the

[5] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into engaging in a commercial sex act, if there is no relationship between that errand and the commercial sex act, the taxi driver cannot be held liable for trafficking in commercial sex.

[6] An actor who traffics a person with intent that the person engage in a commercial sex act *with the actor* may be subject to liability under sex assault offenses defined under Chapter 13.

[7] Masturbation is not explicitly included in the definition of "commercial sex act." However, the term "commercial sex act" is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."

[8] This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

[9] D.C. Code § 22-1834.

defendant knew that the person had not attained the age of 18 years."[10] Consequently, the current statute's drafting is ambiguous as to whether "recklessness" always suffices to prove liability (as appears to be stated in subsection (a)) or whether a knowing culpable mental state always is required for liability except where there is a reasonable opportunity to view the complainant (as appears to be stated in subsection (b)). There is no case law on point, however legislative history indicates that the latter interpretation of the statute is correct,[11] and recklessness as to the complainant's age is insufficient for liability except when the actor has a reasonable opportunity to observe the complainant. Notably, D.C. Code § 22-2704 requires that the trafficked person is under the age of 18, but does not specify a culpable mental state for this element, and there is no relevant DCCA case law. In contrast, the RCC sex trafficking of a minor statute requires a culpable mental state of recklessness, a defined term, and omits the limitation about a reasonable opportunity to observe the child. It is not clear why reasonable observation, uniquely, is treated as being such strong evidence of age that the a lower culpable mental state is required where there is such an opportunity.[12] Requiring recklessness as to a complainant being under 18 years of age is consistent with similar age-based circumstances required in other offenses in the RCC and current D.C. Code. This change improves the clarity and consistency of the revised statute.

Second, the revised sex trafficking of a minor statute specifies that a "knowingly" mental state applies to result elements of the offense. A knowing culpable mental state already is required for the similar sex trafficking of children offense.[13] However, D.C. Code § 22-2704 also makes it a crime to "secrete" or "harbor" a child under the age of 18 "for the purposes of prostitution."[14] The current code does not specify any culpable mental state for these elements of D.C. Code § 22-2704, and there is no relevant D.C. Court of Appeals (DCCA) case law. In contrast, the revised sex trafficking of a minor statute specifies that the accused must knowingly recruit, entice, harbor, transport, provide, obtain, or maintain by any means, another person. This change improves the clarity and consistency of the revised statutes.

Third, the revised sex trafficking of a minor statute specifies that the accused act "with intent" that the trafficked person will be caused to engage in a commercial sex act.

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[10] D.C. Code § 22-1834 (b).

[11] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 "Prohibition Against Human Trafficking Amendment Act of 2010" at 8. March 9, 2010. ("Section 104 Creates the crime of sex trafficking of children. A child is defined as under the age of 18 for commercial sex. The prosecution does not have to prove that coercion was used or that the defendant had actual knowledge of the minor's age. However, if the defendant did not have an opportunity to observe the victim, the government needs to prove the defendant had actual knowledge of the victim's age.").

[12] On the one hand, a reasonable opportunity to observe the complainant does not mean that an actor still could not reasonably mistake the complainant's age as being significantly older than 17 years old. On the other hand, other circumstances may provide an actor equally strong evidence of the complainant's age, even though he or she is never seen—e.g. a report from a trusted source as to the complainant apparently being a minor.

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

[14] D.C. Code § 22-2704 (a)(2).

A knowing culpable mental state is required for the current sex trafficking of children offense.[15] However, D.C. Code § 22-2704 requires that the accused secrete or harbor another person "for the purposes of prostitution." D.C. Code § 22-2704 does not further specify the meaning of "for the purposes" or specify (other) culpable mental states, and there is no relevant DCCA case law. In contrast, the revised sex trafficking of a minor statute specifies that the accused must act "with intent" that the person will be caused to engage in a commercial sex act. This change improves the clarity and consistency of the revised statutes.

Fourth, the revised sex trafficking of a minor statute includes a penalty enhancement if the trafficked person was held or provides commercial sex acts for more a total of more than 180 days. The current sex trafficking of children offense contains this penalty enhancement.[16] However, D.C. Code § 22-2704 does not provide for heightened penalties. In contrast, the revised sex trafficking of a minor statute allows that the offense classification may be increased by one class if the trafficked person is held or caused to engage in commercial sex act for more than 180 days. This change improves the proportionality and consistency of the revised statutes.

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

First, the revised sex trafficking of a minor statute requires that the accused had intent that the complainant would be caused to engage in a commercial sex act *with a person other than the actor.* The current statute does not specify whether the accused must have intent that the complainant engage in a commercial sex act with someone other than the accused, and there is no relevant DCCA case law. To resolve this ambiguity, the revised statute specifies that the accused must have had intent that the complainant will engage in a commercial sex act with someone other than the accused. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Second, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code sex trafficking of children statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[17] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

[15] D.C. Code § 22-1834.
[16] D.C. Code § 22-1834.
[17] D.C. Code §22-1837 (a)(2).

RCC § 22E-1606. Benefiting from Human Trafficking.

Explanatory Note. *This section establishes the benefitting from human trafficking offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly obtaining any benefit or property by participating in an association of two or more persons, with recklessness that the group is engaged in forced commercial sex, trafficking in commercial sex, sex trafficking of a minor, forced labor, or trafficking labor or services. The offense is divided into two penalty grades, depending on whether the benefit arose from a group's commission of forced commercial sex, sex trafficking, or sex trafficking of a minor; or forced labor or trafficking in labor or services. The benefitting from human trafficking offense replaces the benefitting financially from human trafficking statute*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies that first degree benefitting from human trafficking requires that the accused knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term "property" is a defined term,[2] which includes anything of value. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would obtain a financial benefit or property.

Paragraph (a)(2) specifies that the accused must have obtained the property or financial benefit through participation in a group of two or more persons. The group may be comprised, at a minimum, of the accused and one other person.[3] The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The accused must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Paragraph (a)(3) specifies that for first degree benefitting from human trafficking, the accused must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced commercial sex under RCC § 22E-1602, trafficking in commercial sex under RCC 22E-1604, or sex trafficking of a minor under RCC § 22E-1605. The "reckless" culpable mental state requirement here means that the accused consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting forced commercial sex, trafficking in commercial sex, or sex trafficking of a minor. The use of "in fact" indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It is not required that all members of the group, including the accused, actually engaged in conduct constituting either of these offenses.[4]

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[1] D.C. Code §22-1836.

[2] RCC § 22E-701.

[3] This element may be satisfied in a case involving a single business comprised of two people who are engaged in human trafficking.

[4] For example, if a motel owner receives payment from a customer, with recklessness that the other person is using the hotel room to coerce people into engaging in commercial sex acts, the motel owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause any one to engage in commercial sex acts by means of coercive threats or debt bondage. *See, Ricchio v. McLean*,

Paragraph (a)(4) specifies that the actor's participation in the group furthers, in any manner, the conduct constituting the human trafficking offense. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. Although it is not required that all members of the group actually engaged in conduct constituting a human trafficking offense, the accused's participation in the group must further, in any manner, the conduct that constitutes forced commercial sex, trafficking in commercial sex, or sex trafficking of a minor.[5]

Paragraph (b)(1) specifies that second degree benefitting from human trafficking requires that the accused knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term "property" is a defined term,[6] which includes anything of value. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would obtain a financial benefit or property.

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

Paragraph (b)(3) specifies that for second degree benefitting from human trafficking, the accused must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced labor or services under RCC 22E-1601 or trafficking in labor or services under RCC 22E-1603. The "reckless" culpable mental state requirement here means that the accused consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting either forced labor or trafficking in labor or services. The use of "in fact" indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It is not required that all members of the group, including the accused, actually engaged in conduct constituting either of these offenses.[7]

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853 F.3d 553, 556 (1st Cir. 2017) (motel owner was "associated" and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally*, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

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

[6] RCC § 22E-701.

[7] For example, if a building owner receives rent payment from a customer, with recklessness that the other person is using the building to run a sweatshop in which people are coerced into providing labor, the building owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause anyone to provide labor by means of coercive threats or debt bondage. *See, Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was "associated" and obtained benefit when he

Paragraph (b)(4) specifies that the actor's participation in the group furthers, in any manner, the conduct constituting the human trafficking offense. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. Although it is not required that all members of the group actually engaged in conduct constituting a human trafficking offense, the accused's participation in the group must further, in any manner, the conduct that constitutes forced labor or trafficking in labor or services.[8]

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

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

Relation to Current District Law. *The revised benefitting from human trafficking offense changes current District law in one main way.*

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

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

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

Second, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[9] "Actor" is a defined term[10], which means "a person accused of any offense." The term "person" is also a defined term[11], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

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rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally*, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

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

[9] D.C. Code § 22-1832.

[10] RCC § 22E-701.

[11] RCC § 22E-701.

RCC § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking.

Explanatory Note. *This section establishes the misuse of documents in furtherance of human trafficking offense ("misuse of documents") for the Revised Criminal Code (RCC). This offense requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, with intent to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person. The misuse of documents in furtherance of human trafficking offense replaces the unlawful conduct with respect to documents in furtherance of human trafficking statute*[1] *in the current D.C. Code.*

Subsection (a) specifies the elements of first degree misuse of documents. Paragraph (a)(1) specifies that first degree misuse of documents requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other immigration document. The terms "destroys," "conceals," "removes," "confiscates," and "actual or purported government identification document" are intended to have the same meaning as under current law. "Possess" is a defined term per RCC § 22E-701 meaning "holds or carries on one's person; or has the ability and desire to exercise control over." The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain both that an actual or purported document was involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Paragraph (a)(2) specifies that misuse of documents requires that the accused acted "with intent to" restrict the person's liberty to move or travel in order to maintain performance of a commercial sex act by that person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person's liberty to move or travel. 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 actor actually succeeded in restricting the person's liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

Subsection (b) specifies the elements of second degree misuse of documents. Subsection (b) specifies the penalty applicable to this offense. Paragraph (b)(1) specifies that first degree misuse of documents requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other immigration document. The terms "destroys," "conceals," "removes," "confiscates," and "actual or purported government identification document" are intended to have the same meaning as under current law. "Possess" is a defined term per RCC § 22E-701 meaning "holds or carries on one's person; or has the ability and desire to exercise control over." The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain both that an actual or purported document was

[1] D.C. Code §22-1835.

involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Paragraph (b)(2) specifies that misuse of documents requires that the accused acted "with intent to" restrict the person's liberty to move or travel in order to maintain labor or services by that person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person's liberty to move or travel. 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 actor actually succeeded in restricting the person's liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

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

Relation to Current District Law. *The revised misuse of documents offense changes current District law in two main ways.*

First, the revised misuse of documents offense is divided into two penalty grades depending on whether the actor misused documents to maintain a person's labor or services, or commercial sex acts. The current misuse of documents offense only has one penalty grade, regardless of whether the misuse of documents is related to forced labor or forced commercial sex. By contrast, the revised offense distinguishes misuse of documents in order to maintain a person's labor or services, or commercial sex acts. Dividing the offense into two penalty grades improves the proportionality of the revised offense. This change improves the proportionality of the revised offense.

Second, the revised misuse of documents offense requires that the accused destroys, conceals, removes, confiscates, or possesses any actual or purported *government* identification document, specifically including passports and immigration documents. The current statute refers broadly to "any actual or purported government identification document, including a passport or other immigration document, or any other actual or purported document."[2] There is no relevant DCCA case law construing these terms, although legislative history refers to "official papers."[3] By contrast, the revised offense clarifies that this offense only applies to government-issued identification documents, including immigration documents.[4] Misuse of other documents with intent to restrict someone's freedom of movement may constitute another crime under the RCC.[5] This change improves the clarity of the revised statute.

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

[2] D.C. Code §22-1835.

[3] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 "Prohibition Against Human Trafficking Amendment Act of 2010" at 8. March 9, 2010.

[4] For example, destroying a person's employee identification badge issued by a private employer does not constitute misuse of documents.

[5] See, e.g., § 22E-1402. Criminal Restraint (attempted); § 22E-2102 Unauthorized use of property.

First, the revised misuse of documents offense specifies that the offense requires "knowingly" destroying, concealing, removing, confiscating, or possessing a government identification document. The current statute clearly requires that the destruction, concealing, etc. of a document be done "knowingly," but the statute is ambiguous whether the "knowingly" mental state applies also to the nature of the document as a form of government identification. D.C. Court of Appeals (DCCA) case law does not address the issue.[6] By contrast, the revised offense clarifies the culpable mental state as to the nature of the document. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[7] This change improves the clarity of the revised statute.

Second, the revised misuse of documents offense specifies that the offense requires that that the accused acted "with intent" to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. The current statute does not specify any culpable mental state for this element, but merely requires that the accused acted "*to* prevent or restrict, or attempt to prevent or restrict . . . the person's liberty to move or travel[.]"[8] Case law does not address the issue. By contrast, the revised offense clarifies that the actor must act with intent to restrict movement. The phrase with intent to means that the person believes to a practical certainty that the complainant would be restricted in their movement, but actual proof of restriction is not required. "With intent" more clearly communicates the mental state requirement and encompasses the conduct indicated by the "attempt to" prong of the current statute. Anytime a person acts with intent to restrict a person's liberty, that person has also acted with intent to attempt to restrict a person's liberty. This change improves the clarity and consistency of the revised statute.

Third, the revised statute omits the words "without lawful authority." The current statute's covered conduct is, "knowingly to destroy, conceal, … document, of any person to prevent or restrict, or attempt to prevent or restrict, *without lawful authority*, the person's liberty to move or travel…" There is no case law interpreting the phrase "without lawful authority." In the RCC, if a person actually has the lawful authority to engage in conduct covered by the revised statute, general defenses would apply to this conduct the same as any other conduct that otherwise would appear to be a crime. This change improves the clarity of the revised statute.

Other changes are clarificatory and are not intended to substantively change current District law.

First, the revised statute requires that the accused act with intent to restrict a person's liberty to move or travel. The current statute criminalizes acting with intent to prevent or "restrict . . . the person's liberty to move or travel[.]" It is unclear what it

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

[7] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[8] D.C. Code § 22-1835.

means to "prevent" a person's liberty to move or travel. The word "restrict" as used in the revised statute is intended to cover all conduct that would constitute "preventing" a person's freedom to move or travel.

Second, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[9] "Actor" is a defined term[10], which means "a person accused of any offense." The term "person" is also a defined term[11], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[9] D.C. Code § 22-1832.
[10] RCC § 22E-701.
[11] RCC § 22E-701.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

Explanatory Note. *This section establishes the commercial sex with a trafficked person offense for the Revised Criminal Code (RCC). The commercial sex with a trafficked person offense is divided into two penalty gradations. Both grades require that the accused knowingly engage in a commercial sex act, and the penalty grades are distinguished based on the presence of one or more additional circumstances relating to whether the other party to the commercial sex act had been coerced or trafficked, and whether the other party was under the age of 18. There is no analogous offense under current District law. The current D.C. Code does not distinctly criminalize engaging in commercial sex acts with human trafficking victims.* [1] *To the extent that certain statutory provisions authorizing extended periods of supervised release*[2] *would apply to the commercial sex with a trafficked person, these provisions are replaced in relevant part by the revised commercial sex with a trafficked person statute.*

Subsection (a) establishes the elements for first degree commercial sex with a trafficked person. Paragraph (a)(1) specifies that the accused must engage in a "commercial sex act," a defined term.[3] The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[4] which here requires that the defendant was practically certain that he or she is engaged in a commercial sex act.

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

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

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

[2] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . **(A)** Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the commercial sex with a trafficked person statute covers sexual acts or contacts without consent, D.C. Code § 22-403.01 would authorize an extended period of supervised release.

[3] RCC § 22E-701

[4] RCC § 22E-206 (b).

Paragraph (a)(2) specifies that first degree commercial sex with a trafficked person requires that an explicit or implicit coercive threat,[5] or debt bondage, both defined terms,[6] was used to cause the other person to engage in the commercial sex act with the accused. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[7] which here requires that the accused was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act.

Paragraph (a)(3) specifies that first degree sex trafficking patronage requires that the accused was reckless as to whether the other person was under the age of 18, or, in fact, the complainant was under 12 years of age. "Recklessness," a defined term,[8] here requires that the defendant consciously disregarded a substantial risk that that was clearly blameworthy that the other person was under the age of 18. "In fact" is a defined term that here means no culpable mental state need be proven if the complainant is under 12 years of age.

Subsection (b) establishes the elements for second degree sex trafficking patronage. Paragraph (b)(1) specifies that the defendant must engage in a commercial sex act. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[9] which here requires that the defendant was practically certain that he or she is engaged in a commercial sex act.

Paragraph (b)(2) specifies that two forms of second degree commercial sex with a trafficked person. Subparagraph (b)(2)(A) requires that an explicit or implicit "coercive threat," or "debt bondage," both defined terms[10], was used to cause the other person to engage in the commercial sex act with the accused. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[11] which here requires that the accused was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act. Subparagraph (b)(2)(B) requires that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[12] which here requires that the accused was practically certain that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. Subparagraph (b)(2)(B) also requires that the accused was reckless

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[5] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

[6] RCC § 22E-701.

[7] RCC § 22E-206 (b).

[8] RCC § 22E-206 (d).

[9] RCC § 22E-206 (b).

[10] RCC § 22E-701.

[11] RCC § 22E-206 (b).

[12] RCC § 22E-206.

that the complainant was under the age of 18, or was, in fact, under the age of 12. When the complainant was under the age of 18, a "reckless" culpable mental state applies, which requires that the accused consciously disregarded a substantial risk that that was clearly blameworthy that the complainant was under the age of 18. When the complainant was under the age of 12, the term "in fact" specifies that no culpable mental state is required.

Relation to Current District Law. *The commercial sex with a trafficked person offense changes current District law by criminalizing the knowingly engaging in a commercial sex act with a victim of trafficking in commercial sex, forced commercial sex, or sex trafficking of a minor.*

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

RCC § 22E-1609. Forfeiture.

Explanatory Note. *This section establishes forfeiture rules for property involved in violations of offenses under this chapter. In addition to any penalties authorized by statutes in this chapter, a court may order any actors convicted of an offense under this chapter to forfeit property used or intended to be used to commit or facilitate commission of an offense under this chapter, or any property obtained as a result of commission of an offense under this chapter. The revised statute replaces the current forfeiture statute applicable to human trafficking offenses.*[1]

Relation to Current District Law. *The forfeiture statute makes changes current District law in one main way.*

The revised statute provides judicial discretion in determining whether and to what extent to require forfeiture. The current statute states that "the court shall order…" forfeiture. There is no DCCA case law on point, although generally the DCCA has recognized constitutional restrictions on asset forfeiture that are excessive.[2] By contrast, the revised statute states that "the court may order…" forfeiture. Providing judicial discretion allows the court to determine a proportionate forfeiture, conscientious of constitutional and sub-constitutional considerations of what would be an excessive loss.

One change is clarificatory and is not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[3] "Actor" is a defined term[4], which means "a person accused of any offense." The term "person" is also a defined term[5], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[1] D.C. Code § 22-1838.
[2] Any forfeiture must be proportional under the excessive fines clause of the U.S. Constitution. *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 560-61 (D.C. 1998).
[3] D.C. Code § 22-1832.
[4] RCC § 22E-701.
[5] RCC § 22E-701.

RCC § 22E-1610. Reputation or opinion evidence.

Explanatory Note. *This section establishes evidentiary rules that prohibits the use of reputation or opinion evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited by RCC § 22E-1602, trafficking in commercial sex, as prohibited by RCC § 22E-1604; sex trafficking of a minor, as prohibited by § 22E-1605; benefitting from human trafficking, as prohibited by § 22E-1606; and commercial sex with a trafficked person, as prohibited by RCC § 22E-1608.. This section is nearly identical to current D.C. Code § 22-1839, but has been amended to apply to prosecutions of forced commercial sex and commercial sex with a trafficked person, which are not currently criminalized under the human trafficking chapter.*

Relation to Current District Law. *The revised reputation or opinion evidence statute changes current District law in one main way.*

The revised reputation or opinion evidence statute bars evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited under RCC § 22E-1602 and commercial sex with a trafficked person, as prohibited under RCC § 22E-1608. Under current law, coercing a person to engage in a commercial sex act and engaging in a commercial sex act with a trafficked person are not separately criminalized. However, the current reputation or opinion evidence statute applies to prosecutions for "trafficking in commercial sex," "sex trafficking of children," and "benefitting financially from human trafficking[.]"[1] By contrast, the revised reputation or opinion evidence statute clarifies that it also applies to prosecutions of the RCC's forced commercial sex and commercial sex with a trafficked person offenses. It would be inconsistent to bar reputation or opinion evidence of an alleged victim's past sexual behavior in prosecutions for other offenses, but allow them in a prosecution for forced commercial sex or commercial sex with a trafficked person. This change improves the consistency and proportionality of the revised statute.

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

The revised statute states that when a "person" is accused of an offense listed in the statute, reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. The RCC defines "person" to include businesses and other legal persons.[2] The current statute only refers to a person being accused of an offense, but that term is not defined.[3] It is unclear whether the current statute applies in cases in which a *business* is accused of an offense listed in the statute, and there is no relevant D.C. Court of Appeals case law on point. By contrast, the revised statute clarifies that the reputation or opinion evidence rules apply when a business is accused of offenses listed under the statute. This change improves the clarity and consistency of the revised statute.

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[1] D.C. Code § 22-1839.

[2] RCC § 22E-701.

[3] Cf. D.C. Code §22-3201 (2A). "'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.

One change to the revised statute is clarificatory in nature and is not intended to substantively change District law. The current statute cross references statutes in the current D.C. Code. The revised statute changes the cross references other statutory provisions to match the revised human trafficking offenses in the RCC. The RCC evidentiary rule applies to RCC §§ 22E-1602, 22E-1604, 22E-1605, and 22E-1608, instead of current D.C. Code §§ 22-1833, 22-1834, and 22-1836. This is a technical change that does not otherwise change the reputation or opinion evidence statute.

RCC § 22E-1611. Civil action.

Explanatory Note. *This section authorizes victims of offenses under RCC § 22E-1601, § 22E-1602, § 22E-1603, § 22E-1604, § 22E-1605, § 22E-1606, § 22E-1607, or § 22E-1608 to bring a civil action in D.C. Superior Court for damages and injunctive relief. This section is nearly identical to current D.C. Code § 22-1840. This section is nearly identical to current D.C. Code § 22-1804, but has been amended to authorize victims of all trafficking offenses included in the RCC to bring a civil action, and to change the statute of limitations.*

This section authorizes a victim of any offense under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, or 22E-1608 to bring a civil action against any person who may be charged as a perpetrator of that offense. It is not required that the defendant in the civil action has actually been charged or convicted of that offense. This language shall not be construed to limit civil liability for other entities that may be held vicariously liable, even if they did not directly engage in conduct constituting an offense under this chapter.[1]

Relation to Current District Law. *The revised civil action statute changes current District law in two main ways.*

First, the revised civil action authorizes victims of commercial sex with a trafficked person as defined under RCC § 22E-1608 to bring a civil action. There is no analogous offense under current law, and accordingly the current civil action statute does not authorize victims of this offense to bring a civil action. By contrast, the revised civil action statute allows victims of commercial sex with a trafficked person to bring civil actions. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of commercial sex with a trafficked person offense. This change improves the consistency of the revised statute.

Second, the revised civil action statute changes the statute of limitations for bringing civil actions under this section. The current statute says that the statute of limitations shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a human trafficking offense, or if the plaintiff is a minor, until the plaintiff reaches the age of majority, whichever is later. By contrast, the revised civil statute extends the time within which a victim can bring a civil action if the offense occurred when the victim was under the age of 35, and generally allows civil suits to be brought within 5 years of when the victim knew, or should have known, of the offense. This revision expands the period in which victims of trafficking offenses may bring civil actions in accordance with changes under the Sexual Abuse Statute of Limitations Elimination Amendment Act of 2017. This change improves the proportionality and consistency of the revised statute.

[1] *See*, *Boykin v. District of Columbia*, 484 A.2d 560, 561–62 (D.C. 1984) ("Under the doctrine of *respondeat superior*, an employer may be held liable for the acts of his employees committed within the scope of their employment.") (citing *Penn Central Transportation Co. v. Reddick*, 398 A.2d 27, 29 (D.C.1979)).

In addition to these two changes, two other revisions may constitute substantive changes to current District law.

The revised civil action authorizes victims of forced commercial sex as defined under RCC § 22E-1602 to bring a civil action. The current code does not explicitly criminalize forced commercial sex, and it is unclear whether the use of coercion or debt bondage to compel a person to engage in a commercial sex act constitutes forced labor or services under the current statute. Therefore, it is unclear whether the current civil action statute provides a civil cause of action if a person uses coercive threats or debt bondage to compel a person to engage in a commercial sex act. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of the forced commercial sex offense. This change improves the consistency of the revised criminal code.

Secondly, the revised civil action statute specifies that a victim of a trafficking offense may bring a civil action against any person who may be charged as a perpetrator of that offense. The current statute does not specify against whom civil actions may be brought, and there is no relevant DCCA case law. This revision clarifies that victims of an offense under this chapter may bring a civil action against a person who may be charged as a perpetrator of that offense.

In addition, one change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The revised statute changes cross references to other statutory provisions to match the revised human trafficking offenses in the RCC. The current statute cross references statutes in the current D.C. Code. The revised statute authorizes victims of offenses defined under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, and 22E-1608. This is a technical change that does not otherwise change the civil action statute.

RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.

Explanatory Note. *The Limitations on Liability and Sentencing for RCC Chapter 16 Offenses ("limitations on liability statute") provides two limitations on liability to offenses under this chapter. First, the limitations on liability statute bars charging a person as an accomplice to a Chapter 16 offense, if the principal had previously committed a Chapter 16 offense against that person within 3 years of the conduct by the principal constituting the offense. Second, the limitations on liability statute bars charging a person with conspiracy to commit a Chapter 16 offense if another party to the conspiracy had previously committed a Chapter 16 offense against that person within 3 years of the formation of the conspiracy.*

Subsection (a) bars charging a person as an accomplice to a Chapter 16 offense if the principal had previously committed a Chapter 16 offense against that person. This subsection only bars accomplice liability, and victims of trafficking offenses may still be charged and convicted as principals.

Subsection (b) bars charging a person with conspiracy to commit a Chapter 16 offense if any party to the conspiracy had previously committed a Chapter 16 offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense.[1]

Relation to Current District Law. *The limitations on liability statute changes current District law in two main ways.*

First, the RCC's limitation on liability statute changes current law by barring charging a person as an accomplice to a Chapter 16 offense if prior to that offense, the principal committed a Chapter 16 offense against that person within 3 years prior to the conduct by the principal constituting the offense. Under current law, there are no restrictions on accomplice liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently aid or assist principals in committing additional offenses under this chapter. This subsection only bars accomplice liability, and victims of trafficking offenses may

[1] Subsections (b) and (c) recognize that in many instances, victims of human trafficking offenses are highly vulnerable and may be co-opted by perpetrators into assisting in committing further trafficking offenses. Although these victims may not necessarily be able to satisfy a common law duress defense, they often have diminished culpability, and imposing accomplice or conspiracy liability may be disproportionately severe. These subsections seek to balance protections for vulnerable victims of human trafficking offenses who are co-opted by perpetrators, while still permitting criminal liability for persons who commit trafficking offenses as principals. Other jurisdictions have enacted provisions limiting liability for victims of trafficking offenses. E.g., N.M. Stat. Ann. § 30-52-1 ("In a prosecution pursuant to this section, a human trafficking victim shall not be charged with accessory to the crime of human trafficking."). In addition, the Reporter's Notes accompanying the American Law Institute's draft for sexual assault and related offense for the Model Penal Code notes that some human trafficking victim's advocates say that "enforcement practices often traumatize victims and expose them to even greater hardship and danger." Council Draft No. 8 (Dec. 17, 2018). The note cites to 22 U.S.C. § 7101(b)(19) which states that "Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked[.]"

still be charged and convicted as principals. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

Second, the RCC's limitation on liabilities statute changes current law by barring charging a person with conspiracy to commit an offense under Chapter 16 if within 3 years prior to the formation of the conspiracy, a party to the conspiracy had committed a Chapter 16 offense against that person. Under current law, there are no restrictions on conspiracy liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently conspire with parties that previously committed a trafficking offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

RCC § 22E-1801. Stalking.

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

Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. "Purposely," a term defined in RCC § 22E-206, here requires a conscious desire to engage in a pattern of misconduct.[1] A course of conduct does not have to consist of identical conduct, but the conduct must share an uninterrupted purpose[2] and must consist of one or more of the activities listed in subparagraphs (a)(1)(A) – (D).[3] The behavior must be directed at a specific person, not merely be disturbing to the general public.[4] The pattern may be established by any combination of conduct described in subparagraphs (a)(1)(A) – (D).

Subparagraph (a)(1)(A) provides that one means of committing stalking is physically following or physically monitoring a specific individual. The term "physically following" is defined in RCC § 22E-701 and means maintaining close proximity to a complainant, near enough to see or hear the complainant's activities person as they move from one location to another.[5] "Physically monitoring" is also defined in RCC § 22E-701 and means appearing in close proximity to someone's residence, workplace, or school, to detect the person's whereabouts or activities. Such following or monitoring may be accomplished by means of a third party,[6] however, the revised stalking statute does not reach unauthorized electronic surveillance.[7] Per the rules of interpretation in

[1] A person does not commit a stalking offense by merely knowing that they are engaging in a pattern of conduct toward the complainant. Consider, for example, a person who communicates to a large audience, such as a television broadcast or an upload to YouTube. That person may be practically certain that the complainant will watch the broadcast, and negligent as to the fact that the complainant will be distressed by the content, but not consciously desire that the complainant watch. Consider also a divorced couple attending a family event, such as a wedding or a funeral. One former spouse may be practically certain that they are maintaining close proximity to the other as they move from the church to the reception hall, and negligent as to the fact that their very presence is distressing, but not consciously desire to physically follow them.

[2] A person does not commit a stalking offense by harming a complainant on two occasions that are unrelated or interrupted by a period of reconciliation. Consider, for example, in February of a given year Sister A and Sister B argue about what to watch on television and A assaults B; from March through September, they get along well; but in October they argue about who has to do the dishes and A assaults B again. Sister A has committed two assaults in violation of RCC § 22E-1202 but has not committed a stalking offense.

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

[4] Conduct in a public place that causes a person to reasonably fear a crime is likely to occur may be punishable as disorderly conduct. RCC § 22E-4201.

[5] The phrase "close proximity" does not require that the defendant be near enough to reach the complainant. Distances may vary widely, depending on facts including crowd density, noise, and height. Examples may include walking a couple of stores down the street from the complainant or driving near the complainant in a vehicle.

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

[7] Unauthorized electronic surveillance is addressed in RCC § 22E-1802, Electronic Stalking.

RCC § 22E-207, the "purposely" culpable mental state also applies to this element. The accused must consciously desire to physically follow or monitor the complainant.[8]

Subparagraph (a)(1)(B) provides that another means of committing stalking is falsely personating a complainant. For example, an actor may commit a stalking offense by falsely posing as the complainant in an online forum and making statements that intentionally or negligently inflict fear or emotional stress on that complainant. Per the rules of interpretation in RCC § 22E-207, the "purposely" culpable mental state also applies to this element. The accused must consciously desire to falsely personate the complainant.

Subparagraph (a)(1)(C) provides that a third means of committing stalking is to persistently contact someone without their effective consent. Per the rules of interpretation in RCC § 22E-207, the "purposely" culpable mental state requires that the accused consciously desire to contact the specific individual.[9] The method of communication is irrelevant, whether it be in person speech, electronic correspondence, or messages sent through a third party.[10] Subparagraph (a)(1)(C) specifies that the person must be negligent as to the fact that the contact is without effectice consent. The term "negligent" is defined in RCC § 22E-206 and here requires that the actor should be aware of a substantial risk that the contact[11] is without the complainant's effective consent[12] and that the actor's conduct is clearly blameworthy.[13] The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an express or implied coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. Subparagraph (a)(1)(C) does not reach communications *about* the specific individual to other (third) persons.[14] This restriction on communication is

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

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

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

[11] It is the contact and not the content that must be without effective consent. Compare, for example, a complainant who notifies the defendant to cease all communication (e.g., "Do not call me again.") with a complainant who asks the defendant to cease certain *offensive* communication (e.g., "Do not call me 'a jerk' again.").

[12] Consider, for example, a person who is told by a love interest's parent, "Never contact my daughter again." If the person reasonable believes that this is the command only of the parent and not the love interest, disobeying the command will not amount to stalking.

[13] For example, a complainant may convey their desire to not be contacted either directly, by telling the person to stop, or indirectly through an attorney, government entity, or a third party. In some instances, blocking electronic communications may also suffice to notify to the accused that further communication is unwelcome. On some communication platforms, electronic blocking is obvious to the person who has been blocked. On other platforms, the user's profile may appear to vanish. On others, the blocking (or muting) is not made apparent to the person who was blocked at all.

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

content-neutral, and prohibits all contact beyond the complainant's effective consent, irrespective of tenor and tone.

Subparagraph (a)(1)(D) provides that a fourth means of committing stalking is to commit, solicit, or attempt Criminal Threats,[15] Theft,[16] Identity Theft,[17] Arson,[18] Criminal Damage to Property,[19] Criminal Graffiti,[20] Trespass,[21] Breach of Home Privacy,[22] or Indecent Exposure.[23] "In fact," a defined term,[24] is used to indicate that there is no separate or additional culpable mental state required as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Paragraph (a)(2) requires that the conduct described in paragraph (a)(1) have either the intent or the effect of causing the victim to experience fear or distress. Under (a)(2)(A), a person commits stalking when they act "with intent to" cause someone fear or significant distress. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause someone fear or significant 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 distress would result.[25] Under (a)(2)(B), a person commits stalking when they negligently cause fear or significant distress, even if they did not subjectively intend to do so.[26] "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[27] and be clearly blameworthy

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

[15] RCC § 22E-1204.

[16] RCC § 22E-2101.

[17] RCC § 22E-2205.

[18] RCC § 22E-2501.

[19] RCC § 22E-2503.

[20] RCC § 22E-2504.

[21] RCC § 22E-2601.

[22] RCC § 22E-4205.

[23] RCC § 22E-4206.

[24] RCC § 22E-207.

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

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

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

under the circumstances.[28] Sub-subparagraphs (a)(2)(A)(i) and (a)(2)(B)(i) specify fear of physical harm or confinement to any person[29] is one of two alternative emotional injuries that may establish stalking liability. The term "safety" is defined in the statute to mean 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 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 distress must rise significantly above the level of uneasiness, nervousness, unhappiness, or similar feelings commonly experienced in day to day living.[30]

Paragraph (b)(1) specifically excludes from stalking liability certain speech about social issues that is usually constitutionally protected speech.[31] Stalking statutes are often vulnerable to constitutional challenges, as written and as applied.[32] The paragraph makes clear that the stalking statute does not punish activities such as participating in a labor strike, advocating a boycott, publishing harsh reviews of a restaurant, acting as a whistleblower, or criticizing a city official's fitness for office. Although such applications of the stalking statute likely would be constitutionally invalid without this statutory language, codifying the exception provides better notice to the public and criminal justice system actors. Pursuant to (b)(1), a person who is a government official, a candidate for elected office, or an employee of a business that is open to the public is expected to tolerate the opinions of the community they serve, at least while they are on duty.[33] However, depending on the facts in a particular case, the First Amendment may offer broader or narrower protection than the speech highlighted in this special exception. Free speech on matters of public concern is not limited to speech directed at political figures and businesses nor is it limited to communications that occur while those persons are engaged in their official duties.[34]

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[28] RCC § 22E-206.

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

[30] RCC § 22E-701.

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

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

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

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

Paragraph (b)(2) specifically excludes from stalking liability persons who are engaged in activities that are vital to a free press and to the fair administration of justice. A journalist, law enforcement officer, professional investigator (licensed or unlicensed), attorney, process server, *pro se* litigant, or compliance investigator who is acting within the reasonable scope of his or her professional duties or court obligations does not commit a stalking offense.[35]

Subsection (c) provides that where conduct is of a continuing nature, each 24-hour period constitutes one occasion. [36]

Subsection (d) provides the penalties for the offense. [*See* Second Draft of Report #41.]

Paragraph (d)(2) authorizes four penalty enhancements. If one or more of the enhancements is alleged and proven beyond a reasonable doubt,[37] the penalty classification is increased by one class. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether the enhancement applies.

Subparagraph (d)(2)(A) authorizes an enhancement if the defendant violated a court order or condition of release prohibiting or restricting contact with the complainant by committing the stalking offense. The accused is strictly liable with respect to whether a court order or condition of release prohibited or restricted contact with the complaining witness.[38] The term "court order" includes any judicial directive, oral or written, that restricts contact with the stalking victim.[39] A condition of release may be imposed by a court or by the United States Parole Commission.[40]

Subparagraph (d)(2)(B) authorizes an enhancement for any person who has a prior stalking or electronic stalking conviction within ten years of the instant offense. This includes any criminal offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would

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> The Supreme Court has defined speech on a matter of public concern as speech that either can be fairly considered as relating to any matter of political, social, or other concern to the community or is on a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

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

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

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

[37] RCC § 22E-605 requires that an enhancement be charged and proven beyond a reasonable doubt.

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

[39] 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.

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

necessarily prove the elements of stalking or electronic stalking under RCC § 22E-1801 and 1802.[41]

Subparagraph (d)(2)(C) authorizes an enhancement for stalking conduct that causes the affected persons to incur expenses that amount 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 stalking.[42] 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.[43]

Subparagraph (d)(2)(D) authorizes a minor victim enhancement, which includes two distinct culpable mental states. First, the actor is strictly liable as to whether he or she is an adult who is at least four years older than the complainant. It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was something less than four years. Second, the actor must recklessly disregard the fact that the victim is a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18 years of age and be clearly blameworthy under the circumstances.[44]

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

Paragraph (e)(2) defines "District official" to have the meaning specified for "public official" in D.C. Code § 1-1161.01(47)(A) – (H).

Paragraph (e)(3) defines "safety" means ongoing security from significant intrusions on one's bodily integrity or bodily movement.[45]

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

First, the revised statute limits stalking liability for non-threatening communications to those communications that occur without the complainant's effective consent. Given that current D.C. Code § 22-3133(a)(3) provides for stalking liability when the defendant does not have any subjective awareness of the impact of his or her non-threatening speech, the defendant may be guilty of stalking while never having been aware that their non-threatening speech was unwanted.[46] In contrast, the revised statute requires that, although the complaining witness does not have to affirmatively notify the

[41] The term "comparable offense" is defined in RCC § 22E-701.
[42] RCC § 22E-701.
[43] *See* D.C. Code § 16-711.
[44] *See* RCC § 22E-206. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary. On the other hand, a person may engage in pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.
[45] *Coleman v. United States*, 202 A.3d 1127 (D.C. 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.").
[46] In Montana, Roman McCarthy received a five-year sentence after mailing two letters to his ex-wife, neither of which she opened but which nonetheless caused her emotional distress. Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 Mich. L. Rev. 607, 608 (2015) (citing *State v. McCarthy*, 980 P.2d 629 (Mont. 1999)).

actor to cease following, monitoring, falsely personating, or criminal behavior,[47] non-criminal speech does not become a predicate for stalking unless the defendant is at least negligent as to the fact that it is unwelcome. This requirement effectively transforms future communications into a verbal act of ignoring the victim's directive to be left alone and invading the victim's privacy. The revised statute thereby criminalizes behavior that is calculated to torment without reaching other legitimate speech.[48] This change improves the clarity, proportionality, and, perhaps, the constitutionality of the revised statutes.[49]

Second, the revised stalking statute provides as a possible basis of liability that a person negligently causes the targeted person to fear for his or her safety or that of another person, or to suffer significant emotional distress. Current D.C. Code § 22-3133(a) provides as one possible basis of liability that there be a course of conduct that "the person should have known *would cause* a reasonable person in the individual's circumstances" to experience fear for safety or emotional distress.[50] The DCCA has held that this element is satisfied where the defendant's conduct is "objectively frightening and alarming." [51] In contrast, under the revised statute an actor is liable for causing an unintended harm only if: (1) he or she should have been aware of a substantial risk that conduct would cause fear for safety or be distressing to *the complainant* and nevertheless

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

[48] The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring). There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. *See State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977). Bill collectors, global warming activists, well-intentioned family members, personal coaches, and religious leaders are among the many persons who may purposely make repeated communications to a specific individual, with messages that they know or should know will cause the hearer significant emotional distress.

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

[50] 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 State v. Shackelford, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[51] *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).

be clearly blameworthy under the circumstances, and (2) the complainant did experience significant emotional distress.[52] This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[53] even though it is highly unusual to provide criminal liability for merely negligent conduct.[54] The lack of any subjective awareness by the accused, however, is offset to some degree by the new requirement that the complainant actually experience harm.[55] 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.[56] This change improves the clarity, consistency, and proportionality of District statutes and may ensure constitutionality.

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[52] 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."

[53] RCC § 22E-206.

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

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

[55] *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).

[56] 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.

Third, the revised statute limits liability for "monitoring" to in-person monitoring at a person's residence, workplace, or school. Current law defines a course of stalking conduct to include acts to "monitor" and "place under surveillance."[57] These terms are not defined and the DCCA has not interpreted their meaning.[58] In contrast, the revised stalking statute defines "physically monitoring" to mean being in the immediate vicinity of the person's residence, workplace, or school, with intent to detect the person's whereabouts or activities.[59] Limiting monitoring to locations where the specific individual is obliged to be and there is a heightened expectation of privacy avoids prosecutions for "mutual stalking"[60] and may help ensure first amendment protections for conduct in public spaces is not burdened.[61] The revised code punishes indirectly observing or recording someone's location or activities as a separate offense focused on nonconsensual electronic monitoring.[62] This change eliminates unnecessary gaps and overlap between criminal offenses.

Fourth, the revised statute does not specifically authorize multiple convictions for stalking and identity theft based on the same facts. Current D.C. Code § 22-3134(d) provides that, "A person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct." Although there is no case law on point, this language appears to categorically authorize multiple convictions for identity theft and stalking based on the same act or course of conduct. In contrast, the revised stalking statute does not contain such a concurrent sentencing provision and treats identity theft the same as other criminal conduct that may subject a person to stalking liability. There is no apparent reason for specially treating identity theft in this manner, and there may be situations where convictions for identity theft and stalking based on the same acts or course of conduct should merge. The revised code includes a comprehensive merger provision in its general part that applies to charges for identity theft (and other predicate crimes) and stalking arising from the same act or course of conduct.[63] This change improves the proportionality of penalties and the consistency of the 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.

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[57] D.C. Code § 22-3132(8)(a).

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

[59] RCC § 22E-1801(d).

[60] Consider, for example, a recently divorced couple that continues to attend the same church services, each experiencing significant emotional distress upon seeing the other. If the revised statute included churches, both people may be said to have committed stalking.

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

[62] RCC § 22E-1802. *See also* D.C. Code § 22-3531, Voyeurism, which makes it unlawful to secretly monitor a person who is (A) Using a bathroom or rest room; (B) Totally or partially undressed or changing clothes; or (C) Engaging in sexual activity.

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

The current D.C Code penalty provisions for stalking include distinct enhancements for a second offense[64] and a third offense.[65] The revised statute retains the second-strike enhancement but eliminates the third-strike enhancement. Instead, the RCC's general repeat offender penalty enhancement may apply when a defendant has two or more prior convictions for a comparable offense.[66] This change improves the consistency and proportionality of District statutes.

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

First, the revised statute specifies that stalking may be committed by falsely personating the complainant or committing Criminal Threats,[67] Theft,[68] Identity Theft,[69] Arson,[70] Criminal Damage to Property,[71] Criminal Graffiti,[72] Trespass,[73] Breach of Home Privacy,[74] or Indecent Exposure.[75] Current D.C. Code § 22-3132(8) defines a "course of conduct" for the stalking statute and provides an extensive list of activities that already appear to be criminal, such as efforts to "threaten,"[76] "[i]nterfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so,"[77] and "[u]se another individual's personal identifying information."[78] The DCCA has not addressed whether the conduct listed in the current stalking statute's definition of a "course of conduct" requires proof equal to corresponding criminal offenses or how such conduct differs from corresponding criminal offenses. The revised statute specifies that only conduct constituting a criminal threat or a specified property offense in the RCC is predicate conduct for stalking, replacing the corresponding general references to threats, property damage, and misuse of personal information in the current statute.[79] This change improves the clarity and consistency of District statutes.

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[64] D.C. Code § 22-3134(b)(2).
[65] One or more of the convictions must have been jury-demandable. D.C. Code § 22-3134(c).
[66] RCC §§ 22E-606(a) and (b).
[67] RCC § 22E-1204.
[68] RCC § 22E-2101.
[69] RCC § 22E-2205.
[70] RCC § 22E-2501.
[71] RCC § 22E-2503.
[72] RCC § 22E-2504.
[73] RCC § 22E-2601.
[74] RCC § 22E-4205.
[75] RCC § 22E-4206.
[76] D.C. Code § 22-3132(8)(A).
[77] D.C. Code § 22-3132(8)(B).
[78] D.C. Code § 22-3132(8)(C).
[79] For example, "threaten" in the current stalking statute generally corresponds to the criminal threat offense codified at RCC § 22E-1204 or the menacing offense codified at RCC § 22E-1203. "Interfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so," generally corresponds to the offenses of theft (RCC § 22E-2101), unauthorized use of property (RCC § 22E-2102; arson (RCC § 22E-2501), damage to property (RCC § 22E-2503), graffiti (RCC § 22E-2504), trespass (RCC § 22E-2601), and trespass of motor vehicle (RCC § 22E-2602). "Use another individual's personal identifying information" generally corresponds with references to the offenses of forgery (RCC § 22E-2204) and identity theft (RCC § 22E-2205).

Second, the revised statute provides stalking liability for communications "about" a person only when such communications are otherwise criminal.[80] Current law defines a course of stalking conduct to include both communications to a person and communications about a person without distinction.[81] The current language appears to capture all speech that a person should know would cause an individual to feel alarmed, disturbed, or distressed.[82] However, the current stalking statute also states that it "does not apply to constitutionally protected activity."[83] To resolve ambiguities as to the constitutional scope of the offense, the revised stalking statute more narrowly proscribes speech that is not merely insensitive to the subject of the commentary but also has the intent or effect of tormenting the listener[84] or threatening bodily harm. This approach may be more consistent with the Council's prior stated intent, as there are many distressing communications "about" an individual that do not amount to the "severe intrusions on the victim's personal privacy and autonomy" that the current statute aims to curtail.[85] This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

Third, the revised statute excludes stalking liability for communications concerning political and public matters to on-duty government officials, candidates for

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[80] Providing stalking liability for other communications "about" a person may criminalize publicizing matters of public concern, or "public shaming." For example, a victim who posts six signs to raise public awareness about the identity of her rapist may be liable for stalking under existing law if that victim knew that it would reasonably cause the perpetrator to suffer emotional distress. *See* Amy Brittain and Maura Judikis, *'The man who attacked me works in your kitchen': Victim of serial groper took justice into her own hands*, Washington Post, January 31, 2019.

[81] D.C. Code § 22-3132(8)(C).

[82] D.C. Code § 22-3133(a)(3)(B). Consider, for example, a person who exposes another person's extramarital affair to several other people. Although the revelation may be disturbing or distressing, it is not the kind of behavior that is typically considered stalking behavior and it is likely protected as free speech. *United States v. Stevens*, 559 U.S. 460, 479 (2010) ("*Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation." (emphasis in original)). Civil tort remedies, including monetary damages and injunctive relief, exist for defamation, invasion of privacy – false light, tortious interference, intentional infliction of emotional distress, and negligent infliction of emotional distress.

[83] D.C. Code § 22-3133(b).

[84] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (upholding a conviction where the defendant published tweets tagging a specific individual; concluding the tweets are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *and People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague); *see also State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[85] D.C. Code § 22-3131(a); *see also Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (holding that nonconsensual one-to-one communications that impinge on the privacy rights of the recipient are not protected under the first amendment); *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (invalidating language in the state's stalking statute identical to the District's current law as overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.); *State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

elected office, or employees of businesses that serve the public.[86] The current stalking statute provides no specific exceptions for particular types of communications or recipients, but states that the statute "does not apply to constitutionally protected activity."[87] While the DCCA has not directly addressed First Amendment challenges to the stalking statute, the issue has been litigated in D.C. Superior Court in the context of communications to a member of the D.C. Council.[88] To resolve ambiguities as to the constitutional scope of the offense, the revised stalking statute explicitly recognizes an exercise of free speech that is especially common in Washington, D.C.: contacting elected representatives to urge or criticize political action.[89] The revised code provides that expressions of opinion about public issues are not a basis for stalking liability,[90] while cautioning the reader that harassing and insulting one-to-one communications[91] sent after hours may not enjoy the same protection.[92] The exception also applies to employees of businesses that serve the public, who may be the subject of distressing criticism of their goods or services. This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

Fourth, the revised statute more precisely specifies the nature of the social harm in stalking to be a 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

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[86] RCC § 22E-1801(e)(2).

[87] D.C. Code § 22-3133(b).

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

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

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

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

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

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

silent as to whether or how the conduct on these occasions is related.[93] The current stalking statute does not define the meaning of "safety" and its definition of "emotional distress"[94] 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.[95] To resolve these ambiguities, the revised code defines the terms "safety" and "significant emotional distress" as *ongoing* fear or distress.[96] Because stalking is most commonly understood to mean an obsessive, protracted pursuit,[97] the revised statute's definitions refer to both the degree and the duration of the harm. This change improves the clarity of the revised statute.

Fifth, the revised definition of "financial injury" more precisely defines the types of expenses that will trigger a penalty enhancement. Current D.C. Code § 22-3132(5) includes 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. In contrast, the revised definition includes expenses incurred by any natural person,[98] 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.

Sixth, the revised stalking statute excludes liability for conduct that is authorized by a court order or District statute, regulation, rule, or license;[99] or that is reasonably within the scope of a person's specific, lawful commercial purpose or employment duty. 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.[100] However, to resolve these ambiguities as to the constitutional scope of the offense, the revised statute specifically excludes from stalking liability activities that, despite being distressing, are generally recognized as legitimate occupational activities. Even if the current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First

[93] D.C. Code § 22-3132(8).
[94] D.C. Code § 22-3132(4).
[95] *See Coleman v. United States*, 202 A.3d 1127 (D.C. 2019).
[96] RCC §§ 22E-1801(d)(8) and (9).
[97] 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).
[98] Expenses incurred by the court system or another entity are excluded from the calculation of financial injury.
[99] For example, a *pro se* litigant may need to send distressing communications in connection with a pending case. *See, e.g.*, Eugene Volokh, *How I Was a Criminal Defendant in a N.J. Harassment Case*, REASON (August 22, 2019).
[100] 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.

Amendment.[101] Without a clear exclusion, such legitimate activities may constitute stalking.[102] This change improves the clarity, proportionality and perhaps the constitutionality of the revised offense.

Seventh, the revised statute extends jurisdiction for stalking only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3135(b) states that jurisdiction extends to communications if "the specific individual lives in the District of Columbia" and "it *can be* electronically accessed in the District of Columbia" (emphasis added). The DCCA has not interpreted the meaning of this phrase. The revised statute does not extend jurisdiction to harms where the accused and the complainant and all relevant action occurs outside the District, even though the complainant is a District resident.[103] 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.[104] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[105] and such an extension, if intended, may be unconstitutional.[106] 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 for safety or emotional distress. Current D.C. Code § 22-3133(a) specifically refers to conduct that would cause another person to "feel seriously alarmed, disturbed, or frightened" without defining these terms. Current D.C. Code §22-3133(a) also refers to fear for "safety," undefined, and "emotional distress" which is defined.[107] 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.[108] Accordingly, the revised stalking statute eliminates a distinct reference to conduct that causes a person to "feel seriously alarmed, disturbed, or

[101] 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).

[102] The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a process server may need to repeatedly lie in wait near someone's home and workplace to hand-serve that person with a distressing pleading. Similarly, a business owner monitoring an employee's compliance with worker safety laws may cause the person some degree of emotional unrest.

[103] 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.

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

[105] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).

[106] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

[107] 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.

[108] *Coleman v. United States*, 202 A.3d 1127, 1139 (D.C. 2019),.

frightened" because such results are adequately captured in the statute by other terminology.[109] This change improves the clarity of District statutes.

Second, the revised statute does not specially codify a statement of legislative intent for the stalking offense. Current D.C. Code § 22-3131 codifies a lengthy statement of legislative intent that, e.g., "urges intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences."[110] No other criminal offense in the current D.C. Code contains a comparable statement of legislative intent.[111] Instead, the DCCA routinely uses the Council's legislative documents (e.g. Committee reports) to determine legislative intent. The revised stalking statute relies upon the usual sources of legislative intent rather than a special codified statement. This change improves the clarity and consistency of the revised statutes.

Third, the revised statute applies standardized definitions for the "purposefully" and "with intent" culpable mental states required for stalking liability. The current stalking statute requires that the accused "purposefully engages in a course of conduct," and provides alternative culpable mental state requirements of acting "with the intent" or "[t]hat the person knows" would cause an individual a specified harm. However, the terms "purposely," "with the intent," and "knows," are not defined and it is unclear to what extent that mental state applies to the language that follows. There is no DCCA case law on point. The revised statute uses the RCC's general provisions that define "purposefully" and "with intent"[112] and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[113] 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*, 202 A.3d 1127 (D.C. 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

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

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

[111] The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.1.1 specifies that "findings" and "purposes" sections are strongly discouraged because they may create confusion or ambiguity in the law.

[112] 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).

[113] RCC § 22E-207(a).

applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

RCC § 22E-1802. Electronic Stalking.

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,*[1] *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 engage in a pattern of misconduct. A course of conduct does not have to consist of identical conduct, but the conduct must share an uninterrupted purpose[2] 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.[3] 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, digital, or other format. The image may be created remotely.[4] Unlike the defined term "sound recording,"[5] 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 "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.[6] 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.[7] Per the rules of interpretation in

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[1] RCC § 22E-1801. [Previously numbered RCC § 22E-1206.]

[2] It is the purpose, not the conduct, that must be uninterrupted. 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.

[3] 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. The word "derivative" has its common meaning: "having parts that originate from another source." Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

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

[5] RCC § 22E-701.

[6] 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).

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

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.[8] 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.[9] "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[10] and be clearly blameworthy under the circumstances.[11] Sub-subparagraphs (a)(2)(A)(i) and (a)(2)(B)(i) specify fear of physical harm or confinement to any person[12] 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.[13]

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

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[8] 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.

[9] 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.

[10] 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.

[11] RCC § 22E-206.

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

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

Paragraph (b)(1) 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 an audio recording.[14]

Paragraph (b)(2) 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 (licensed or unlicensed), attorney, process server, *pro se* litigant, or compliance investigator who is acting within the reasonable scope of their professional duties or court obligations does not commit an electronic stalking offense.[15]

Subsection (c) provides that where conduct is of a continuing nature, each 24-hour period constitutes one occasion.[16]

Subsection (d) provides the penalties for the offense. [*See* Second Draft of Report #41.]

Paragraph (d)(2) authorizes four penalty enhancements. If one or more of the enhancements is alleged and proven beyond a reasonable doubt,[17] the penalty classification is increased by one class. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether the enhancement applies.

Subparagraph (d)(2)(A) authorizes an enhancement if the defendant violated a court order or condition of release prohibiting or restricting contact with the complainant by committing the electronic stalking offense. The accused is strictly liable with respect to whether a court order or condition of release prohibited or restricted 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.[18] A condition of release may be imposed by a court or by the United States Parole Commission.[19]

Subparagraph (e)(2)(B) authorizes an enhancement for any person who has a prior stalking or electronic stalking conviction within ten years of the instant offense. This includes any criminal offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would

[14] 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.

[15] 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.

[16] *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).

[17] RCC § 22E-605 requires that an enhancement be charged and proven beyond a reasonable doubt.

[18] 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.

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

necessarily prove the elements of stalking or electronic stalking under RCC § 22E-1801 and 1802.[20]

Subparagraph (d)(2)(C) 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.[21] 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.[22]

Subparagraph (d)(2)(D) authorizes a minor victim enhancement, which includes two distinct culpable mental states. First, the actor is strictly liable as to whether he or she is an adult who is at least four years older than the complainant. It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was something less than four years. Second, the actor must recklessly disregard the fact that the victim is a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18 years of age and be clearly blameworthy under the circumstances.[23]

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

Paragraph (e)(2) defines "safety" to mean ongoing security from significant intrusions on one's bodily integrity or bodily movement.[24]

Relation to Current District Law. *The revised electronic stalking statute substantively changes current District law in five 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."[25] However, these terms are not defined and the DCCA has not interpreted their meaning.[26] In contrast, the revised code distinguishes between "physically monitoring"[27] in violation of the revised stalking statute[28] and electronically stalking in violation of RCC § 22E-1802. Different

[20] The term "comparable offense" is defined in RCC § 22E-701.
[21] RCC § 22E-701.
[22] *See* D.C. Code § 16-711.
[23] *See* RCC § 22E-206. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary.
[24] *Coleman v. United States*, 202 A.3d 1127 (D.C. 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.").
[25] D.C. Code § 22-3132(8)(a).
[26] 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).
[27] 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.
[28] RCC § 22E-1801. [Previously numbered RCC § 22E-1206.]

exclusions from liability and penalties apply to each offense.[29] This change improves 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).[30] The DCCA has held that this element of stalking is satisfied where the defendant's conduct is "objectively frightening and alarming."[31] 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.[32] This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[33] even though it is highly unusual to provide criminal liability for merely negligent conduct.[34] The broad scope of the

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

[30] 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).

[31] *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).

[32] 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."

[33] RCC § 22E-206.

[34] *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.

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.[35] 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.[36] 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.[37] The revised code includes a comprehensive merger provision in its general part that applies to charges for identity theft and stalking arising from the same

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> 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288).

[35] *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).

[36] 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.

[37] 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.

act or course of conduct.[38] This change improves the proportionality of penalties and the consistency of the code.

Fourth, 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[39] and a third offense.[40] 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.[41] This change improves the consistency and proportionality of District statutes.

Fifth, 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,[42] self-recording may be punished as stalking if the actor knows it would reasonably cause the other party to suffer emotional distress.[43] 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.[44] The revised statute improves the clarity, consistency, and proportionality of the revised code.

Beyond these five 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.[45] The current stalking statute does not define the meaning of "safety" and its definition of "emotional distress"[46] is silent on whether such distress is of an ongoing nature. The DCCA has

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

[39] 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.

[40] 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.

[41] RCC § 22E-606.

[42] *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).

[43] *See* D.C. Code § 3133(a)(2)(C).

[44] *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).

[45] D.C. Code § 22-3132(8).

[46] D.C. Code § 22-3132(4).

explained only that each term requires a severe degree of intrusion.[47] To resolve these ambiguities, the revised statute defines the terms "safety" and "significant emotional distress" as *ongoing* fear or distress.[48] Because stalking is most commonly understood to mean an obsessive, protracted pursuit,[49] 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 considered financial injury.[50] To resolve this ambiguity, the revised definition includes expenses incurred by any natural person,[51] 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.[52] 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.[53] 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

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[47] *See Coleman v. United States*, 202 A.3d 1127, 1139 (D.C. 2019).

[48] RCC §§ 22E-1801(d)(8) and (9).

[49] 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).

[50] 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.

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

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

[53] 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.

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.[54] Without a clear exclusion, such legitimate activities may constitute stalking or electronic stalking.[55] 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 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.[56] 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.[57] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[58] and such an extension, if intended, may be unconstitutional.[59] 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.[60] 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.[61]

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[54] 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).

[55] 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.

[56] 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.

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

[58] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).

[59] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

[60] 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.

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

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.[62] 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."[63] No other criminal offense in the current D.C. Code contains a comparable statement of legislative intent.[64] 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"[65] and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[66] 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*,[67] the District of Columbia Court of Appeals explained, "'Fear for safety' means fear of significant injury or a comparable

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[62] *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).

[63] 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.

[64] The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.1.1 specifies that "findings" and "purposes" sections are strongly discouraged because they may create confusion or ambiguity in the law.

[65] 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).

[66] RCC § 22E-207(a).

[67] 202 A.3d 1127 (D.C. 2019).

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.

RCC § 22E-1803. Voyeurism.

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.*[1] *The offense replaces the current misdemeanor voyeurism offense in D.C. Code § 22-3531.*[2]

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.[3] Subparagraphs (a)(1)(A) and (a)(1)(C) prohibit capturing visual images, whereas subparagraph (a)(1)(B) prohibits capturing visual images or audio recording. 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, digital, or other format. The image may be created remotely.[4] Unlike the defined term "sound recording,"[5] 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.[6]

Subparagraph (a)(1)(A) prohibits capturing images of a someone's exposed private areas[7] or a person in their underwear.[8] 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.

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,[9] 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.

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[1] *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.")

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

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

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

[5] RCC § 22E-701.

[6] 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. The word "derivative" has its common meaning: "having parts that originate from another source." Merriam-Webster.com, "*derivative*", 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[7] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman.

[8] 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.

[9] RCC § 22E-1802.

Subparagraph (a)(1)(C) prohibits capturing images of someone while they are urinating or defecating. 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 urination or defecation.

Paragraph (a)(2) requires that the person act without the complainant's effective consent to being recorded. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an express or implied coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. 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.[10]

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.[11] Whether a person's expectation of privacy is reasonable depends on all of the surrounding circumstances,[12] including the time, place,[13] the complainant's manner of dress,[14] the complainant's body position,[15] and efforts to communicate that privacy is expected.[16] A person may know that they will be observed and nevertheless reasonably expect to not be recorded.[17]

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[10] 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.

[11] 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.

[12] 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).

[13] *See, e.g.*, *State v. Frost*, 634 N.E.2d 272 (Ohio Ct. App. 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).

[14] 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.

[15] 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 knowing 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).

[16] 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.

[17] 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).

Subsection (b) specifies the requirements of second degree voyeurism, which requires observing[18] private behavior without permission.

Paragraph (b)(1) specifies that the person must act at least knowingly. "Knowingly" is a defined term[19] 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[20] or a person in their underwear.[21] It also prohibits observing a person while they are engaging in a sexual act or masturbation or while they are urinating or defecating. The term "sexual act" is defined in RCC § 22E-701.

Paragraph (b)(2) requires that the person act without the complainant's effective consent to being observed. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an express or implied coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. 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.[22] 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,[23] the complainant's body position,[24] and efforts to communicate that privacy is expected.[25]

Subsection (c) provides the penalty for each gradation of the revised offense. [*See* Second Draft of Report #41.] Paragraph (c)(3) specifies that the penalty classification may be increased by one penalty class if it is proven beyond a reasonable doubt[26] that the

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

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

[20] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman.

[21] 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.

[22] 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.

[23] 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.

[24] 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).

[25] 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.

[26] RCC § 22E-605.

defendant was reckless as to the fact that the complainant was 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 be clearly blameworthy under the circumstances.[27]

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

Relation to Current District Law. *The revised voyeurism offense changes current District law in eight 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 reasonable expectation of privacy, even if the accused does not produce a recorded image. This change may eliminate an unnecessary gap in law.[28]

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,[29] or lifting a dress.[30] 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 voyeurism and unauthorized disclosure of a sexual recording[31] offenses establish four distinct penalties for attempting, observing, recording, and

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

[28] *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).

[29] 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.

[30] *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 offensive physical contact under RCC § 22E-1205.

[31] RCC § 22E-1804.

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.[32] A person is subject to the same one-year penalty if they electronically record those observations[33] or create a recording of the complainant's private area.[34] 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."[35] 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[36] and penalty for an attempt[37] to define and penalize attempts the same as for other revised offenses.[38] Distribution of a recording is punished as unauthorized disclosure of a sexual recording, under RCC § 22E-1804. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised offense includes an enhancement for recklessly 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.[39] At least one advocacy group recommended deferring the decision about enhancements to the Criminal Code Reform Commission.[40] The revised statute includes an enhancement but requires proof that the defendant was reckless as to the fact that the victim was underage.[41] A person who is practically certain that they are observing or recording a child inflicts a more egregious social harm than a person who

[32] D.C. Code §§ 22-3531(b) and (f)(1).
[33] D.C. Code §§ 22-3531(c) and (f)(1).
[34] D.C. Code §§ 22-3531(d) and (f)(1).
[35] D.C. Code § 22-3531(f)(2).
[36] RCC § 22E-301(a).
[37] RCC § 22E-301(c)(1).
[38] 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).
[39] *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.").
[40] *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.").
[41] *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.").

invades the privacy of an adult.[42] 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.

Fifth, 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.[43] In contrast, the revised statute specifies a defined mental state for every 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.[44] 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.[45] 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[46] and legal

[42] 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.

[43] 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).

[44] 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)).

[45] *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.").

[46] *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).").

experts[47] 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.

Sixth, 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 the general defense for execution of a public duty.[48] 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.[49] 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.[50] In contrast, the revised code includes an emergency health professional defense[51] 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.

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[47] *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).

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

[49] 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.

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

[51] RC § 22E-408(a)(3).

Seventh, the revised code defines the term "effective consent."[52] 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, an express or implied coercive threat, or deception.[53] This change improves the proportionality of the revised offense.

Eighth, 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,[54] the DCCA has explained that its purpose is to protect the victim of the observation or recording.[55] The RCC classifies voyeurism as an offense against persons, clarifying that the statute permits separate punishments for separate victims[56] and does not permit separate punishments for each copy of an image or for each recipient. Other unit of prosecution issues[57] are not addressed in the statutory language or accompanying commentary but may be addressed in the RCC's general part.[58] This change clarifies and improves the proportionality the revised offense.

Beyond these eight 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

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[52] RCC § 22E-701.

[53] "Consent" is also a defined term in RCC § 22E-701.

[54] 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.

[55] *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.")

[56] *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).

[57] 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."

[58] [Further Commission recommendations are forthcoming.]

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.[59] 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.[60] The revised statute prohibits recording a person who is using the bathroom only if that person's nude or undergarment-clad private areas are exposed or if the person is urinating or defecating. 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."[61] It is also unclear whether the term "image" includes a "series of images"[62] 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, digital, or other 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

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[59] 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.

[60] 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).

[61] *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.

[62] *See* D.C. Code § 22-3531(f)(2).

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.[63] 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 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.[64]

[63] RCC § 22E-701.

[64] *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 a Sexual Recording.

Explanatory Note. *This section establishes the unauthorized disclosure of a sexual recording 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).*[1]

Paragraph (a)(1) specifies that a person must act at least knowingly with respect to a distribution or display. "Knowingly" is a defined term[2] 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.[3] The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[4] The phrase "make accessible on an electronic platform" does not require proof that the material was actually accessed or viewed.[5] The word "user" excludes technical administrators that have access to all files hosted on the website.[6]

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[7] pubic area, buttocks, or female breast[8] below the top of the areola.

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, digital, or other format. Unlike the defined term "sound recording,"[9] 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

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

[2] RCC § 22E-206.

[3] *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).

[4] 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.

[5] 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.

[6] 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.

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

[8] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman.

[9] RCC § 22E-701.

a sexual act, masturbation, or sadomasochistic abuse.[10] 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, an express or implied 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 explicit or implicit agreement that the image or audio recording would not be shared.[11] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that such an agreement applied at the time of the distribution or display. Subparagraph (a)(3)(A) requires an intent to alarm or to 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 four unlawful means as defined in the RCC: 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 two exclusions from liability for the distribution of an obscene image offense. Paragraph (b)(1) provides that the statute does not apply to any

[10] 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.

[11] *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 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.").

licensee[12] under the Communications Act of 1934, such as a radio, television, or phone service provider.[13] Paragraph (b)(2) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[14]

Subsection (c) establishes an affirmative defense for the innocent display or distribution of a prohibited image.[15] The actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[16] 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. The recipient of the display or distribution must be someone that the actor reasonably believes to be a "law enforcement officer, prosecutor, attorney, school administrator;" or someone with a responsibility for the health, welfare, or supervision of one of the people depicted or involved in the creation of the image or recording.

Subsection (d) provides the penalty for the revised offense. [*See* Second Draft of Report #41.] 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 a sexual recording 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." [17] This requirement does not provide liability for distribution of an image that was taken without the victim's knowledge or permission.[18] In contrast, the revised statute provides liability for

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

[13] *See* D.C. Code § 22-2201(d).

[14] 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.

[15] Per RCC § 22E-201, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

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

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

[18] 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

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.[19] 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.[20] The revised statute punishes exploiting a stranger as severely as exploiting a former partner.[21] 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 prohibits distribution of "one or more sexual images,"[22] 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."[23] In contrast to the current non-consensual pornography statute, the revised statute recognizes a right to privacy in sexual audio recordings,[24] that is more consistent with the scope of the revised voyeurism statute.[25] Second, the current non-consensual pornography offense defines the term "sexual image" to mean "a photograph, video, or other visual recording,"[26] whereas the current felony voyeurism statute does not define the term "image" but does require that the image be electronic.[27] 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,"[28] 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"[29] and

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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.

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

[20] *Id*. at *19.

[21] *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.").

[22] D.C. Code §§ 22-3052(a), 22-3053(a), and 22-3054(a).

[23] D.C. Code § 22-3531.

[24] For example, such recordings may be of sexual encounters and masturbation (e.g., phone sex), consistent with the current voyeurism offense.

[25] 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).

[26] D.C. Code § 22-3051(7). (Emphasis added.)

[27] 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…").

[28] RCC § 22E-701.

[29] D.C. Code § 22-3051(7). (Emphasis added.)

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*."[30] 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*."[31] 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,"[32] whereas the current felony voyeurism statute protects depictions of "sexual activity"[33] or "using a bathroom or restroom,"[34] without defining those terms. The meaning of the term "sexual activity" is unclear and may include 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,[35] 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."[36] 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.[37] 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

[30] D.C. Code § 22-3051(4). (Emphasis added.)
[31] D.C. Code § 3531(a)(2). (Emphasis added.)
[32] D.C. Code §§ 22-3051(6); 22-3101(5).
[33] D.C. Code §§ 22-3531(b)(3) and (c)(1)(C).
[34] D.C. Code §§ 22-3531(b)(1) and (c)(1)(A).
[35] 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.
[36] D.C. Code § 22-3051(2).
[37] See RCC § 22E-701 (defining "sexual act" and "sexual contact").

a limited audience.[38] 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."[39] 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 other than the defendant and the person depicted in the image."[40] 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[41] and penalty for an attempt[42] to define and penalize attempts the same as for other revised offenses. This change improves the consistency[43] 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.[44] 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.[45] In contrast, the revised statute punishes redistribution only if the person acted as a co-conspirator or as an accomplice.[46] The revised statute's language avoids punishing a person who shares an image as

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[38] *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).

[39] D.C. Code § 3531(f)(2).

[40] *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).

[41] RCC § 22E-301(a).

[42] RCC § 22E-301(c)(1).

[43] 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-1204. 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.

[44] D.C. Code § 22-3531(f)(2).

[45] D.C. Code § 22-3054(a).

[46] *See* RCC §§ 22E-210 and 22-302.

severely as the person who is responsible for the original privacy intrusion.[47] 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.[48] 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"[49] and define "Internet" to mean "an electronically available platform by which sexual images can be disseminated to a wide audience."[50] The term "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 a sexual recording 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.[51] Under the current non-consensual pornography statutes, distribution of sexual images obtained by consent is punishable by either 180 days in jail[52] or three years in prison,[53] 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

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[47] 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.

[48] D.C. Code § 22-3531(f)(2).

[49] D.C. Code § 22-3051(5).

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

[51] D.C. Code § 22-3531(f)(2).

[52] D.C. Code § 22-3052(b).

[53] D.C. Code § 22-3053(b).

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 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."[54] 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, an express or implied coercive threat, or deception.[55] 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 a sexual recording 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"[56] and specify that there is no additional culpable mental state required with respect to an actor's underlying criminal conduct. Applying a

[54] RCC § 22E-701.
[55] For more information on the meaning of "effective consent" in the RCC, see entries for "consent" and "effective consent" in RCC § 22E-701.
[56] RCC § 22E-206.

knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[57] 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 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.[58] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[59] 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.[60] 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."[61] The current felony voyeurism statute does not include a comparable affirmative defense provision.[62] 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 they distributed the image or audio recording to someone they reasonably believed to be a law enforcement officer, prosecutor, attorney, school administrator, or person with a responsibility for the health, welfare, or supervision of someone depicted in the image or involved in the creation of the image. It also requires that the person

[57] 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)).
[58] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
[59] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[60] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).
[61] D.C. Code § 22-3056.
[62] D.C. Code § 22-3531(f)2).

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.[63] 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-consensual pornography whether the victim is named ("identified") or the victim's face is depicted ("identifiable").[64] 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.[65] 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."[66] This language is surplusage.

[63] 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.

[64] *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.").

[65] In *Roberts v. United States*, 216 A.3d 870, 880 (D.C. 2019), the DCCA explained, "it suffices that the person depicted in a sexual image can identify himself or herself in the image."

[66] D.C. Code § 22-3531(f)(2).

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

Explanatory Note. *This section establishes the distribution of an obscene image offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces subsection (a) of the obscenity statute, D.C. Code § 22-2201 (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[1] 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.[2] 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, digital, or other format. The person must also be practically certain that the picture or video depicts an actual or simulated[3] sexual act; sadomasochistic abuse; masturbation; sexual or sexualized[4] display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexualized[5] display of the breast[6] 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.[7] The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an express or implied coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. 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 receiving the offensive image.[8]

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[1] RCC § 22E-206.

[2] 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.

[3] 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.

[4] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[5] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[6] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman.

[7] *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)).

[8] 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.

Paragraph (a)(3) specifies that a person must also be reckless as to the image being obscene.[9] 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[10] and considered as a whole; is patently offensive; and is lacking serious literary, artistic, political, or scientific value, considered as a whole.[11] "Reckless" is defined in the revised code,[12] 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.

Subsection (b) establishes three exclusions from liability for the distribution of an obscene image offense.[13] Paragraph (b)(1) provides that the statute does not apply to any licensee[14] under the Communications Act of 1934, such as a radio, television, or phone service provider.[15] Paragraph (b)(2) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16] Paragraph (b)(3) 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[17] or with the purpose of reaching a specific viewer,[18] without that viewer's effective consent.

Subsection (c) establishes an affirmative defense for an employee of a school, museum, library, movie theater, or other venue, who is acting within the scope of their role.[19]

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[9] 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).

[10] *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").

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

[12] RCC § 22E-206.

[13] *See* RCC §§ 22E-201(b); 22E-605.

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

[15] *See* D.C. Code § 22-2201(d).

[16] 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.

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

[18] *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).

[19] 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.

Subsection (d) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

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

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.[20] In contrast, the revised offense defines "knowingly" to require practical certainty and defines "recklessness" to require conscious disregard of a substantial risk.[21] 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.[22] 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[23]and courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[24] 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

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[20] *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)).

[21] RCC § 22E-206.

[22] *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.")

[23] 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)).

[24] *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.").

in,[25] purchase,[26] possess,[27] materials that are obscene, indecent, filthy, or immoral.[28] The current statute also makes it unlawful to promote[29] or possess with intent to disseminate[30] 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, and in other situations were effective consent has not been given. Merely creating, possessing, or promoting depictions of sexual activity between consenting adults is not prohibited.[31] Due process confers a right to privately create and enjoy erotica, even if it is objectively offensive.[32] 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.[33] 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.[34] Moreover, the

[25] *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").

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

[27] D.C. Code § 22-2201(a)(1)(E).

[28] 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).

[29] 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").

[30] D.C. Code § 22-2201(a)(1)(E).

[31] 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).

[32] *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."

[33] *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).

[34] *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.").

rationale for criminalizing conduct short of an attempt[35] 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 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[36] has interpreted the terms to refer to the three criteria enumerated by the Supreme Court in *Miller v. California*.[37] Namely, to determine whether material is obscene, one must consider: (a) whether 'the average person,[38] applying contemporary community standards'[39] would find that the work, taken as a whole, appeals to the prurient interest,[40] (b) whether the work depicts or describes, in a patently offensive way,[41] sexual conduct specifically defined by the applicable state law, and (c) whether

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[35] *See* RCC § 22E-301.

[36] 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.

[37] 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).

[38] 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.").

[39] *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.

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

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

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,[42] a person may be held criminally liable if they comprehend the material's content[43] or character,[44] 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[45] 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

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> [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).

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

[43] *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).

[44] *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).

[45] 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.)

print, electronic, magnetic, or digital format.[46] 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*.[47] A blanket prohibition of devices, articles, or things that are "intended for…immoral use"[48] also may be especially vulnerable to a substantive due process challenge.[49] 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[50] 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.[51] 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.[52] In contrast, the revised statute limits liability for obscene online publication to conduct that targets an online user. Paragraph (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,[53] tagging that user in the image or

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[46] RCC § 22E-701.

[47] 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."

[48] D.C. Code § 22-2201(a)(1)(D).

[49] *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).

[50] 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."

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

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[53] 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.

image caption[54]). 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.

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, movie theaters, and other venues who are acting within the reasonable scope of their professional duties.[55] Other general defenses in the RCC's general part may also apply to persons with special justification.[56] 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,[57] 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

[54] *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).

[55] 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.

[56] 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).

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

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 granted or continued in force under authority of this chapter"[58] 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."[59] The revised statute adopts this definition to clarify the meaning of the revised offense.

[58] 47 U.S.C. § 153(30).
[59] 47 U.S.C. § 153(49).

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

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 subsection (b) of the obscenity statute, D.C. Code § 22-2201 (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[1] and, applied here, means that the person must be practically certain that they are distributing or displaying an image to another person.[2] The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[3] 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, digital, or other format. The person must also be practically certain that the image depicts: a sexual act; sadomasochistic abuse; masturbation; a sexual or sexualized[4] display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or a sexual or sexualized[5] display of the breast[6] 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.[7] 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[8] and considered as a whole is patently offensive; and is lacking serious literary, artistic, political, or scientific value, considered as a whole.[9] "Reckless" is defined in the

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[1] RCC § 22E-206.

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

[3] 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.

[4] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[5] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[6] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman.

[7] 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).

[8] *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").

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

revised code,[10] 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.

Subparagraph (a)(2)(B) specifies that a person must also be reckless as to the recipient being under 16 years old.[11] 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.[12]

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.[13] 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 three exclusions from liability for the distributing obscene materials to a minor offense. Paragraph (b)(1) provides that the statute does not apply to any licensee[14] under the Communications Act of 1934, such as a radio, television, or phone service provider.[15] Paragraph (b)(2) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16] Paragraph (b)(3) 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.[17]

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[10] RCC § 22E-206.

[11] *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)).

[12] *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.

[13] RCC § 22E-207.

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

[15] *See* D.C. Code § 22-2201(d).

[16] 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.

[17] *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, movie theater, or other venue, who is acting within the scope of their role.[18]

Paragraph (c)(2) establishes an affirmative defense if the actor and the complainant are, in fact, 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"[19] 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, an express or implied coercive threat, or deception." The term "consent" is also defined in RCC § 22E-701.

Subsection (d) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

Subsection (e) 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 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.[20] 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

[18] 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.

[19] 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.").

[20] RCC § 22E-206.

the complainant. Application of the standardized RCC definitions here appears to be largely consistent with District case law interpreting the obscenity statute.[21] 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[22] and courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[23] 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.[24] The term "sexual conduct" is defined broadly to include homosexuality[25] and all physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or female breast.[26] And the term "sado-masochistic abuse" is defined broadly to include any flagellation or physical restraint of a person wearing undergarments, a mask, or a bizarre costume.[27] District case law[28] explains that the

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[21] *See Kramer v. United States*, 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.")

[22] 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)).

[23] *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.").

[24] D.C. Code § 22-2201(b)(2)(B).

[25] 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.

[26] 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."

[27] D.C. Code § 22-2201(b)(2)(D).

[28] 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

proscribed materials in the obscenity statute are limited to the three criteria enumerated in *Miller v. California*.[29] Namely, to determine whether material is obscene, one must consider: (a) whether 'the average person,[30] applying contemporary community standards'[31] would find that the work, taken as a whole, appeals to the prurient interest,[32] (b) whether the work depicts or describes, in a patently offensive way,[33] sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a

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Court established the constitutional baseline, per the First Amendment, for criminal laws prohibiting obscenity.

[29] 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).

[30] 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.").

[31] *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.

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

[33] 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).

whole, lacks serious literary, artistic, political, or scientific value. Although local and national community standards may be difficult to discern,[34] a person may be held criminally liable if they comprehend the material's content[35] or character,[36] 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.[37] 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,"[38] "book, magazine, or other printed matter however reproduced or sound recording,"[39] "explicit and detailed verbal description[] or narrative account[],"[40] and "motion picture, show, or other presentation."[41] 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, digital, or other format.[42] 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.*

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

[35] *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).

[36] *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).

[37] 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.

[38] D.C. Code § 22-2201(b)(1)(A)(i).

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

[40] *Id*.

[41] D.C. Code § 22-2201(b)(1)(B).

[42] RCC § 22E-701.

California.[43] 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.[44] 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."[45] 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[46] 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.[47] 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 publication to conduct that targets an online user. Paragraph (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,[48] tagging that user in the image or image caption[49]). A mere knowledge

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[43] 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."

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

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

[46] 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."

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

[48] 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.

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, movie theaters, and other venues who are acting within the reasonable scope of their professional duties.[50] Other general defenses in the RCC's general part may also apply to persons with special justification.[51] 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[52] 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[53] and the current sexual performance of a minor offense.[54] In contrast, the revised distribution of an

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[49] *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).

[50] 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.

[51] 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).

[52] D.C. Code § 22-2201.

[53] 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.

[54] 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

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[55] 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 granted or continued in force under authority of this chapter"[56] 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."[57] 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

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recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[55] 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).

[56] 47 U.S.C. § 153(30).

[57] 47 U.S.C. § 153(49).

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[58] that the obscenity statute is to be interpreted consistent with the Supreme Court's ruling in *Miller*.[59] The *Miller* articulation of the standards for interpreting what is patently offensive and whether to assess obscenity in terms of the "whole" work varies[60] 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.

[58] *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976)
[59] *Miller v. California*, 413 U.S. 15 (1973).
[60] 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. Creating or Trafficking an Obscene Image of a Minor.

Explanatory Note.[1] *The RCC creating or 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 civil law for a complainant under the age of 18 years from giving effective consent for the 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,*[2] *the main difference being that the RCC creating or trafficking an obscene image of a minor offense is limited to images. Along with the possession of an obscene image of a minor offense,*[3] *the arranging a live sexual performance of a minor offense,*[4] *and the attending or viewing a live sexual performance of a minor offense,*[5] *the revised creating or trafficking an obscene image of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *for that offense.*

Subsection (a) specifies the various types of prohibited conduct in first degree creating or 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 he or she will cause the prohibited result, i.e., creating a specified image. Per the rules of interpretation 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).

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. "Derivative" is intended to have

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[1] 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.").

[2] RCC § 22E-1809.

[3] RCC § 22E-1808.

[4] RCC § 22E-1809.

[5] RCC § 22E-1810.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

its common meaning as "having parts that originate from another source."[10] 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.[11] 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).

Subparagraph (a)(1)(B) prohibits a "person with a responsibility under 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 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.[12] 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.[13] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied 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.[14]

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[10] Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[11] 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.

[12] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state also applies to the fact that the actor is a "person with a responsibility under 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.

[13] 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.

[14] 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

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.[15] Additionally, for 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.[16]

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[17] 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.[18]

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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.

[15] RCC § 22E-701 defines a "live broadcast" as "a streaming video, or any other electronically transmitted image for simultaneous viewing by one or more people." 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 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.

[16] 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.

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

[18] 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)

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.[19]

Paragraph (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 the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body 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,[20] or anus, when there is less than a full opaque covering.[21] 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 rules of interpretation in RCC § 22E-207, the "reckless" 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 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 creating or 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

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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.

[19] 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.

[20] 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.

[21] 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).

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) in first degree creating or trafficking an obscene image of a minor. However, the types of prohibited sexual conduct are different in second degree creating or 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.[22] The terms "obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rules of interpretation 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.

Subsection (c) establishes two exclusions from liability for the RCC trafficking an obscene image offense. Paragraph (c)(1) provides that the statute does not apply to any person that is a licensee[23] under the Communications Act of 1934, such as a radio, television, or phone service provider. Paragraph (c)(2) provides that the statute does not apply to any person that is an interactive computer service as defined in 47 U.S.C. § 230(f)(2).[24]

Subsection (d) establishes several affirmative defenses for the RCC creating or trafficking an obscene image statute. The general provision in RCC § 22E-XX establishes the burdens of proof and production for all affirmative defenses in the RCC. 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*,[25] 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*.[26] 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 for an actor that is under the age of 18 years. Paragraph (d)(2) establishes that the affirmative defense 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

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[22] 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).

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

[24] 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.

[25] *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.").

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

image in subparagraphs (a)(1)(E) and (b)(1)(E). Paragraph (d)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to paragraph (d)(2) and subparagraphs (d)(2)(A) and (d)(2)(B) and there is no culpable mental state requirement for any of the elements in these subparagraphs. Under subparagraph (d)(2)(A), the affirmative defense 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, subparagraph (d)(2)(B) applies and the actor must have the effective consent, or reasonably believe that the actor has the effective consent, of every person under 18 years of age who is, or who will be, depicted in the image. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception."

Paragraph (d)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Per paragraph (d)(3), 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))—i.e., all prohibited conduct in the offense except a person responsible for the complainant under civil law giving effective consent (subparagraphs (a)(1)(A) and (b)(1)(A)) and selling or advertising an image (subparagraphs (a)(1)(E) and (b)(1)(E)). Subparagraph (d)(3)(A) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to every element under subparagraph (d)(3)(A) through subparagraph (d)(3)(D) and there is no culpable mental state required for any of the elements in these subparagraphs or the sub-subparagraphs therein.

There are several requirements to the affirmative defense under paragraph (d)(3). First, per subparagraph (d)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (d)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs (d)(3)(A)(i) and (d)(3)(A)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant (sub-subparagraph (d)(3)(A)(ii). "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[27] and is intended to have the same meaning. There are additional requirements if the actor in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (d)(3)(A)(ii). Under sub-subparagraph (d)(3)(A)(ii)(a), the actor must not be at least four years older than a complainant who is

[27] 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.").

under 16 years of age and under sub-subparagraph (d)(3)(A)(ii)(b) the actor must not be in a "position of trust with or authority over" and at least four years older than a complainant who is under 18 years of age. "Position of trust with or authority over" is a defined term in RCC § 22E-701. The requirements in sub-subparagraphs (d)(3)(A)(ii)(a) and (d)(3)(A)(ii)(b) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Second, per subparagraph (d)(3)(B), 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. Third, per subparagraph (d)(3)(C), the complainant must give "effective consent" to the actor's conduct, or the actor must reasonably believe that the actor has the complainant's "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, an express or implied 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 actor 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)(4) establishes an affirmative defense for the innocent display or distribution of a prohibited image in certain socially beneficial situations. Per paragraph (d)(4), the defense applies to the display or distribution of an image under subparagraphs (a)(1)(C) and (b)(1)(C) of the offense. Subparagraph (d)(4)A) requires that the actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[28] 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. Subparagraph (d)(4)(B) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(4)(B) and sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii) and there is no culpable mental state requirement for any of the elements in these subparagraphs. Subparagraph (d)(4)(B) requires that the actor display or distribute the image to a person the actor reasonably believes is a person specified in sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), such as a law enforcement officer or a person responsible under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believes is depicted in the image or involved in the creation of the image.

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

Paragraph (d)(5) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. The affirmative defense applies to defense to subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E).[29] Paragraph (d)(5) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(5)(A), (d)(5)(B), and (d)(5)(C) and there is no culpable mental state requirement for any of the elements in these subparagraphs. 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.

Subsection (e) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

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

First, the revised creating or 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,[30] even though creating and distributing are direct forms of child abuse[31] and selling and advertising are "an integral part" of the market.[32] In

[29] 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 creating or 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.

This defense also does not apply to individuals that are responsible for the complainant under 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.

[30] 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).

[31] *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.").

contrast, the revised creating or trafficking an obscene image statute penalizes creating,[33] 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.[34] The revised creating or 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.[35] This change improves the consistency and proportionality of the revised offense.

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[32] *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.").

[33] The revised creating or 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.

[34] *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).

[35] 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 creating or 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,"[36] 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 creating or 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.[37] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised creating or 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,[38] 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.[39] The current D.C. Code

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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).

[36] 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.").

[37] 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.

[38] 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.").

[39] 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).

obscenity statute is penalized as a misdemeanor for a first offense,[40] with no enhancements for the obscene materials depicting a minor.[41] In contrast, the first degree of the revised creating or 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[42] 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."[43] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[44] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised creating or 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.[45] The current

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[40] 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.").

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

[42] 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.

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

[44] 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.").

[45] 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*

D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[46] with no enhancements for the obscene materials depicting a minor.[47] In contrast, the RCC revised creating or trafficking an obscene image of a minor statute criminalizes the creation and distribution of certain depictions of the pubic area[48] 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.[49] 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).

[46] 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.").

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

[48] 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.

[49] 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 creating or trafficking an obscene image statute expands the current exception to liability for conduct by persons under 18 years of age and makes it an affirmative defense. 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,[50] or, if there are multiple minors depicted, all of the minors consent.[51] A minor that is not depicted,[52] or an adult that is not more than four years older than the minor or minors depicted,[53] 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,[54] and minors are still liable under the current statute for creating images of themselves or other minors[55] or engaging in sexual conduct.[56] There is no DCCA case law interpreting the current exclusion. In contrast, the revised trafficking an obscene image statute

[50] 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.").

[51] 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.").

[52] 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.").

[53] 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.").

[54] 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.").

[55] 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.").

[56] 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.").

excludes from liability all persons under the age of 18 years,[57] applies to all images,[58] 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.[59] 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;[60] or 2) The actor has the complainant's effective consent or reasonably believes that the actor has the effective consent of every person under 18 years of age who is, or who will be, depicted in the image.[61] The "effective consent"

[57] The revised creating or trafficking statute excludes from liability minors that have a responsibility under 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 recording, photographing, or filming of a non-derivative image. This exclusion ensures that the revised creating or 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.

[58] 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."

[59] *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.").

[60] 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).

[61] 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

requirements are consistent with 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,[62] or for distribution or display of an image without the recipient's effective consent.[63] 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, school, and other venue 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[64] for a "librarian engaged in the normal course of his or her employment"[65] and certain movie theater employees[66] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[67] 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, schools, and other venues 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.[68] For reasons discussed the in explanatory note to this

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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).

[62] 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.

[63] 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.

[64] 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.

[65] D.C. Code § 22-3104(b)(1)(A).

[66] 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).

[67] 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.").

[68] 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

offense, the affirmative 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.[69] 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, including a law enforcement officer or person with a responsibility under 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.[70] 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 are married or with whom they are in a domestic partnership or romantic relationship.

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

[69] 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.").

[70] 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.

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.[71] 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.[72] 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, with several additional requirements 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 actor must have the complainant's effective consent or reasonably believe that the actor has the complainant's 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. 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. This change improves the consistency and proportionality of the revised statute.

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,

[71] 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.

[72] 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.").

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.[73] In contrast, first degree of the revised creating or 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.[74] 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.[75] 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 representation, dance, or any other visual presentation or exhibition."[76] 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.[77] 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,

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[73] 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.

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

[75] 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 creating or 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).

[76] D.C. Code § 22-3101(3).

[77] *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.").

the ruling did not turn on the medium or method visual representation.[78] In contrast, through the definition of "image" in RCC § 22E-701, the revised creating or 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,[79] and, for second degree, that the images are "patently offensive" under modern community standards per *Miller v. California*.[80] This change improves the clarity, consistency, and constitutionality of the revised statute.

Eleventh, the revised creating or 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.[81] 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 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.[82] In contrast, the revised creating or 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

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[78] 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.").

[79] 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.

[80] 413 U.S. 15 (1973).

[81] D.C. Code § 22-3102(a)(1).

[82] D.C. Code § 22-3102(1).

offense (RCC § 22E-302),[83] 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[84] 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."[85] 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.[86] 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,[87] such as a radio station, television broadcaster, or phone service provider, consistent with the current and revised obscenity offenses.[88] The revised offense also excludes liability for any interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934,[89] for content provided by another person, consistent with the current and revised nonconsensual pornography offenses.[90] 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 creating or trafficking an obscene image statute may be viewed as a substantive change of law.

First, the revised creating or trafficking an obscene image statute requires a "knowingly" culpable mental state 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. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance.[91] The statute does not

[83] [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.

[84] RCC § 22E-301.

[85] D.C. Code § 22-3102(d)(3).

[86] 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.

[87] 47 U.S.C. § 151 et seq.

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

[89] 7 U.S.C. § 230(f)(2).

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

[91] 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.").

specify whether this culpable mental state extends to the prohibited conduct, such as creating the image, and the definition of "knowingly"[92] 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,"[93] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[94] Resolving this ambiguity, the revised creating or 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.[95] 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 creating or 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[96] and defines

[92] 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.

[93] 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.").

[94] *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.")

[95] *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)").

[96] 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.").

"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."[97] There is no DCCA case law interpreting the definition of "knowingly"[98] or how it applies to the current statute. The current obscenity statute has a substantively identical definition of "knowingly,"[99] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[100] Resolving this ambiguity, the revised creating or trafficking an obscene image statute requires recklessness as to the content of the image,[101] 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,[102] but courts have also recognized that recklessness regarding a

[97] D.C. Code § 22-3101(1).

[98] 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.

[99] 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.").

[100] *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.")

[101] While the revised creating or 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.

[102] 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)).

risk of serious harm is wrongful conduct.[103] This change improves the clarity and consistency of the revised statute

Third, the revised creating or 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,"[104] 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 creating or trafficking an obscene image statute specifies that at least part[105] 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.[106] Distribution of obscene images of purely computer-generated or other fictitious minors[107] may be

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[103] *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.").

[104] D.C. Code § 22-3101(2).

[105] The revised creating or trafficking an obscene image 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.

[106] 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.

[107] 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, 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

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 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,[108] 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,[109] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[110] and is supported by Supreme Court case law.[111] Distribution of obscene 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 creating or trafficking an obscene image statute provides liability for a person responsible for the complainant under civil law giving "effective consent" to the complainant's participation in the recording, photographing, or filming,

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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).

[108] D.C. Code § 22-3101(5)(A).

[109] 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.

[110] 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.").

[111] 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 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.

and requires a "knowingly" culpable mental state for this element.[112] 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."[113] 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 creating or trafficking statute requires that the individual responsible under 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 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, an express or implied 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.[114] This change improves the clarity and consistency of the revised statute.

Sixth, the revised creating or 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[115] 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."[116] 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,[117] and it is also unclear whether the mental state applies to the age of the

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[112] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) and paragraph (b)(1) also applies to the fact that the defendant is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant."

[113] D.C. Code § 22-3102(a)(1).

[114] *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)").

[115] 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.").

[116] D.C. Code § 22-3101(1).

[117] 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

complainant.[118] There is no DCCA case law on these issues. However, the current statute has an affirmative defense for a reasonable mistake of age,[119] 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 creating or 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[120] 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.[121] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[122] Throughout the RCC, recklessness as to age is a consistent basis for penalty enhancement.[123] This change improves the clarity and consistency of the revised statute.

Seventh, the revised creating or trafficking an obscene image statute does not criminalize a person with specified responsibility under civil law for the complainant giving effective consent for the complainant to aid the creation of derivative images. The definition of "performance"[124] in the current sexual performance of a minor statute

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to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[118] 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.

[119] 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.").

[120] 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 creating or 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. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

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

[122] *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.).

[123] 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.

[124] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

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,"[125] 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 creating or 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.[126] The definition of "performance"[127] 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.[128] 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."[129] Resolving this ambiguity, the revised creating or 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.[130] "Produc[ing]" 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."[131] However, a person who 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

[125] D.C. Code § 22-3102(a)(1).
[126] D.C. Code § 22-3102(a)(2).
[127] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").
[128] 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.
[129] 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.
[130] 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.
[131] 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.

liability statute (RCC § 22E-210).[132] 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."[133] It is unclear whether this is a general statement or part of the actual offense for which a person can be charged and convicted.[134] The revised creating or 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.[135] 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 creating or 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— creating or 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.

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[132] 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.

[133] D.C. Code § 22-3102(a).

[134] 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.").

[135] 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.").

Third, the revised creating or trafficking an obscene image statute no longer uses the defined term "minor."[136] 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,"[137] 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 creating or trafficking an obscene image statute replaces "parent, legal guardian, or custodian of a minor" with a "person with a responsibility under 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."[138] 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."[139] The revised statute similarly uses a "person with a responsibility under 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 creating or 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,[140] but otherwise refers generally to the complainant's sexual conduct.[141] The revised creating or 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) participant. This clarifies the scope of the revised statute without changing current District law.

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[136] 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.

[137] *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….").

[138] D.C. Code § 22-3102(a)(1).

[139] 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.

[140] D.C. Code § 22-3102(a)(1).

[141] 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.

Sixth, the revised creating or 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.[142] This change clarifies the revised statute.

Seventh, instead of prohibiting a "lewd" exhibition,[143] the revised creating or 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."[144] The revised creating or 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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[142] 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.

[143] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[144] *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 creating or trafficking an obscene image statute deletes the definitions of "transmit" and "transmission" in the current statute[145] because they are redundant with distribution. Deleting them clarifies the revised statute without changing current law.

Tenth, the revised creating or 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.[146] To 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.

[145] 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].").

[146] 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 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.

Explanatory Note.[1] *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,*[2] *the main difference being that the RCC possession of an obscene image of a minor offense is limited to images. Along with the creating or trafficking of an obscene image of a minor offense,*[3] *the arranging a live sexual performance of a minor offense,*[4] *and the attending or viewing a live sexual performance of a minor offense,*[5] *the revised possession of an obscene image of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *for that offense.*

Paragraph (a)(1) 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.[10] "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."[11] The RCC definition of "knowingly" in RCC § 22E-206 here means the actor must be "practically 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.

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[1] 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.").

[2] RCC § 22E-1810.

[3] RCC § 22E-1807.

[4] RCC § 22E-1809.

[5] RCC § 22E-1810.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

[10] 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.

[11] 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.

Paragraph (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 the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body 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,[12] or anus, when there is less than a full opaque covering.[13] 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 rules of interpretation 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) in first degree. 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.[14] RCC § 22E-701 defines "obscene" and "sexual contact." Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (b)(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.

Subsection (c) establishes two exclusions from liability for the RCC possession of an obscene image offense. Paragraph (c)(1) provides that the statute does not apply to

[12] 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.

[13] 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).

[14] 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.

any person that is a licensee[15] under the Communications Act of 1934, such as a radio, television, or phone service provider. Paragraph (c)(2) provides that the statute does not apply to any person that is an interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16]

Subsection (d) establishes several affirmative defenses for the RCC creating or trafficking an obscene image statute. The general provision in RCC § 22E-XX establishes the burdens of proof and production for all affirmative defenses in the RCC. 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*,[17] 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*.[18] 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 for an actor that is under the age of 18 years. Paragraph (d)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to paragraph (d)(2) and subparagraphs (d)(2)(A) and (d)(2)(B) and there is no culpable mental state requirement for any of the elements in this paragraph or subparagraphs. Under subparagraph (d)(2)(A), the affirmative defense applies if the actor is the only person under the age of 18 years who is depicted in the image. If there are multiple people under the age of 18 years who are depicted in the image, subparagraph (d)(2)(B) applies and the actor must have the effective consent, or reasonably believe that the actor has the effective consent, of every person under 18 years of age who is depicted in the image. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception."

Paragraph (d)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Subparagraph (d)(3)(A) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to every element in subparagraph (d)(3)(A) through (d)(3)(C) and there is no culpable

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

[16] 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.

[17] *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.").

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

mental state requirement for any of the elements in these subparagraphs or the sub-subparagraphs or sub-sub-subparagraphs contained therein.

There are several requirements to the affirmative defense under paragraph (d)(3). First, per subparagraph (d)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (d)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs (d)(3)(A)(i) and (d)(3)(A)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant (sub-subparagraph (d)(3)(A)(ii)). "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[19] and is intended to have the same meaning. There are additional requirements if the actor in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (d)(3)(A)(ii). Under sub-sub-subparagraph (d)(3)(A)(ii)(I), the actor must not be at least four years older than a complainant who is under 16 years of age and under sub-sub-subparagraph (d)(3)(A)(ii)(ii) the actor must not be in a "position of trust with or authority over" and at least four years older than a complainant who is under 18 years of age. The requirements in sub-sub-subparagraphs (d)(3)(A)(ii)(I) and (d)(3)(A)(ii)(II) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302). "Position of trust with or authority over" is a defined term in RCC § 22E-701.

Second, per subparagraph (d)(3)(B), 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 third persons. Third, per subparagraph (d)(3)(C), the complainant must give "effective consent" to the actor's conduct, or the actor must reasonably believe that the actor has the complainant's "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, an express or implied coercive threat, or deception."

Paragraph (d)(4) establishes an affirmative defense for the innocent display or distribution of a prohibited image in certain socially beneficial situations.[20] Subparagraph (d)(4)A) requires that the actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[21] 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

[19] 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.").

[20] The CCRC is currently drafting a general defense for temporary innocent possession that may also address this conduct.

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

illegal conduct or sought legal counsel, only that the defendant believed to a practical certainty that he or she would do so. Subparagraph (d)(4)(B) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(4)(B), sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), subparagraph (d)(4)(C), and sub-subparagraphs (d)(4)(C)(i) and (d)(4)(C)(ii) and there is no culpable mental state requirement for any of the elements in these subparagraphs or sub-subparagraphs. Subparagraph (d)(4)(B) requires that the actor promptly contact a person the actor reasonably believes is a person specified in sub-subparagraphs (d)(4)(C)(i) and (d)(4)(C)(ii), such as a "law enforcement officer" or a person responsible under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believes is depicted in the image or involved in the creation of the image. "Law enforcement officer" is a defined term in RCC § 22E-701. Per sub-subparagraph (d)(4)(C)(i) and sub-subparagraph (d)(4)(C)(ii), the actor must also promptly distribute the image to one of the specified individuals or authorities, without making or retaining a copy, or allow a law enforcement agency access to the image.

Paragraph (d)(5) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. Paragraph (d)(5) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(5)(A), (d)(5)(B), and (d)(5)(C) and there is no culpable mental state requirement for any of the elements in these subparagraphs. 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.

Subsection (e) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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,[22] even though creating and distributing are direct forms of child

[22] 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).

abuse[23] and selling and advertising are "an integral part" of the market.[24] 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 creating or 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.[25] 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 creating or trafficking an obscene image and possession of an obscene image offenses.[26] 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,"[27] 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

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[23] *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.").

[24] *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.").

[25] *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).

[26] 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."

[27] 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.").

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.[28] 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,[29] 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 obscenity statute.[30] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[31] with no enhancements for the obscene materials depicting a minor.[32] 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[33] as other conduct penalized by the

[28] 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.

[29] 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.").

[30] 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).

[31] 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.").

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

[33] 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,

current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[34] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[35] 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."[36] 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 areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[37] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[38] with no enhancements for the obscene materials depicting a minor.[39] In contrast, the RCC revised possession of an obscene image statute criminalizes possessing certain depictions of the pubic area[40] 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.[41] As defined, display of the pubic area or

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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.

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

[35] 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.").

[36] D.C. Code § 22-3101(5)(E).

[37] 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).

[38] 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.").

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

[40] 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.

[41] 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

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.[42] There is no DCCA case law interpreting the current defense.

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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 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.").

[42] 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)

In contrast, the RCC affirmative defense is available for possessing any number of images, if the actor also promptly contacts a specified individual, such as a law enforcement officer or person with a responsibility under 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.[43] 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.

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.[44] 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[45] and excludes marriages,

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Reported the matter to a law enforcement agency and afforded that agency access to each such photograph or motion picture.").

[43] 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.

[44] 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.

[45] 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.").

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, with several additional requirements. The prohibited conduct must be limited to the actor and the complainant or just the complainant, and the actor must have the complainant's effective consent or reasonably believe that the actor has the complainant's 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. 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. This change improves the consistency and proportionality of the revised statute.

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 employees of museums, schools, and other venues. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]"[46] any sexual performance of a minor[47] for a "librarian engaged in the normal course of his or her employment"[48] and certain movie theater employees[49] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[50] 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, schools, and other venues 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.[51] Practically, the expanded defense provides a clearer safe-harbor

[46] 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.

[47] 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.

[48] D.C. Code § 22-3104(b)(1)(A).

[49] 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).

[50] 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.").

[51] 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-

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 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.[52] 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.[53] This change improves the constitutionality of the revised statute.

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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.

[52] 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.").

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

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."[54] 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.[55] 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.[56] 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,[57] and, for second degree, that the images are "patently offensive" under modern community standards per *Miller v. California*.[58] This change improves the clarity, consistency, and constitutionality of the revised statute.

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[54] D.C. Code § 22-3101(3).

[55] *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.").

[56] 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.").

[57] 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.

[58] 413 U.S. 15 (1973).

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."[59] 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,[60] such as a radio station, television broadcaster, or phone service provider, consistent with the current and revised obscenity offenses.[61] The revised offense also excludes liability for any interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934,[62] for content provided by another person, consistent with the current and revised nonconsensual pornography offenses.[63] 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."[64] 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,"[65] 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.[66] 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.

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[59] D.C. Code § 22-3102(d)(3)

[60] 47 U.S.C. § 151 et seq.

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

[62] 7 U.S.C. § 230(f)(2).

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

[64] 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.").

[65] 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."

[66] 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.

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,[67] it does not specify whether this culpable mental state extends to possession, and the definition of "knowingly"[68] 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,"[69] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[70] 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[71] 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

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[67] 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.").

[68] 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.

[69] 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.").

[70] *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.")

[71] *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)").

character and content" of the sexual performance[72] 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."[73] There is no DCCA case law interpreting the definition of "knowingly"[74] or how it applies to the current statute. The current obscenity statute has a substantively identical definition of "knowingly,"[75] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[76] Resolving this ambiguity, the revised possession of an obscene image statute requires recklessness as to the content of the image,[77] 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,[78] but courts

[72] 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.")

[73] D.C. Code § 22-3101(1).

[74] 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.

[75] 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.").

[76] *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.")

[77] 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.

[78] 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

have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[79] 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,"[80] 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 possession of an obscene image statute specifies that at least part[81] 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.[82] 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,[83] 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

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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)).

[79] *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.").

[80] D.C. Code § 22-3101(2).

[81] 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.

[82] 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.

[83] D.C. Code § 22-3101(5)(A).

prohibited conduct is actually occurring are included in the revised statute,[84] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[85] and is supported by Supreme Court case law.[86] Possession of suggestive or 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[87] 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."[88] The legislative history states that the defendant must "know that the performance will depict a minor,"[89] 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.[90] There is no DCCA case law on this issue. However, the current statute

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[84] 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.

[85] 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.").

[86] 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 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.

[87] 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.")

[88] D.C. Code § 22-3101(1).

[89] 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.

[90] 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

has an affirmative defense for a reasonable mistake of age,[91] 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[92] 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.[93] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[94] Throughout the RCC, recklessness as to age is a consistent basis for penalty enhancement.[95] 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 and makes it an affirmative defense. 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,[96] or when all the minors depicted in the still or motion picture consent.[97] The current exclusion does not define

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"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.

[91] 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.").

[92] 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 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. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

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

[94] *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.).

[95] 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.

[96] 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.").

[97] 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

"consent" and does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent.[98] 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[99] that is depicted in the image,[100] or reasonably believed that every person under the age of 18 years[101] gave 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.[102] 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

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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.").

[98] 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.").

[99] 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).

[100] 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, 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.").

[101] 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).

[102] 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.").

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."[103] 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,"[104] 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 various forms of sexual penetration the current sexual performance of a minor statute prohibits, including bestiality.[105] This change clarifies the revised statute.

Fourth, instead of prohibiting a "lewd" exhibition,[106] 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."[107] The

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[103] 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.

[104] *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….").

[105] 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.

[106] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[107] *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.

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,"[108] and refers generally to the complainant's sexual conduct."[109] The revised 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.

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.

[108] D.C. Code § 22-3102(b).

[109] "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).

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

Explanatory Note. [1] *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 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 creating or trafficking an obscene image of a minor statute,*[2] *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,*[3] *the possession of an obscene image of a minor offense,*[4] *and the attending a live performance of a minor offense,*[5] *the revised arranging a live performance of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *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, including an audience of one person." 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 will cause the prohibited result, i.e., creating a live performance. Per the rules of interpretation 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).

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, including an audience of one person." An

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[1] 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.").

[2] RCC § 22E-1807.

[3] RCC § 22E-1807.

[4] RCC § 22E-1808.

[5] RCC § 22E-1810.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

actor that "creates" or directs" a visual presentation will nearly always be sufficient for the audience requirement, even if the actor does not watch the presentation.[10] There may also be liability if the audience is not physically present for the presentation.[11] "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."[12]

Subparagraph (a)(1)(B) prohibits a "person with a responsibility under 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 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.[13] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied 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 actor give effective consent for the complainant to engage in or submit to the creation of a live performance.[14]

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[10] 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).

[11] 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."

[12] 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.

[13] 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 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.

[14] 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

For subparagraph (a)(1)(C), the actor must be "practically certain" that he or she will sell admission to[15] 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.

Paragraph (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 the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body 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.[16] 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 rules of interpretation 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 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.

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) in first degree. However, the types of prohibited sexual conduct are different. 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

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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.

[15] 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).

[16] 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).

buttocks, when there is less than a full opaque covering.[17] The terms "obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rules of interpretation 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.

Subsection (c) establishes several affirmative defenses for the RCC arranging a live performance statute. The general provision in RCC § 22E-XX establishes the burdens of proof and production for all affirmative defenses in the RCC. Paragraph (c)(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*,[18] 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*.[19] However, the affirmative defense recognizes that there may be rare situations where live performances of such conduct warrant First Amendment protection.

Paragraph (c)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Paragraph (c)(2) establishes that the affirmative defense 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). Paragraph (c)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to paragraph (c)(2) and subparagraphs (c)(2)(A) and (c)(2)(B) and there is no culpable mental state requirement for any of the elements in these paragraphs or subparagraphs. Under subparagraph (c)(2)(A), the affirmative defense applies if the actor is the only person under the age of 18 years who 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 performance, subparagraph (c)(2)(B) applies and the actor must have the effective consent, or reasonably believe that the actor has the effective consent, of every person under 18 years of age who is, or who will be, depicted in the performance. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception."

Paragraph (c)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Per paragraph (c)(3), the affirmative defense applies to subparagraphs (a)(1)(A) and (b)(1)(A)

[17] 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).

[18] *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.").

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

of the offense. Subparagraph (c)(3)(A) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to every element under subparagraph (c)(3)(A) through subparagraph (c)(3)(D) and there is no culpable mental state required for any of the elements in these subparagraphs or sub-subparagraphs or sub-sub-subparagraphs contained therein.

There are several requirements to the affirmative defense under paragraph (c)(3). First, per subparagraph (c)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (c)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs c)(3)(A)(i) and (c)(3)(A)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant. "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[20] and is intended to have the same meaning. There are additional requirements if the actor in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (c)(3)(A)(ii). Under sub-sub-subparagraph (c)(3)(A)(ii)(I), the actor must not be at least four years older than a complainant who is under 16 years of age and under sub-sub-subparagraph (c)(3)(A)(ii)(II) the actor must not be in a "position of trust with or authority over" and at least four years older than a complainant who is under 18 years of age. The requirements in sub-sub-subparagraphs (c)(3)(A)(ii)(I) and (c)(3)(A)(ii)(II) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302). "Position of trust with or authority over" is a defined term in RCC § 22E-701.

Second, per subparagraph (c)(3)(B), the complainant must be the only person who is depicted, or who will be depicted, in the live performance, or the actor and the complainant must be the only persons who are depicted, or who will be depicted in the live performance. The marriage or romantic partner defense is not available when the live performance shows, or will show, third persons. Third, per subparagraph (c)(3)(C), the complainant must give "effective consent" to the actor's conduct, or the actor must reasonably believe that the actor has the complainant's "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, an express or implied coercive threat, or deception." Fourth, per subparagraph (c)(4)(D), 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.[21]

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[20] 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.").

[21] 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

Paragraph (c)(4) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. The affirmative defense applies to subparagraphs (a)(1)(C) and (b)(1)(C).[22] Paragraph (c)(4) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (c)(4)(A), (c)(4)(B), and (c)(4)(C) and there is no culpable mental state requirement for any of the elements in these subparagraphs. 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 actor must not record, photograph, or film the live performance.[23] 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.

Subsection (d) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

Subsection (e) 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.[24] The current sexual performance of a minor statute has the same penalties for creating, selling, advertising, attending, and viewing a live performance,[25] even

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"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.

[22] This defense does not apply to creating, producing, or directing a live performance (subparagraphs (a)(1)(A) and (b)(1)(A)) because such actions create child pornography directly from the sexual abuse of minors. However, there may be a separate defense for first degree arranging a live sexual performance of a minor image for live performances that have serious artistic or other value (paragraph (d)(1)), or an argument that the images are not "obscene" as required for second degree.

This defense also does not apply to individuals that are responsible for the complainant under 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.

[23] 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).

[24] 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.

[25] 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).

though creating a live performance is a direct form of child abuse[26] and selling and advertising are "an integral part" of the market.[27] 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.[28] 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 definition.[29] 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,"[30] a

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[26] *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.").

[27] *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.").

[28] *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).

[29] 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.

[30] 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

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.[31] 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 prohibits actual masturbation and sadomasochistic abuse,[32] 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.[33] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[34] with no enhancements for the obscene materials depicting a minor.[35] 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,"

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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.").

[31] 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.

[32] 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.").

[33] 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).

[34] 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.").

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

and "sexual contact" are defined in RCC § 22E-701. As defined, such sexual conduct may be as graphic[36] 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."[37] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[38] This change improves the consistency and proportionality of the revised statute.

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.[39] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[40] with no enhancements for the obscene materials depicting a minor.[41] In contrast, the RCC criminalizes creating, producing, and directing live performances featuring certain

[36] 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.

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

[38] 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.").

[39] 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).

[40] 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.").

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

depictions of the pubic area[42] 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.[43] 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 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 and makes it an affirmative defense. 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,[44] or, if there are multiple minors depicted, all of the

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[42] 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.

[43] 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 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.")

[44] 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

minors consent.[45] A minor that is not depicted,[46] or an adult that is not more than four years older than the minor or minors depicted,[47] 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,[48] and minors are still liable under the current statute for creating live performances with themselves or other minors[49] or engaging in sexual conduct.[50] 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,[51] 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

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transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[45] 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.").

[46] 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.").

[47] 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.").

[48] 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.").

[49] 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.").

[50] 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.").

[51] The revised arranging a live performance statute excludes from liability minors that have a responsibility under 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.

otherwise legal sexual encounters.[52] 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;[53] or 2) The actor has the complainant's effective consent or reasonably believes that the actor has the effective consent of every person under 18 years of age who is, or who will be, depicted in the image.[54] 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,[55] 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, school, and other venue 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[56] for a "librarian engaged in the normal course of his or her

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[52] *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.").

[53] 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. 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).

[54] 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).

[55] 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.

[56] 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

employment"[57] and certain movie theater employees[58] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[59] 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, schools, and other venues 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.[60] For reasons discussed the in explanatory note to this offense, the affirmative defense is limited to the conduct prohibited in subparagraphs (a)(1)(C) and (b)(1)(C) provided that the actor does not record, film, or photograph the live performance. 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 paragraph (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.[61] The current sexual performance of a minor

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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.

[57] D.C. Code § 22-3104(b)(1)(A).

[58] 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).

[59] 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.").

[60] 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 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.

[61] 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

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[62] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference.[63] 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, with several additional requirements. The defense only applies to creating, producing, or directing a live performance (sub-paragraphs (a)(1)(A) and (b)(1)(B)). The live performance must be limited to the actor and the complainant or just the complainant, and the actor must have the complainant's effective consent or reasonably believe that the actor has the complainant's 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. 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. 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.[64]

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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.

[62] 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.").

[63] 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.").

[64] In *Ferber*, the Court acknowledged that some applications of the statute, which extended to live performances, at issue would be unconstitutional:

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.[65] 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.[66] 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.[67] 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.[68] 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),[69] defined in a manner consistent with

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> 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.

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

[66] 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).

[67] D.C. Code § 22-3102(a)(1).

[68] D.C. Code § 22-3102(1).

[69] [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.

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[70] 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.

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.[71] 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"[72] 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,"[73] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[74] 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

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[70] RCC § 22E-301.

[71] 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.").

[72] 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.

[73] 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.").

[74] *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.").

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.[75] 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 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,[76] but neither the statute nor the current definition of "sexual performance"[77] specifies whether the visual presentation must be for an audience.[78] In addition, the definition of "knowingly"[79] 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,"[80] which the DCCA has interpreted as requiring

[75] *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)").

[76] 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.").

[77] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[78] 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.").

[79] 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.

[80] 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.").

subjective knowledge of the sexual nature of the material at issue.[81] Resolving these ambiguities, the revised arranging 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" as defined in RCC § 22E-701.[82] 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."[83] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[84] 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[85] 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."[86] There is no DCCA case law interpreting the definition of "knowingly" or how it applies to the current statute.[87]

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[81] *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.").

[82] 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, including an audience of one person." *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.").

[83] This requirement is discussed further in the explanatory note for the revised offense.

[84] *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)").

[85] 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.").

[86] D.C. Code § 22-3101(1).

[87] 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

However, the current obscenity statute has a substantively identical definition of "knowingly,"[88] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[89] 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,[90] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[91] 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[92] 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."[93] It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower

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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.

[88] 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.").

[89] *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.").

[90] 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)).

[91] *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.").

[92] 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.").

[93] D.C. Code § 22-3101(1).

culpable mental state akin to recklessness or negligence,[94] and it is also unclear whether the mental state applies to the age of the complainant.[95] There is no DCCA case law on these issues. However, the current statute has an affirmative defense for a reasonable mistake of age,[96] 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[97] 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.[98] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[99] 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

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[94] 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.

[95] 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.

[96] 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.").

[97] 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. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

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

[99] *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.).

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,"[100] 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 arranging a live performance statute specifies that at least part[101] 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.[102] 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).[103] 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,[104] 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,[105] not other portrayals that are clearly staged. This definition is similar to

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[100] D.C. Code § 22-3101(2).

[101] 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.

[102] 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.

[103] 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.

[104] D.C. Code § 22-3101(5)(A).

[105] 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.

another jurisdiction's definition[106] and is supported by Supreme Court case law.[107] This change improves the clarity, consistency, and constitutionality of the revised statute.

Seventh, the revised arranging a live performance statute provides liability for a person responsible for the complainant under civil law giving "effective consent" to the complainant's participation in the live performance, and requires a "knowingly" culpable mental state for this element.[108] 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."[109] 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 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 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, an express or implied 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.[110] This change improves the clarity and consistency of the revised statute.

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[106] 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.").

[107] 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 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.

[108] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) and paragraph (b)(1) also applies to the fact that the defendant is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant."

[109] D.C. Code § 22-3102(a)(1).

[110] *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 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."[111] It is unclear whether this is a general statement or part of the actual offense for which a person can be charged and convicted.[112] 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.[113] 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 creating or 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."[114] 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.

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[111] D.C. Code § 22-3102(a).

[112] 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.").

[113] 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.").

[114] 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.

Code refer to a person under 18 years of age as a "child,"[115] 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 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."[116] 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."[117] 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,[118] but otherwise refers generally to the complainant's actions.[119] 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.[120] This change clarifies the revised statute.

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[115] *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….").

[116] D.C. Code § 22-3102(a)(1).

[117] 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.

[118] D.C. Code § 22-3102(a)(1).

[119] 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.

[120] 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.").

Seventh, instead of prohibiting a "lewd" exhibition,[121] 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."[122] 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.

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,[123] but in the context of a live sexual performance, it is more accurate to say selling "admission to."[124] This change improves the clarity of the revised statute without changing current District law.

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.

[121] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[122] *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.

[123] D.C. Code §§ 22-3102(a)(2) (prohibiting "promotes" any sexual performance with a minor); 22-3101(4) (defining "promote" to include "sell.").

[124] If a live performance is filmed, photographed, etc., and the resulting image is sold, there is liability under the RCC creating or trafficking an obscene image statute (RCC § 22E-1807).

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

Explanatory Note.[1] *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,*[2] *the main difference being that the RCC possession of an obscene image of a minor offense is limited to images. Along with the creating or trafficking of an obscene image of a minor offense,*[3] *the possession of an obscene image of a minor offense,*[4] *and the arranging a live sexual performance of a minor offense,*[5] *the revised attending or viewing a live sexual performance of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *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."[10] "Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience, including an audience of one person." "Live broadcast" is defined in RCC § 22E-701 as "a streaming video, or any other electronically transmitted image for viewing by one or more people." 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."[11] As applied to the elements "live performance" and "live broadcast," the

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[1] 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.").

[2] RCC § 22E-1808.

[3] RCC § 22E-1807.

[4] RCC § 22E-1808.

[5] RCC § 22E-1809.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

[10] 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 § 22E-701, a "live broadcast" is essentially a "live performance" that is streamed or electronically transmitted. However, the revised statute includes both live performances and live broadcasts for clarity.

[11] 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

"knowingly" culpable mental state requires that the actor be "practically certain" that the visual presentation is for an audience or one or more people."[12]

Paragraph (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 the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body 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.[13] 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 rules of interpretation 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

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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.

[12] The actor must be "practically certain" that the visual presentation is "for an audience, including an audience of one person" and the visual presentation must, in fact, be "for" an audience. It is a fact-specific inquiry as to whether a visual 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. A similar analysis applies for a "live broadcast," which is defined in RCC § 22E-701 to require that the broadcast be "for" simultaneous viewing by one or more people

[13] 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).

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) in first degree. 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 buttocks, when there is less than a full opaque covering.[14] "Obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rules of interpretation 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 rules of interpretation 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.

Subsection (c) establishes several affirmative defenses for the RCC attending or viewing a live performance statute. The general provision in RCC § 22E-XX establishes the burdens of proof and production for all affirmative defenses in the RCC. Paragraph (c)(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*,[15] 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*.[16] However, the affirmative defense recognizes that there may be rare situations where live performances of such conduct warrant First Amendment protection.

Paragraph (c)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Paragraph (c)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraph (c)(2)(A) and subparagraph (c)(2)(B) and there is no culpable mental state requirement for any of the elements in these subparagraphs. Under subparagraph (c)(2)(A), the affirmative defense 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

[14] 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).

[15] *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.").

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

there are multiple people under the age of 18 years who are, or who will be, depicted in the performance, subparagraph (c)(2)(B) applies and the actor must have the effective consent, or reasonably believe that the actor has the effective consent, of every person under 18 years of age who is depicted in the performance or live broadcast. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception."

Paragraph (c)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Subparagraph (c)(3)(A) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to every element under subparagraph (c)(3)(A) through subparagraph (c)(3)(D) and there is no culpable mental state required for any of the elements in these subparagraphs or sub-subparagraphs or sub-sub-subparagraphs contained therein.

There are several requirements to the affirmative defense under paragraph (c)(3). First, per subparagraph (c)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (c)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs (c)(3)(A)(i) and (c)(3)(A)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant. "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[17] and is intended to have the same meaning. There are additional requirements if the actor in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (c)(3)(A)(ii). Under sub-sub-subparagraph (c)(3)(A)(ii)(I), the actor must not be at least four years older than a complainant who is under 16 years of age and under sub-sub-subparagraph (c)(3)(A)(ii)(II) the actor must not be in a "position of trust with or authority over" and at least four years older than a complainant who is under 18 years of age. The requirements in sub-sub-subparagraphs (c)(3)(A)(ii)(I) and (c)(3)(A)(ii)(II) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302). "Position of trust with or authority over" is a defined term in RCC § 22E-701.

Second, per subparagraph (c)(3)(B), 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, or who will be depicted in the live performance or live broadcast. The marriage or romantic partner defense is not available when the live performance or live broadcast shows third persons. Third, per subparagraph (c)(3)(C), the actor must have the complainant's "effective consent" to the actor's conduct, or the actor must reasonably believe that the actor has the complainant's

[17] 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.").

"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, an express or implied coercive threat, or deception." Finally, per subparagraph (c)(4)(B), 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.[18]

Paragraph (c)(4) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. Paragraph (c)(4) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (c)(4)(A), (c)(4)(B), (c)(4)(C), and (c)(4)(D) and there is no culpable mental state requirement for any of the elements in these subparagraphs. 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 or live broadcast.[19] 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.

Subsection (d) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

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,[20] even though creation of a live performance is a direct form of child

[18] 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.

[19] 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 creating or trafficking an obscene image offense (RCC § 22E-1807).

[20] 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).

abuse[21] and selling and advertising are "an integral part" of the market.[22] 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 creating or 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.[23] 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,"[24] 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 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.[25] 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,

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[21] *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.").

[22] *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.").

[23] *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).

[24] 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.").

[25] 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.

and an obscene "sexual contact." The current sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[26] 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.[27] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[28] with no enhancements for the obscene materials depicting a minor.[29] 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[30] 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."[31] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[32] This change improves the consistency and proportionality of the revised statute.

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[26] 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.").

[27] 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).

[28] 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.").

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

[30] 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.

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

[32] 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*

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.[33] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[34] with no enhancements for the obscene materials depicting a minor.[35] In contrast, the RCC criminalizes attending or viewing live performances or live broadcasts that feature certain depictions of the pubic area[36] 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.[37] As defined, display of the pubic area or anus is as graphic as other conduct

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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.").

[33] 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).

[34] 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.").

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

[36] 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.

[37] 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). 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

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,[38] or, if there are multiple minors depicted, all of the minors consent.[39] A minor that is not depicted,[40] or an adult that is not more than four years older than the minor or

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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.")

[38] 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.").

[39] 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.").

[40] 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.").

minors depicted,[41] 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,[42] and minors are still liable under the current statute for creating or viewing live performances or live broadcasts with themselves or other minors[43] or engaging in sexual conduct.[44] 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.[45] The minor must be the only person under the age of 18 years who is depicted in the live performance or live

[41] 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.").

[42] 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.").

[43] 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.").

[44] 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.").

[45] *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.").

broadcast;[46] 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.[47] 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, school, and other venue 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[48] for a "librarian engaged in the normal course of his or her employment"[49] and certain movie theater employees[50] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[51] 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, schools, and other venues 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 live performance or live broadcast.[52] Practically, the

[46] 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).

[47] 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).

[48] 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.

[49] D.C. Code § 22-3104(b)(1)(A).

[50] 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).

[51] 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.").

[52] 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

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 (c)(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.[53] 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[54] 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, with several additional requirements. 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 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

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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.

[53] 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.

[54] 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.").

(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. 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.[55] In contrast, the revised attending a live performance statute has an affirmative defense that 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.[56] 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.[57] This change improves the constitutionality of the revised statute.

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[55] 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.

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

[57] 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).

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.[58] 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"[59] 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,"[60] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[61] Resolving this ambiguity, the revised 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.[62] 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.

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[58] 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.").

[59] 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.

[60] 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.").

[61] *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.").

[62] *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)").

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 or "for" one or more people, 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,[63] but neither the statute nor the current definition of "sexual performance"[64] specifies whether the visual presentation must be for an audience.[65] In addition, the definition of "knowingly"[66] 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,"[67] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[68] 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"[69] or "live broadcast" as

[63] 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.").

[64] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[65] 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.").

[66] 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.

[67] 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.").

[68] *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.").

[69] 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

defined in RCC § 22E-701. The RCC definitions of "live performance" and "live broadcast" require that the visual presentation be "for" an audience or "for" one or more people and read in conjunction with the RCC definition of "knowingly," requires that the defendant be "practically certain" that the live performance is "for" an audience or the live broadcast is "for" one or more people.[70] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[71] 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[72] 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."[73] There is no DCCA case law interpreting the definition of "knowingly" or how it applies to the current statute.[74] However, the current obscenity statute has a substantively identical definition of "knowingly,"[75] which the DCCA has interpreted as requiring subjective knowledge of

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be "for an audience, including an audience of one person." *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.").

[70] This requirement is discussed further in the explanatory note for the revised offense.

[71] *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)").

[72] 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.").

[73] D.C. Code § 22-3101(1).

[74] 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.

[75] 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.").

the sexual nature of the material at issue.[76] 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,[77] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[78] 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,"[79] 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[80] of a "real," 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.[81] The RCC does not criminalize attending or viewing an

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[76] *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.")

[77] 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)).

[78] *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.").

[79] D.C. Code § 22-3101(2).

[80] 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 to be attached to a real minor's body. There is no requirement that the government prove the identity of a real minor.

[81] 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

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.[82] 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,[83] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[84] and is supported by Supreme Court case law.[85] This change improves the clarity, consistency, and constitutionality of the revised statute.

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

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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.

[82] D.C. Code § 22-3101(5)(A).

[83] 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.

[84] 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.").

[85] 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 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.

First, the revised attending a live performance statute clarifies that viewing a "live performance" is a discrete form of liability.[86] The current sexual performance of a minor statute prohibits "attend[ing]" or "possess[ing]" a sexual "performance."[87] 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.[88] 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."[89] The current definition of "performance" includes any "visual representation or exhibition,"[90] 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 images and live performances.[91] 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 creating or 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—creating or trafficking an obscene image and

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[86] 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.

[87] D.C. Code § 22-3102(b).

[88] 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.

[89] D.C. Code § 22-3102(b).

[90] 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).

[91] 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.").

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."[92] 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,"[93] 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,[94] but otherwise refers generally to the complainant's actions.[95] 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 various forms of sexual penetration the current sexual performance of a minor statute prohibits and includes bestiality.[96] This change clarifies the revised statute.

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[92] 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.

[93] *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….").

[94] D.C. Code § 22-3102(a)(1).

[95] 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.

[96] 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,[97] 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."[98] 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.

[97] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[98] *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.

RCC § 22E-1811. Limitations on Liability for RCC Chapter 18 Offenses.

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[1] 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.[2] 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.

[1] D.C. Code §§ 22-2201 (obscenity); 22-3051 – 3057 (nonconsensual pornography); 22-3131 – 3135 (stalking); 22-3531 (voyeurism); 22-3101 – 3104 (sexual performance of a minor).

[2] 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.

COMMENTARY
SUBTITLE III. PROPERTY OFFENSES

RCC § 22E-2101. Theft.

Explanatory Note. *This section establishes the revised theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct in which there is an intent to deprive another of property without an owner's consent. The penalty gradations are primarily based on the value of the property involved in the crime. The revised theft offense replaces the theft statute*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct for first degree theft—takes, obtains, transfers, or exercises control over the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes goods, services, and cash. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) applies to all of the elements in paragraph (a)(1)—takes, obtains, transfers, or exercises control over the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct takes, obtains, transfers, or exercises control over property that is "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the consent of an owner." "Consent" is a defined term in RCC § 22E-701 that means "a word or action that indicates, expressly or implicitly, agreement to particular conduct or a particular result" and given by a person that is generally competent to do so. Any indication of agreement that satisfies the definition of "consent," even if obtained by deception, coercive threat, or physical force, negates the element "without the consent of an owner" and the accused is not guilty of theft. However, there may be liability under the RCC fraud offense (RCC § 22E-2101) or the RCC extortion offense (RCC § 22E-2301) if the taking was committed by deception, a coercive threat, or physical force. "Owner" is defined to mean a person holding an interest in property with which the actor is not privileged to interfere. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), here requiring the accused to be aware to a practical certainty that he or she lacks the consent of an owner.

Paragraph (a)(3) requires that the defendant had an "intent to deprive" that owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. 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

[1] D.C. Code § 22-3211.

prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

The requirements for liability in paragraphs (b)(1) - (b)(3) (second degree theft), paragraphs (c)(1) - (c)(3) (third degree theft), paragraphs (d)(1) - (d)(3) (fourth degree theft), and paragraphs (e)(1) - (e)(3) (fifth degree theft) are the same as those in paragraphs (a)(1) - (a)(3) for first degree theft. The theft gradations differ only in the requirements as to the amount and type of property at issue.

The various gradation requirements for theft are in paragraph (a)(4) (first degree theft), paragraph (b)(4) (second degree theft), paragraph (c)(4) (third degree theft), subsection (d)(4), and paragraph (e)(4) (fifth degree theft). Each of these paragraphs uses "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. Each of these gradations refers to "value," a defined term in RCC § 22E-701 that generally means the fair market value of property, although, as will be discussed, some gradations of the RCC theft offense have additional bases for liability.

Paragraph (a)(4) specifies that first degree theft requires that "in fact" the property has a value of $500,000 or more. The defendant is strictly liable as to the value of the property.

Paragraph (b)(4) specifies that second degree theft requires that "in fact" the property has a value of $50,000 or more. The defendant is strictly liable as to the value of the property.

For third degree theft, subparagraph (c)(4)(A) requires "in fact" that the property has a value of $5,000 or more. The defendant is strictly liable as to the value of the property. Subparagraph (c)(4)(B) specifies an additional basis for liability for third degree theft—that the property "in fact" is a motor vehicle. "Motor vehicle" is defined in RCC § 22E-701 as a vehicle designed to be propelled only by an internal-combustion engine or electricity. The defendant is strictly liable as to whether the property is a motor vehicle. Subparagraph (c)(4)(C) specifies the final basis for liability for third degree theft—that the property "in fact" is taken from a complainant in specified circumstances. Per sub-subparagraph (c)(4)(C)(i), the complainant holds or carries the property on his or her person, or, per subsection (c)(4)(C)(ii) the complainant has the ability and desire to exercise control over the property and it is within his or her immediate physical control. The defendant is strictly liable as to whether the complainant holds or carries the property on his or her person or the complainant has the ability and desire to exercise control over the property and it is within his or her immediate physical control.

Paragraph (d)(4) specifies that fourth degree theft requires that "in fact" the property has a value of $500 or more. The defendant is strictly liable as to the value of the property.

Paragraph (e)(4) specifies that fifth degree theft requires that "in fact" the property has any value. The defendant is strictly liable as to the property having any value.

Subsection (f) codifies an exception to liability for fare evasion. Conduct that violates D.C. Code § 35-252 is not a violation of theft.

Subsection (g) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised theft statute changes current District law in five main ways.*

First, the revised theft offense no longer includes conduct that constitutes "obtaining property by trick," "false pretense," "deception," "false token," or "larceny by trick."[2] Under current law, such conduct is criminalized both as theft[3] and fraud.[4] Currently, a defendant may be convicted of both theft and fraud based on the same act or course of conduct, even though he or she must be concurrently sentenced for these convictions.[5] In contrast, in the RCC, conduct that constitutes "obtaining property by trick," "false pretense," "deception," or "larceny by trick" is criminalized only in RCC § 22E-2201, the revised fraud offense. Conduct previously known as "larceny by trust," "embezzlement," or obtaining property by "tampering" remains part of theft, except insofar as such conduct involves obtaining consent by deception and is therefore part of the revised fraud statute (RCC § 22E-2201). This revision reduces unnecessary overlap among offenses and improves the proportionality of the revised theft and fraud statutes.

Second, the revised theft offense eliminates as a separate means of proving liability for theft that the defendant have an intent to "appropriate"[6] property. Currently, District law defines "appropriate" as "to take or make use of without authority or right."[7] As applied to the current theft statute, the definition of "appropriate" means that any unauthorized taking or use of property, no matter how brief, can suffice for a theft conviction and is punishable the same as the more serious intent to interfere with property that is required by "with intent to deprive."[8] In contrast, in the RCC, conduct that is punishable under "with intent to appropriate" in the current theft statute instead will be punished under the revised unauthorized use of property offense in section RCC § 22E-2102. This revision improves the proportionality of the revised theft offense and reduces the overlap that currently exists between theft and theft-related offenses such as unauthorized use of a motor vehicle,[9] receiving stolen property,[10] and taking property without right,[11] which either require a lesser intent or no intent with regards to the defendant's level of interference with property.

Third, the revised theft statute increases the number and type of grade distinctions, grading primarily based on the value of the property. The current theft

[2] D.C. Code § 22-3211(a)(3).
[3] D.C. Code § 22-3211.
[4] D.C. Code § 22-3221.
[5] D.C. Code § 22-3203. However, even if the imprisonment sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences.
[6] D.C. Code § 22-3211(b)(2).
[7] D.C. Code § 22-3201(1).
[8] D.C. Code §§ 22-3201(2); 22-3211(b)(1).
[9] D.C. Code § 22-3215.
[10] D.C. Code § 22-3232.
[11] D.C. Code § 22-3213.

offense is limited to two gradations based solely on value.[12] In contrast, the revised theft offense has a total of five gradations which span a much greater range in value, with a value of $500,000 or more being the most serious grade, and include a gradation for theft of a motor vehicle. Third degree theft includes theft of any motor vehicle, allowing for theft of low-value motor vehicles to be treated as higher value property, with correspondingly greater penalties than they would otherwise receive if treated as fourth or fifth degree theft. This special treatment of low-value motor vehicles recognizes that such vehicles are often targeted for theft. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft and fraud offenses.

Fourth, third degree of the revised theft statute criminalizes as a property crime the non-violent taking of a motor vehicle (subparagraph (c)(4)(B)) and most[13] non-violent taking of any property[14] from the actual possession of another person or from within his or her immediate physical control (sub-subparagraphs (c)(4)(C)(i) and (c)(4)(C)(ii)). The District's current robbery[15] and carjacking[16] statutes criminalize takings of property from the immediate actual possession of another person[17] "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear." The DCCA has interpreted the current robbery statute to include taking property that was not on the complainant's person[18] and taking property without the complainant's knowledge,[19] when the only "force or violence" involved was the force of moving the object taken.[20] It appears that the current carjacking statute has a similar

[12] First degree theft involves property with a value of $1,000 or more and is punished as a serious felony; second degree theft involves property valued at less than $1,000 and is a misdemeanor. D.C. Code § 22-3212.

[13] The RCC robbery statute prohibits removing property from the "hand or arms of the complainant." This conduct overlaps with the requirement "[h]olds or carries the property on his or her person" in sub-subparagraph (c)(4)(C)(i) in third degree of the revised theft statute. If a defendant were charged with both robbery and theft for this conduct based on the same course of conduct, the convictions would merge under the RCC merger provision (RCC § 22E-214).

[14] "Property" in sub-subparagraphs (c)(4)(C)(i) and (c)(4)(C)(ii) would include a motor vehicle. However, the theft of any motor vehicle, including from the complainant's actual possession or immediate physical control, is a separate basis of liability for third degree theft under subparagraph (c)(4)(B).

[15] D.C. Code § 22-2801.

[16] D.C. Code § 22-2803.

[17] The DCCA has defined "immediate actual possession" under the robbery statute as "the area within which the victim can reasonably be expected to exercise some physical control over the property." *Sutton v. United States*, 988 A.2d 478, 485 (D.C. 2010). *See also*, *Beaner v. United States*, 845 A.2d 525, 532-33 (D.C. 2004) (holding that the term "immediate actual possession," as used in the carjacking statute was borrowed from the robbery statute, includes a car that was several feet from the owner when it was taken).

[18] *Spencer v. United States*, 73 App. D.C. 98 (D.C. Cir. 1940) (affirming robbery conviction when defendant took cash from person's pants, which were resting on a chair at the foot of a bed that defendant was using at the time); *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994).

[19] *Spencer v. United States*, 73 App. D.C. 98 (D.C. Cir. 1940) (affirming robbery conviction when defendant took cash from person's pants, which were resting on a chair at the foot of a bed that defendant was using at the time); *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994).

[20] District case law states that any taking from the immediate actual possession of another person satisfies the "by force or violence" requirement in the current robbery statute. *See, e.g.*, *Turner v. United States*, 16 F.2d 535, 536 (D.C. Cir. 1926) ("[T]he requirement for force is satisfied within the sense of the statute by

scope.[21] While the DCCA has suggested that there is a limit to sudden or stealthy seizures or snatchings under the current robbery statute due to the statutory "by force or violence" requirement, the precise contours of this limit have not been articulated.[22] In contrast, the RCC criminalizes as a property crime non-violent takings of a motor vehicle (subparagraph (c)(4)(B)) and most[23] non-violent taking of any property[24] from the actual possession of another person or from within his or her immediate physical control (sub-subparagraphs (c)(4)(C)(i) and (c)(4)(C)(ii)), instead of as robbery or carjacking offenses against persons. Such non-violent takings merit less severe punishment as theft as opposed to robbery.

This revision leads to several additional changes to current District law. First, under third degree of the revised theft statute, non-violent takings of motor vehicles and

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an actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person.").

[21] Unlike the clear case law on robbery, whether current District law on carjacking extends liability to takings that occur without a criminal menace or use of force is not firmly established in District case law. However, the statutory language regarding "sudden or stealthy seizure, or snatching" that requires no use of force or criminal menace is identical in the current robbery and carjacking statutes. And, in at least one case, the DCCA, ruling on other issues, appears to have upheld a carjacking conviction on facts that involved a sudden and stealthy seizure with no apparent criminal menace, use of physical force, or bodily injury. *See Young v. United States*, 111 A.3d 13, 14 (D.C. 2015) (affirming multiple convictions for carjacking, first degree theft, and unauthorized use of a motor vehicle based on the defendant's taking a car with keys in it while the owner was standing nearby).

[22] In a 2017 case, in response to an argument in the dissent, the DCCA rejected the proposition that any taking from the immediate actual possession of another person is robbery instead of theft because "[s]uch a principle would completely nullify the 'by force or violence' element of robbery." *Gray v. United States*, 155 A.3d 377, 386 (D.C. 2017); *see also id.* at 386 n.18 (recognizing that "there are passages in opinions . . . that, divorced from context, could be read as supporting the broad proposition advanced by the dissent" that any theft from a person or from his or her immediate possession constitutes a robbery, but stating that "[w]e are unaware of any opinion binding on us that actually *holds* that this is the case."). However, this discussion about the limits of sudden or stealthy seizure or snatching under the current robbery statute is dicta. The jury was not instructed on sudden or stealthy seizure or snatching, *id.* at 382 & n. 13, and this provision of the current robbery statute was not addressed in the court's holding. The issue in *Gray* was whether the trial court erred in refusing to instruct the jury on the lesser included offense of second degree theft. *Id.* at 382. The court stated that "[o]ur earlier opinions glossed 'by force or violence' as 'using force or violence' or 'accomplished by force of by putting the victim in fear' . . . suggesting that we understood the statute to require proof of some sort of purposeful employment or at least knowing exploitation of force or violence." *Id.* at 384 (internal citations omitted). The DCCA held that the trial court did err because, under the "unusual" facts of the case, "the jury rationally could have doubted that [appellant] assaulted the women intending to effectuate the theft or that, in taking [complainant's] money, [appellant] was conscious of any fear (and lowered resistance) [complainant] might have experienced from the assaults." *Id.* at 383.

[23] The RCC robbery statute prohibits removing property from the "hand or arms of the complainant." This conduct overlaps with the requirement "[h]olds or carries the property on his or her person" in sub-subparagraph (c)(4)(C)(i) in third degree of the revised theft statute. If a defendant were charged with both robbery and theft for this conduct based on the same course of conduct, the convictions would merge under the RCC merger provision (RCC § 22E-214).

[24] "Property" in sub-subparagraphs (c)(4)(C)(i) and (c)(4)(C)(ii) would include a motor vehicle. However, the theft of any motor vehicle, including from the complainant's actual possession or immediate physical control, is a separate basis of liability for third degree theft under subparagraph (c)(4)(B).

non-violent takings of any property[25] from the actual possession of another person or from within his or her immediate physical control are no longer subject to the "while armed" penalty enhancement in D.C. Code § 22-4502[26] or to penalty enhancements for the status of the complainant[27] as they are under current law. These enhanced penalties are unnecessary for non-violent conduct that constitutes third degree theft, although there may be liability for possession of a dangerous weapon in such circumstances under other provisions in the RCC.[28] Second, third degree of the revised theft statute punishes attempted non-violent takings of property from the actual possession of another person or from within his or her immediate physical control consistent with other criminal attempts. The D.C. Code currently codifies a penalty for attempted robbery[29] that differs from the general penalty for attempted crimes, but there is no clear rationale for such special

[25] "Property" in sub-subparagraphs (c)(4)(C)(i) and (c)(4)(C)(ii) would include a motor vehicle. However, the theft of any motor vehicle, including from the complainant's actual possession or immediate physical control, is a separate basis of liability for third degree theft under subparagraph (c)(4)(B).

[26] The current robbery statute is subject to enhanced penalties for committing robbery "while armed" with or "having readily available" a dangerous weapon. D.C. Code § 22-4502. In most non-violent takings of property from the actual possession of another person or from within his or her immediate physical control, the defendant will not be "armed" with a dangerous weapon and will only have it "readily available." Regardless, under current law, the entire enhancement in D.C. Code § 22-4502 applies to the current robbery statute. The current D.C. Code has a separate armed carjacking offense for committing carjacking "while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles)." D.C. Code § 22-2803(b)(1). Despite this offense, both carjacking and armed carjacking are subject to the additional penalty in D.C. Code § 22-4502 for committing the offenses "while armed" or "having readily available" a dangerous weapon.

However, DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the while armed enhancement in D.C. Code § 22-4502(a)(1) may not be applied to the current armed carjacking offense because it overlaps with an element of the offense. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[27] The District's protection of District public officials statute penalizes various actions, including taking the property of any District official or employee while in the course of his or her duties or on account of those duties. D.C. Code § 22-851(c). The District has penalty enhancements for robbery when the complainant is: a minor (D.C. Code §§ 22-3611; 23-1331(4)); a senior citizen (D.C. Code § 22-3601); a taxicab driver (D.C. Code §§ 22-3751; 22-3752); a transit operator or Metrorail station manager (D.C. Code §§ 22-3751.01; 22-3752); or a member of a citizen patrol (D.C. Code § 22-3602). The District has penalty enhancements for carjacking when the complainant is: a minor (D.C. Code §§ 22-3611; 23-1331(4)); a senior citizen (D.C. Code § 22-3601); a taxicab driver (D.C. Code §§ 22-3751.01; 22-3752); and a transit operator or Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

[28] *See, e.g.*, RCC § 7-2502.01, Possession of an Unregistered Firearm, Destructive Device, or Ammunition. In addition, an actor may face an enhanced penalty under RCC § 22E-607, the hate crime penalty enhancement, if he or she targets the complainant because of a characteristic such as his or her sex.

[29] D.C. Code § 22-2802 (making attempted robbery punishable with a maximum term of imprisonment of three years).

attempt penalties in robbery as compared to other offenses. Under the revised theft statute, the RCC attempt provision (RCC § 22E-301) specifies what must be proven to establish attempt liability and establish penalties for attempted theft consistent with other offenses. Third, the revised theft statute requires a person to act "knowingly" with respect to taking or exercising control over a motor vehicle and whether the motor vehicle satisfies the RCC definitions of "property" and "property of another." The current carjacking statute requires only that a person acts "recklessly" with respect to the taking or exercise of control over the motor vehicle,[30] although it is unclear in the legislative history whether the Council intended this culpable mental state.[31] DCCA case law and current District practice suggest that the offense requires the property to be of another.[32] Requiring a "knowingly" culpable mental state is consistent with the culpable mental state in other RCC property offenses,[33] which generally require that the defendant act knowingly with respect to the elements of the offense, as is requiring that the motor vehicle be "property" and "property of another," as those terms are defined in the RCC.[34]

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[30] D.C. Code § 22-2803(a)(1).

[31] The legislative history of the current carjacking statute does not discuss why a recklessly mental state was adopted. The committee report makes no mention of recklessness, and actually states that the statute "[d]efines the offenses of carjacking and armed carjacking as the knowing and/or forceful taking from another the possession of that person's motor vehicle." Committee Report to the Carjacking Prevention Act of 1993, Bill 10-16 at 3.

[32] Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership. *See Allen v. United States*, 697 A.2d 1 (D.C. 1997) (listing as one of the elements of carjacking as the taking "of a person's vehicle," implying the taking of a vehicle owned by someone other than the defendant); *see also Pixley v. United States*, 692 A.2d 438 (D.C. 1997) (making no distinction between robbery and carjacking on the issue of actual ownership; thus, implying that a defendant could not be guilty of carjacking if he was the lawful owner of the motor vehicle).").

[33] There are two additional changes in current District law for carjacking that are related to culpable mental states. First, the revised theft statute requires an intent to deprive. Current District law does not have such a requirement for carjacking. In the RCC, a non-violent taking of a motor vehicle without intent to deprive would be criminalized under either the unauthorized use of property statute (RCC § 22E-2102) or unauthorized use of a motor vehicle statute (RCC § 22E-2103). Second, the revised theft statute requires that the defendant know that he or she lack the consent of the owner. As this commentary discusses later, District practice supports requiring lack of consent as an element of carjacking. The current carjacking statute requires a "knowingly or recklessly" culpable mental state, but it is unclear how the DCCA would construe these mental states in relation to the lack of consent of the owner, particularly when this element is not in the current statute. The current unauthorized use of a motor vehicle statute, for example, requires "without the consent of the owner," but does not contain any culpable mental states. D.C. Code § 22-3215(b). DCCA case law, however, requires a "knowing" mental state for this element. *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[34] RCC § 22E-701 defines property as "anything of value" which would include a motor vehicle. The RCC definition of "property of another" clarifies when property is subject to the theft offense, such as when the accused takes property in which he or she has a joint ownership. The relevant language in the RCC definition of "property of another" is "any property that a person has an interest with which the actor is not privileged to interfere, regardless of whether the actor also has an interest in that property." The second requirement of the RCC definition of "property of another" is that the definition does not include "any

Collectively, these revisions improve the consistency of the revised theft statute with other offenses and the proportionality of penalties.

Fifth, the revised theft offense eliminates the special recidivist theft penalty set forth in current D.C. Code § 22-3212(c).[35] The current recidivist theft penalty provides that a defendant convicted of first or second degree theft who has two or more prior convictions for theft not committed on the same occasion shall be sentenced to a term of imprisonment of not more than 15 years and is subject to a mandatory minimum term of imprisonment of one year. This special enhancement is highly unusual in current District law. There is no clear basis for singling out recidivist thefts as compared to other offenses of similar seriousness. In contrast, for the revised theft statute, only the general recidivism enhancement in section RCC § 22E-606 may provide enhanced punishment for recidivist theft, consistent with other offenses, improving the overall consistency and proportionality of the RCC.

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

First, the revised theft statute eliminates the evidentiary provision for theft of services that is in subsection (c) of the current theft statute.[36] The evidentiary provision states that "proof" of certain facts "shall be prima facie evidence that the person had committed the offense of theft." The provision neither specifies the government's burden of proof for those facts nor states whether the finding of prima facie evidence is a mandatory presumption that the trier of fact must make or a permissive presumption that the trier of fact may, but is not required, to make. There is no District case law concerning the theft of services provision. It appears that the language in the theft of services provision is superfluous[37] and deletion of the provision clarifies the revised theft offense.

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property in the possession of the accused that the other person has only a security interest in." The definition of "property of another" is discussed in the commentary to RCC § 22E-701.

[35] D.C. Code § 22-3212:

> (c) A person convicted of theft in the first or second degree who has 2 or more prior convictions for theft, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 15 years and for a mandatory-minimum term of not less than one year, or both. A person sentenced under this subsection shall not be released from prison, granted probation, or granted suspension of sentence, prior to serving the mandatory-minimum.
>
> (d) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for theft if he or she has been convicted on at least 2 occasions of violations of:
>
> (1) § 22-3211;
>
> (2) A statute in one or more jurisdictions prohibiting theft or larceny; or
>
> (3) Conduct that would constitute a violation of § 22-3211 if committed in the District of Columbia.

[36] D.C. Code § 22-3211(c).

[37] In practice, it is unclear whether there are fact patterns where it could be said the government would satisfy the requirements of the theft of services provision and not also established a prima facie case for theft. Indeed, the theft of services evidentiary provision requires the government to establish additional facts beyond what the theft offense requires—for example that the services were rendered "in

Second, the revised theft offense requires a "knowingly" culpable mental state for whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property, and whether the property met the definitions of "property" and "property of another." The current theft statute does not specify a culpable mental state for these elements and no case law exists directly on point. The current robbery statute does not refer to "property" or "property of another," but the statute and case law support using these elements as they are defined in the RCC,[38] and applying a culpable mental similar to that of theft.[39] Resolving these ambiguities, the revised theft statute requires a "knowingly" culpable mental state whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property, and whether the property met the definitions of "property" and "property of another." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[40] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[41]

Third, the revised theft gradations, by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property or the motor vehicle, whether the property is a "motor vehicle," as that term is defined in RCC § 22E-701, or the fact that the property was taken from the actual possession of another person or from within his or her immediate physical control. The current theft, robbery, and carjacking statutes are silent as to what culpable mental state applies to these elements and there is no District case law on point. However, District practice does not appear to apply a mental state to the values in the current theft gradations.[42] In addition, the current

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circumstances where payment is ordinarily made immediately upon the rendering of services or prior to departure from the place where the services were obtained."

[38] The current robbery statute requires that the defendant "take" "anything of value." D.C. Code § 22-2801. RCC § 22E-701 defines property as "anything of value." In addition, the DCCA has held that the current robbery statute incorporates the elements of "larceny," *Lattimore*, 684 A.2d at 359, which requires that property belong to another person. *See, e.g.*, *Lattimore*, 684 A.2d at 360 ("An individual has committed larceny if that person "without right took and carried away property of another with the intent to permanently deprive the rightful owner thereof.") (quoting *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967)).

The definition of "property of another" clarifies when property is subject to the theft offense, such as when the accused takes property in which he or she has a joint ownership. The relevant language in the RCC definition of "property of another" is "any property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property." The second requirement of the RCC definition of "property of another" is that the definition does not include "any property in the possession of the accused that the other person has only a security interest in." The definition of "property of another" is discussed in the commentary to RCC § 22E-701.

[39] The DCCA has stated that robbery consists of larceny and an assault, and requires a "felonious taking," similar to the current and revised theft statutes. *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996) (citing *United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)).

[40] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[41] *See, e.g.*, RCC § 22E-2201.

[42] D.C. Crim. Jur. Instr. § 5.300.

carjacking statute does not define "motor vehicle" and there is no relevant case law, making the scope of the offense unclear as compared to other offenses in Title 22 that define "motor vehicle."[43] To resolve these ambiguities, the revised theft offense, by use of the phrase "in fact," applies strict liability to the value of the property or the motor vehicle, whether the property is a "motor vehicle," as that term is defined in RCC § 22E-701, or the fact that the property was taken from the actual possession of another person or from within his or her immediate physical control. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[44] Clarifying that these elements are matters of strict liability in the revised theft gradations clarifies and potentially fills a gap in District law, as does applying the RCC definition of "motor vehicle."

Fourth, third degree of the revised theft statute does not require asportation of the property for the non-violent taking of property from the actual possession of another person or from within his or her immediate physical control. The current robbery statute does not include an asportation element. However, the DCCA has stated that robbery requires that the defendant "possess the item being stolen and move it."[45] Asportation is a minimal requirement under current robbery law that may be satisfied by "the slightest moving of an object from its original location."[46] Third degree of the revised theft statute eliminates the asportation requirement as redundant to liability for non-violent taking of property from the actual possession of another person or from within his or her immediate physical control. It is unclear how a defendant could "take" property without also slightly moving it and satisfying any asportation requirement. However, to the extent that eliminating an asportation requirement expands the scope of current District law, such expansion reflects the gravamen of the gradation—invading the space of the complainant.[47] Eliminating the asportation requirement is also consistent with the

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[43] *See* D.C. Code §§ 22-3215(a) (defining "motor vehicle" for the unauthorized use of a motor vehicle statute as "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."); D.C. Code § 22-3233(c)(2) (defining "motor vehicle" for the altering or removing motor vehicle identification numbers offense as "any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").

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

[45] *Moorer v. United States*, 868 A.2d 137, 142 (D.C. 2005) (discussing *Newman v. United States*, 705 A.2d 246 (D.C. 1997)). *See also* D.C. Crim. Jur. Instr. § 4.300 ("[a]lthough not explicitly required in the statute, the government must prove that the defendant took the property and carried it away[.]").

Current District law does not require asportation for carjacking liability. *Moorer*, 868 A.2d at 141 ("Carjacking simply requires possession or control (or attempted possession or control) of the car. Neither the statute nor the case law requires the government to prove asportation—or, indeed, any movement at all—of the car.").

[46] *See, e.g., Simmons v. United States*, 554 A.2d 1167, 1171 n.9 (D.C. 1989) (citing, *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967)).

[47] *See, e.g.*, § 19.3(b) Carrying away (asportation), 3 Subst. Crim. L. § 19.3(b) (3d ed.) ("The rationale is that, in any taking from the area [within the victim's presence] 'the rights of the person to inviolability

revised robbery statute (RCC § 22E-1201) and revised unauthorized use of property statute (RCC § 22E-2102), neither of which requires asportation. 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, paragraph (a)(1) of the revised theft offense no longer uses the phrase "wrongfully obtains or uses" that is in the current theft statute,[48] and eliminates superfluous language[49] in the long list of predicate conduct. These changes in wording do not affect the limited District case law interpreting this part of the definition of "wrongfully obtains or uses," such as *In re D.D.*[50] and *Dobyns v. United States*.[51] No change to the scope of the theft statute is intended by these changes.

Second, paragraph (a)(3) of the revised theft statute requires that the defendant act "without the consent of an owner." This element is intended to clarify the meaning of the ambiguous phrase "without authority or right" in current theft law. The current theft statute does not distinguish "without authority or right" as a separate element, but "without authority or right" is part of one of the statutorily specified means of committing theft.[52] Regardless of the status of "without authority or right" as a separate element in the theft statute, both the legislative history[53] and current practice as reflected by the Redbook jury instruction[54] acknowledge that theft requires an additional element similar to "without authority or right," although they each use different language to discuss it. The current robbery statute[55] and carjacking statute[56] do not state as an element that the

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would be encroached upon and his personal security endangered, quite as much as if his watch or purse had been taken from his pocket.'") (quoting *State v. Eno*, 8 Minn. 220 (1963)).

[48] D.C. Code § 22-3211(a).

[49] Superfluous terms are: "making an unauthorized use" or unauthorized "disposition," and "interest in or possession of property." The remaining terms in the definition of "wrongfully obtains or uses" are included in either the revised theft offense or revised fraud offense (RCC § 22E-2201).takes, obtains, transfers, or exercises control over

[50] 775 A.2d 1096 (D.C. 2001).

[51] 30 A.3d 155 (D.C. 2011).

[52] D.C. Code §§ 22-3211(b)(2) (requiring "with intent to appropriate the property to his or her own use or to the use of a third person."); 22-3201(1) (defining "appropriate" as "to take or make use of without authority or right."). However, in at least one instance the DCCA has suggested that proof that a defendant act "without authority or right" also is required when the defendant committed theft by an "intent to deprive." *Russell v. United States*, 65 A.3d 1177, 1181 (D.C. 2013) ("[W]e are satisfied that appellants 'wrongfully obtained' [Federal Aviation Administration] property, 'without authority or right,' specifically intending at the time to deprive the [Federal Aviation Administration] of property that the evidence shows had value. Accordingly, the statutory elements of second-degree theft have been satisfied.").

[53] Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 16-17 (discussing how "wrongfully" was added to the phrase "obtains or uses" to "insure that purely innocent transactions are excluded from the scope" of the theft offense and is used to "indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property.").

[54] D.C. Crim. Jur. Instr. § 5.300 cmt. 5-33 to 5-34 (discussing why "against the will" and "against the will or interest" were added to parts of the theft jury instruction).

[55] D.C. Code § 22-2801.

[56] D.C. Code § 22-2803.

actor lacks the consent of an owner, but case law[57] and current District practice[58] support requiring such an element.

Resolving these ambiguities, the revised theft statute requires that the defendant lack the "consent" of an "owner," as those terms are defined in RCC § 22E-701. "Consent" has been recognized in DCCA case law as providing a grant of authority or right which negates theft[59] and it seems as though it would similarly negate robbery and carjacking. However, a person may have authority or right to deprive another of their property without consent of an owner, such as in the case of a police seizure of contraband or other government operations. To the extent that there is a government seizure of property of another without consent of an owner, that does not constitute theft under the revised statute. No change in the scope of liability is intended by requiring that the defendant lack the "consent of an owner." The definitions of "consent" and "owner" are discussed in more detail in the commentary to RCC § 22E-701.

Third, paragraph (a)(4) of the revised theft statute requires that the defendant act "with intent to deprive the other of the property." The current theft statute requires an "intent to deprive the other of a right to the property or a benefit of the property."[60] The revised theft statute deletes the language "a right to the property or a benefit of the property as surplusage, given that the definition of "deprive" in RCC § 22E-701 refers to the property's "value" and "benefit." The current robbery statute does not specify an intent to deprive, but the DCCA has held that the statute incorporates the elements of "larceny,"[61] which requires an intent to deprive.[62] No change to current District law is intended by this change.

Fourth, paragraph (a)(3) of the revised theft statute specifies a "knowingly" culpable mental state as to the fact that the accused lacked an owner's consent. Although the current theft statute is silent as to the applicable culpable mental state, DCCA case law has applied a knowledge requirement to a similar element.[63] The current robbery

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[57] The DCCA has stated that robbery requires a "felonious taking" "against the other person's will." *Lattimore v. United States*, 684 A.2d 357, 359-60 (D.C. 1996) (*citing United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)); *see also Lattimore*, 684 A.2d at 327 (examining the elements of larceny, which include taking and carrying away property "without right," because "robbery is [partially] comprised of larceny.") (internal citations and quotations omitted).

[58] D.C. Crim. Jur. Instr. § 4.300 (listing as an element of robbery that the actor "did so against the will" of the complainant); Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership."

[59] *Nowlin v. United States*, 782 A.2d 288, 290, 292-93 (D.C. 2001) (discussing the importance of the fact that there was another individual "authorized" to sign checks on the auto body shop account as it pertains to whether the defendant "knew" he was not "entitled" to cash the check); *Russell*, 65 A.3d at 1777-81, n. 27 (discussing the doctrine of apparent authority).

[60] D.C. Code § 22-3211(b)(1).

[61] *Lattimore*, 684 A.2d at 359 ("In the District of Columbia, robbery retains its common law elements. Thus, the government must prove larceny and assault.") (internal citations omitted).

[62] *See, e.g.*, *Lattimore*, 684 A.2d at 360 ("An individual has committed larceny if that person "without right took and carried away property of another with the intent to permanently deprive the rightful owner thereof.") (quoting *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967)).

[63] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted);

statute does not state as an element that the actor lacks the consent of an owner, but case law supports such a requirement[64] and applying a culpable mental similar to that of theft.[65] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[66]

Fifth, subsection (f) of the revised theft statute codifies an exclusion from liability for fare evasion. This exception codifies recent law.[67]

Nowlin v. United States, 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").

The DCCA has also stated that the culpable mental state of the current theft offense is one of "specific intent." *See, e.g.*, *Price v. United States*, 985 A.2d 434, 438 (D.C. 2009).

[64] The DCCA has stated that robbery requires a "felonious taking" "against the other person's will." *Lattimore v. United States*, 684 A.2d 357, 359-60 (D.C. 1996) (*citing United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)); *see also Lattimore*, 684 A.2d at 327 (examining the elements of larceny, which include taking and carrying away property "without right," because "robbery is [partially] comprised of larceny.") (internal citations and quotations omitted).

[65] The DCCA has stated that robbery consists of larceny and an assault, and requires a "felonious taking," similar to the current and revised theft statutes. *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996) (citing *United States v. McGill*, 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)).

[66] *See, e.g.*, RCC § 22E-2201.

[67] Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592).

RCC § 22E-2102. Unauthorized Use of Property.

Explanatory Note. *This section establishes the unauthorized use of property (UUP) offense in the Revised Criminal Code (RCC). UUP covers conduct that results in the taking, obtaining, transferring, or exercising of control over property of another without an owner's effective consent. UUP criminalizes behavior that does not rise to the level of conduct "with intent to deprive an owner of the property" in the revised theft offense (RCC § 22E- 2101), the revised fraud offense (RCC § 22E-2201), or the revised extortion offense (RCC § 22E-2301). The revised UUP offense replaces the taking property without right (TPWR) statute*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct—takes, obtains, transfers, or exercises control over the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes goods, services, and cash. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) applies to all of the elements in paragraph (a)(1)—takes, obtains, transfers, or exercises control over the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct takes, obtains, transfers, or exercises control over property that is "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) codifies an exception to liability for fare evasion. Conduct constituting a violation of D.C. Code § 35-252 is not a violation of UUP.

Subsection (c) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised UUP statute changes current District law in four main ways.*

[1] D.C. Code § 22-3216.

First, the revised UUP offense eliminates the current statute's asportation requirement[2] and extends liability if the defendant merely "takes," "obtains," "transfers," or "exercises control" over the property without carrying it away. The DCCA has never interpreted the scope of the asportation requirement in the current TPWR statute, but in the context of other offenses has stated it is a minimal requirement.[3] In contrast, the revised UUP statute requires only that the defendant take, obtain, transfer, or exercise control over the property of another. It is unclear why a slight physical movement of property should make the difference between an unauthorized, temporary action being criminal and non-criminal. This revision improves the consistency and proportionality of the revised statute.

Second, the revised UUP statute applies a "knowingly" culpable mental state to the elements "property of another" and "without the effective consent of an owner." The current TPWR statute merely requires that the defendant engage in conduct "without right" and does not specify a mental state for this element.[4] Case law interpreting the current TPWR statute has construed the phrase "without right" to mean without the consent of the owner, but has not required a knowledge culpable mental state as to the lack of consent.[5] Similarly, case law suggests that something less than a knowledge culpable mental state is necessary for the element that the property is "property of another."[6] In contrast, the revised UUP statute applies a "knowingly" culpable mental state to the elements "property of another" and "without the effective consent of an owner." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[7] Requiring a knowing culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses,

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[2] D.C. Code § 22-3216 (requiring takes and "carries away" the property of another).

[3] *Simmons v. United States*, 554 A.2d 1167, 1171 & n. 9(D.C. 1989) ("We have made clear in several cases that the slightest moving of an object from its original location may constitute an asportation." (citing *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967) and *Ray v. United States*, 229 A.2d 161, 162 (D.C.1967)).

[4] The DCCA has stated that the culpable mental state of the current TPWR offense is one of "general intent." *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995). "General intent" is not used in or defined in the statute for TPWR, but the DCCA has said that it is frequently defined as "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[5] *Tibbs v. United States*, 507 A.2d 141, 143 (D.C. 1986) ("Only two legal principles can be distilled from the existing case law. First, we held very recently . . . that '[p]roperty cannot be taken 'without right' if it is taken with the knowledge and consent of the owner, or one authorized to consent on his behalf.' . . . Second, it is established that to convict a person of taking property without right, the government need not prove any specific intent; a general intent to commit the proscribed act is all that the law requires." (internal citations omitted).).

[6] *Schafer v. United States*, 656 A.2d 1185, 1189 (D.C. 1995) ("In other words, in the context of this particular case, we must determine whether substantial evidence in the record demonstrates that in removing the television set appellant actually knew, or had reason to know that it was the property of another, not his own.").

[7] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

which generally require that the defendant act knowingly with respect to the elements of the offense.[8]

Third, the revised UUP statute, through the general culpability principles for self-induced intoxication in RCC § 22E-209, allows a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current TPWR statute is a general intent crime,[9] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[10] At the same time, the DCCA has also interpreted the current statute to incorporate a negligence-like culpable mental state, which is not a form of culpability that is susceptible to being negated by self-induced intoxication.[11] As a result, a defendant charged under the current statute would have no basis for even raising—let alone presenting evidence in support of—a claim that he or she, due to his or her self-induced intoxicated state, lacked the necessary intent. By contrast, per the revised UUP offense, a defendant would both have a basis for, and be allowed to raise, a claim of this nature since the revised UUP offense is subject to a more demanding culpable mental state of knowledge.[12] Likewise, where appropriate, under the revised UUP offense the defendant would be entitled to a jury instruction clarifying that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in UUP. This change improves the clarity, consistency, and proportionality of the offense.

Fourth, subsection (b) of the revised UUP statute codifies an exception for liability for fare evasion. Such an exception exists in current law for the theft statute,[13] but not TPWR. Conduct that satisfies the current theft statute could also be charged as TPWR.[14] Codifying the same exclusion from liability for fare evasion improves the consistency of the revised UUP statute and further clarifies the lesser included relationship between theft and UUP.

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

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[8] *See, e.g.*, RCC § 22E-2201.

[9] *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995).

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

[11] *See Schafer*, 656 A.2d at 1188.

[12] This result is a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[13] Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592).

[14] The current theft statute can be satisfied with an intent to "appropriate," which is defined as "to take or make use of without authority or right." D.C. Code §§ 22-3211(b)(2); 22-3201. Since the current TPWR statute does not require any intent to interfere with the property, an intent to "appropriate" could satisfy TPWR.

First, the revised UUP offense is made a lesser included offense[15] of the revised theft (RCC § 22E-2101), fraud (RCC § 22E-2201), and extortion (RCC § 22E-2301) offenses. The current TPWR statute is silent as to whether it constitutes a lesser included offense of the current theft,[16] fraud,[17] and extortion[18] offenses. Based on legislative history,[19] the DCCA has recognized that the current TPWR statute is a lesser included offense of theft,[20] although the current TPWR statute appears to fail the DCCA's current "elements test" as to whether it is a lesser included offense of theft.[21] There is no case law on point with respect to fraud or extortion and these offenses also appear to fail the DCCA's current "elements test."[22] Instead of this ambiguity, the revised UUP statute is clearly a lesser included offense of the revised theft, fraud, and extortion statutes insofar as it has no elements not included in these offenses.[23] This revision removes an

[15] By being a lesser included offense, a person cannot be convicted of both UUP and theft or UUP and fraud, or UUP and extortion for the same act or course of conduct. *See, e.g., Mooney v. United States*, 938 A.2d 710, 723 (D.C. 2007) (discussing how multiple punishments that result from convictions of a greater and a lesser-included offense are prohibited by the Double Jeopardy Clause unless there is clear legislative intent that punishment should be imposed for both offenses). In addition, the defendant is on notice from the time of indictment for theft, fraud, or extortion, that he may be convicted of the lesser included offense. *See Woodard v. United States*, 738 A.2d 254, 259 n. 10 (D.C. 1999) ("the law is settled that an indictment on a greater offense puts the indictee on notice that the prosecution might also press a lesser-included charge"); *see also Schmuck v. United States*, 489 U.S. 705, 718, 109 S. Ct. 1443, 1452, 103 L. Ed. 2d 734 (1989) ("The elements test . . . permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge."). Upon a showing of some evidence, the defendant may demand an instruction to the jury on the lesser included offense of UUP to accompany theft, fraud, or extortion charges. *Woodward v. United States*, 738 A.2d at 261 ("Any evidence, however weak, is sufficient to support a lesser-included instruction so long as a jury could rationally convict on the lesser-included offense after crediting the evidence.").

[16] D.C. Code § 22-3211.

[17] D.C. Code § 22-3221.

[18] D.C. Code § 22-3251.

[19] The legislative history for the 1982 Theft Act indicates that the Council of the District of Columbia intended for TPWR to be a lesser included offense of theft. Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 36 ("[I]t is intended that the offense of taking property without right continue to be treated as a lesser included offense of the consolidated theft offense.").

[20] *Moorer v. United States*, 868 A.2d 137, 143 (D.C. 2005).

[21] *Moorer v. United States*, 868 A.2d at 140 ("Under the elements test, one offense is included within another if "(1) the lesser included offense consists of some, but not every element of the greater offense; and (2) the evidence is sufficient to support the lesser charge."). Because the asportation element of the current TPWR statute is not required by the current theft, fraud, or extortion statutes, the current TPWR statute does not appear to be a lesser included offense of the current theft, fraud, or extortion statutes.

[22] See *Byrd v. United States*, 598 A.2d 386, 390 (D.C. 1991) (*en banc*).

[23] The revised UUP statute requires "without the effective consent of the owner." RCC § 22E-701 defines "effective consent" as "consent other than consent induced by the physical force, a coercive threat, or deception." RCC § 22E-701 defines "consent" as "a word or action that indicates, expressly or implicitly, agreement to particular conduct or a particular result" given by a person generally competent to do so. Thus, in requiring that the defendant lack "effective consent," the revised UUP statute requires either that there is no consent at all, or that there is consent but it is obtained by physical force, coercive threat, or deception, and is not valid. These requirements mirror the requirements in the RCC theft offense ("without the consent of the owner"), fraud ("with the consent of the owner; the consent being obtained by

unnecessary gap in liability for temporary takings and improves the overall proportionality of these statutes.

Second, the revised UUP offense requires a "knowingly" culpable mental state for "takes, obtains, transfers, or exercises control over the property of another." The current statute does not specify a culpable mental state for the comparable elements[24] and no case law exists directly on point.[25] Instead of this ambiguity, the revised UUP statute requires a "knowingly" culpable mental state for "takes, obtains, transfers, or exercises control over the property of another." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[26] A knowingly culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[27] This revision improves the clarity and consistency of the revised statute.

Third, the revised UUP offense requires that the person act "without the effective consent of an owner." The current TPWR statute requires that the defendant act "without right." This phrase has been interpreted by the DCCA to refer to "consent of the owner, or one authorized to consent on his behalf,"[28] and to exclude instances where the consent was "the product of trickery" or where the person had consent to take the item for one purpose but then exceeded the terms of that consent.[29] The revised UUP requirement that the person act "without the effective consent of an owner," uses definitions in RCC § 22E-701 for "consent," "effective consent," and "owner" that are consistent across property offenses and also appears to be consistent with existing case law on the current TPWR statute. The change improves the clarity and consistency of the revised UUP offense.

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deception), and extortion ("with the consent of the owner; the consent being obtained by a coercive threat.").

[24] D.C. Code § 22-3216 ("A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so.").

[25] Insofar as the current TPWR offense has been held to be a "general intent crime," courts have consistently held that there must be an "intent to commit the proscribed act" which here consists of the taking. *See, e.g., Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975). However, case law provides no greater specificity as to the nature of the required intent for TPWR.

[26] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[27] *See, e.g.*, RCC § 22E-2101.

[28] *Fussell v. United States*, 505 A.2d 72 (D.C. 1986).

[29] *Baggett v. United States*, 528 A.2d 444 (D.C. 1987).

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

Explanatory Note. *This section establishes the unauthorized use of a motor vehicle (UUV) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes the use of a motor vehicle without the effective consent of an owner. The offense has a single penalty gradation. The revised UUV offense replaces portions of the unauthorized use of motor vehicles statute[1] in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct—operating a motor vehicle. "Motor vehicle" is a defined term in RCC § 22E-701 that includes any vehicle designed to be propelled only by an internal-combustion engine or electricity. Paragraph (a)(1) also specifies a culpable mental state of "knowingly," a term defined at RCC § 22E-206 that here means the accused must be aware to a practical certainty that his or her conduct is operating a "motor vehicle," as that term is defined in RCC § 22E-701.

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. "Owner" is a defined term in RCC § 22E-207 that means a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), and here requires that the accused be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) specifies the penalties for the offense. [*See* Second Draft of Report #41.]

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

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

First, through the revised definition of "motor vehicle" in RCC § 22E-701, the revised UUV offense includes liability with respect to any vehicle that is "designed to be propelled only by an internal-combustion engine or electricity." The current definition of "motor vehicle," and thus the scope of the current UUV offense, is limited to "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."[2] In contrast, the revised definition of "motor vehicle" broadens the revised UUV offense to include any watercraft, aircraft, or land vehicle that is "designed to be propelled only by an internal-combustion engine or electricity." The

[1] D.C. Code § 22-3215. Specifically, the revised UUV offense replaces D.C. Code § 22-3215 (b), (d)(1)-(d)(3). The remaining portions of D.C. Code § 22-3215, concerning rented and leased cars under certain conditions, are not part of the RCC and will remain in D.C. Code § 22-3215, subject to conforming amendments as necessary.
[2] D.C. Code § 22-3215(a).

"designed to be" language includes vehicles that happen to be moved by human exertion in a given case, but are "designed" to be propelled only by an internal-combustion engine or electricity. This revision eliminates possible gaps in the offense and clarifies the statute.

Second, through the revised definition of "motor vehicle" in in RCC § 22E-701, the revised UUV offense no longer includes vehicles like mopeds that are designed to be propelled, in whole or in part, by human exertion. The current definition of "motor vehicle," and thus the scope of the current UUV offense, is limited to "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus,"[3] although the DCCA has held explicitly held that mopeds[4] fall within the current definition of "motor vehicle." In contrast, the revised definition of "motor vehicle" requires that the vehicle that be "designed to be propelled only by an internal-combustion engine or electricity." These types of vehicles are generally more expensive, heavier, and pose more severe safety risks to others than a vehicle that is designed to be propelled, in whole or in part, by human exertion. Unauthorized use of vehicles such as mopeds,[5] that fall outside the RCC definition of "motor vehicle" and the revised UUV offense, remains criminalized by the RCC unauthorized use of property offense (RCC § 22E-2102). This revision improves the clarity, consistency, and proportionality of the revised definition.

Third, the revised UUV offense eliminates the special recidivist penalty in the current UUV statute.[6] This recidivist enhancement unique to one statute is unusual in current District law. In contrast, in the RCC, the general recidivism enhancement (RCC

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[3] D.C. Code § 22-3215(a).

[4] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." *Stancil v. United States*, 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[5] Similarly, a bicycle or scooter designed to run on either an electric motor or bodily propulsion would not constitute a "motor vehicle."

[6] D.C. Code § 22-3215(d)(3).

> (3)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who has 2 or more prior convictions for unauthorized use of a motor vehicle or theft in the first degree, not committed on the same occasion, shall be fined not less than $5,000 nor more than $15,000, or imprisoned for not less than 30 months nor more than 15 years, or both.
>
> (B) For the purposes of this paragraph, a person shall be considered as having 2 prior convictions for unauthorized use of a motor vehicle or theft in the first degree if the person has been twice before convicted on separate occasions of:
>
> (i) A prior violation of subsection (b) of this section or theft in the first degree;
>
> (ii) A statute in one or more other jurisdictions prohibiting unauthorized use of a motor vehicle or theft in the first degree;
>
> (iii) Conduct that would constitute a violation of subsection (b) of this section or a violation of theft in the first degree if committed in the District of Columbia; or
>
> (iv) Conduct that is substantially similar to that prosecuted as a violation of subsection (b) of this section or theft in the first degree.

§ 22E-606) will provide enhanced punishment for recidivist UUV consistent with other offenses. There is no clear basis for singling out UUV for a recidivist enhancement as compared to other offenses of equal seriousness. This change improves the proportionality and consistency of the revised UUV offense.

Fourth, the revised UUV offense eliminates the special penalty for committing UUV during a crime of violence or to facilitate a crime of violence that is in the current UUV statute.[7] This enhancement is particularly unusual in current District law for requiring consecutive sentencing. In contrast, the RCC deletes this special penalty for committing UUV during a crime of violence or to facilitate a crime of violence. There is no clear basis for singling out UUV for a crime of violence enhancement as compared to other offenses of equal seriousness. The RCC reserves theft of a motor vehicle for the RCC theft statute and limits the RCC UUV statute to temporary unauthorized use of a motor vehicle that is a true "joy ride." If an individual uses the motor vehicle during a crime of violence or to facilitate a crime of violence, the defendant will be liable for either theft or UUV, as well as the crime of violence, ensuring that there is added liability for theft of a motor vehicle in conjunction with a crime of violence. This change improves the proportionality and consistency of the revised UUV and theft offenses.

Fifth, the revised UUV offense eliminates the separate offense of "UUV passenger" that currently is recognized in DCCA case law. The current UUV statute is limited to a single gradation,[8] and does not specifically address whether or in what manner it reaches a passenger in a motor vehicle. However, the DCCA has held that riding in a motor vehicle as a passenger with knowledge of its unlawful operation is sufficient for liability.[9] In contrast, the revised UUV offense penalizes only knowingly *operating* a motor vehicle without the effective consent of an owner. A passenger riding in a motor vehicle, with knowledge of its unlawful operation, is not, without more, sufficient for UUV liability. However, a passenger that satisfies the requirements of accomplice liability (RCC § 22E-210) may be liable as an accomplice to UUV and consequently receive the same penalty as the driver of the vehicle. The revised UUV statute does not change District case law establishing that mere presence in the vehicle is

[7] D.C. Code § 22-3215(d)(2):

> (2)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who took, used, or operated the motor vehicle, or caused the motor vehicle to be taken, used, or operated, during the course of or to facilitate a crime of violence, shall be:
>
> > (i) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, consecutive to the penalty imposed for the crime of violence; and
> >
> > (ii) If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.
>
> (B) For the purposes of this paragraph, the term "crime of violence" shall have the same meaning as provided in § 23-1331(4).

[8] D.C. Code § 22-3215(d)(1).

[9] *See, e.g.*, *Bynum v. United States*, 133 A.3d 983, 987 (D.C. 2016); *In re D.P.*, 996 A.2d 1286, 1288 (D.C. 2010); *In re C.A.P.*, 633 A.2d 787, 792 (D.C. 1993); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006); *see also In re T.T.B.*, 333 A.2d 671 (D.C. 1975) ("To sustain a conviction of a passenger in a stolen vehicle of its unauthorized use, the government must show beyond a reasonable doubt that the passenger rode in the vehicle knowing that it was being used without the consent of the owner.").

insufficient to prove knowledge, such as *In re Davis*[10] and *Stevens v. United States*,[11] nor does it change the requirement in existing case law that a passenger is not liable for aiding and abetting UUV if he or she does not have a reasonable opportunity to exit the vehicle upon gaining knowledge that its operation is unauthorized.[12] To the extent that District case law holds that riding as a passenger in a motor vehicle with knowledge of its unlawful operation is sufficient for UUV, the revised UUV statute is a change in law.[13] This revision clarifies current law and improves the proportionality of the revised UUV statute.

Sixth, under the revised UUV statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current statute is a general intent crime,[14] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[15] The DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[16]—the claim that, due to his or her self-induced intoxicated state, the defendant not possess the knowledge required for any element of UUV.[17] In contrast, per the revised UUV offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that voluntary intoxication prevented the defendant from forming the knowledge required to prove UUV. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable

[10] *In re Davis*, 264 A.2d 297 (D.C. 1970)
[11] *Stevens v. United States*, 319 F.2d 733 (D.C. Cir. 1963).
[12] *Jones v. United States*, 404 F.2d 212, 216 (D.C. Cir. 1968) ("It scarcely brooks denial that a passenger is not to be convicted of aiding and abetting if he discovers only in the course of a 60 mile per hour chase that the vehicle is being operated without the owner's permission."); *Bynum v. United States*, 133 A.3d 983, 987 (D.C. 2016) ("A passenger is not to be convicted of aiding and abetting if he discovers only in the course of a 60 mile per hour chase that the vehicle is being operated without the owner's permission.") (quoting *Jones v United States*, 404 F.2d 212, 216 (D.C. Cir. 1968)).
[13] *See, e.g.*, *Kemp v. United States*, 311 F.2d 774 (D.C. Cir. 1962); *Jones v. United States*, 404 F.2d 212 (D.C. Cir. 1968); *In re D.M.L.*, 293 A.2d 277 (D.C. Cir. 1972); *In re T.T.B.*, 333 A.2d 671 (D.C. 1975); *In re C.A.P.*, 633 A.2d 787 (D.C. 1993); *In re R.K.S.*, 905 A.2d 201 (D.C. 2006); *Bynum v. United States*, 133 A.3d 983 (D.C. 2016).
[14] *See Carter v. United States*, 531 A.2d 956, 960 n.13 (D.C. 1987).
[15] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").
[16] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).
[17] This is so, moreover, notwithstanding the fact that the defendant, due to his or her self-induced intoxicated state, may not have actually possessed the knowledge required for any element of UUV.

mental state of knowledge at issue in UUV.[18] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these six main changes to current District law, one other aspect of the revised UUV statute may be viewed as a substantive change in law.

The revised UUV statute requires a "knowingly" culpable mental state for "operat[ing]" a "motor vehicle." The current statute does not clearly specify a culpable mental state for these elements. No case law exists directly on point, although the DCCA does require for UUV that the defendant know he lack the consent of the owner.[19] Instead of this ambiguity, the revised UUV statute requires a "knowingly" culpable mental state for operating a motor vehicle. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[20] This revision is consistent with the DCCA requirement of knowledge as to the lack of consent of an owner. It also makes the revised UUV offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[21]

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

First, "takes" and "uses" have been deleted from the revised UUV offense. Deleting "takes" does not change the scope of the general UUV offense because, practically, a "taking" of a motor vehicle necessarily involves its operation. "Uses" has been deleted because it is unclear exactly what conduct constitutes "use" of a motor vehicle but does not constitute "operating" it. Possible examples of "use"—but not operation—might include passively sitting in or on a motor vehicle, but, to the extent a person can "use" a motor vehicle without also operating it, that conduct is more proportionally penalized as third degree trespass involving a motor vehicle (RCC § 22E-2601). This change is not intended to change current District law.

Second, the revised general UUV offense deletes "for his or her own profit, use, or purpose" that is in the current UUV offense. It appears this language does not actually narrow the scope of the UUV offense, as even a person whose ostensible motive is to benefit another would have as his or her own purpose the unauthorized use of the car to

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

[19] *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[20] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[21] *See, e.g.*, RCC § 22E-2101.

benefit that other person. Deleting "for his or her own profit, use, or purpose" clarifies the scope of the revised UUV offense without a substantive change of law.

Third, "causes a motor vehicle to be taken, used or operated" has been deleted from the revised statute. It is unclear what this language could mean other than codifying liability for aiding and abetting, conduct addressed generally for all offenses in section RCC § 22E-210. Deleting the language is not intended to change the scope of the revised offense.

Fourth, the revised UUV statute requires that the defendant act without the "effective consent of an owner." The current UUV statute simply requires that the defendant act "without the consent of the owner."[22] However, DCCA case law for UUV expands "consent of the owner" to an "authorized" person" to give consent,[23] and indicates that a person who uses deception to obtain consent to use a motor vehicle commits UUV.[24] Using "effective consent" in the revised UUV statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. The definitions of "effective consent" and "owner" are discussed in the commentary to RCC § 22E-701. The RCC relies on civil law for determining agency and it is unnecessary to specify that consent may be given by authorized persons. The change improves the clarity and consistency of definitions throughout property offenses.

Fifth, the revised UUV statute requires a "knowingly" culpable mental state as to the fact that the defendant lacked effective consent of an owner. The current UUV statute requires acting "without the consent of the owner," but does not specify a mental state for the element. DCCA case law, however, requires a "knowing" mental state for this element.[25] This revision is not intended to change current District law.

[22] D.C. Code § 22-3215(b).

[23] *Agnew v. United States*, 813 A.2d 192 (D.C. 2002) (stating as an element "at the time the appellant took, used, operated, or removed the vehicle . . . she knew he that she did so without the consent of the owner or some other authorized person.") (citations omitted); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006).

[24] *Evans v. United States*, 417 A.2d 963, 966 (D.C. 1980) (finding in a general UUV case that the"government's evidence that appellant gave a false identity and false addresses in order to procure the rental agreement was sufficient for a jury to conclude that Hertz did not knowingly consent to appellant's use of the vehicle at the time agreement was signed."). *Evans* is a pre-1982 case relying on statutes concerning unauthorized use of motor vehicles that are substantively similar, but not identical, to the current UUV statute.

[25] *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

RCC § 22E-2104. Shoplifting.

Explanatory Note. *This section establishes the revised shoplifting offense and penalty for the Revised Criminal Code (RCC). Shoplifting addresses theft-like conduct specific to stores and retail establishments, but does not require an intent to deprive an owner of property. There are no penalty gradations. The revised shoplifting offense replaces the existing shoplifting statute[1] in the current D.C. Code.*

Subsection (a)(1)(A), subsection (a)(1)(B), and subsection (a)(1)(C) specify the prohibited conduct—conduct that conceals, removes, transfers, etc. an item. Subsection (a)(1) specifies the culpable mental state for this conduct to be "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(1) applies to the elements in subsection (a)(1)(a), subsection (a)(1)(B), and subsection (a)(1)(c). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be aware to a practical certainty that his or her conduct is concealing, removing, transferring, etc. an item.

Subsection (a)(2) specifies several requirements for the item that the defendant must conceal, remove, transfer, etc. First, the item must be "property," a defined term in RCC § 22E-701 meaning an item of value which includes goods, services, and cash. Second, the property must be "property of another," a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in the property. Third, the item must be the "personal" property of another, which excludes property such as real estate. Fourth, the item must be either "displayed or offered for sale" (subsection (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)). Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) also applies to the elements in subsection (a)(2), here requiring the accused to be aware to a practical certainty that the item is personal property of another that is displayed, held, stored, or offered for sale in the required manner.

Subsection (a)(3) states that the proscribed conduct must be done "with intent to take or make use of without complete payment." This is a lesser intent than "with intent to deprive an owner of the property" that the revised theft offense requires in RCC § 22E-2101. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would take or make use of the property without complete payment. 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 actually took or made use of the property without complete payment, only that the defendant believed to a practical certainty that this would occur.

Subsection (b) prohibits charging attempted shoplifting. Conduct constituting attempted shoplifting may be chargeable as attempted theft or attempted unauthorized use of property, however.

Subsection (c) specifies the penalty for the offense. [*See* Second Draft of Report #41.]

[1] D.C. Code § 22-3213.

Subsection (d) provides qualified immunity to specified individuals for detention, false imprisonment, malicious prosecution, defamation, and false arrest in any proceedings arising from the detention or arrest of a person suspected of shoplifting. The subsection lists requirements for the detention or arrest that must be met for the immunity to apply.

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

Relation to Current District Law. *The revised shoplifting statute changes current District law in one main way.*

First, the language in subsection (a)(1)(C) has been simplified to refer to transfer from any container or package (regardless of the purpose of the container). The current shoplifting statute limits the container involved to those concerning sale or display.[2] There is no case law interpreting the scope of this language. In contrast, the revised language in subsection (a)(1)(C), in combination with the requirements that the property be "displayed or offered for sale" (subsection (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)), effectively broadens the revised offense to include transfers between containers that store or otherwise hold property. The nature of the container is irrelevant if the action is done with intent to take or make use of the property without complete payment per subsection (a)(3). This revision clarifies the statute and reduces possible litigation over whether a given container may be a display or sales container.

Beyond this substantive change to current District law, three other aspects of the revised shoplifting statute may be viewed as a substantive change of law.

Per subsection (a)(3) of the shoplifting offense, engaging in the specified conduct "with intent to take or make use of the property without complete payment" is the sole intent for shoplifting. The current shoplifting statute requires the specified conduct either be "with intent to appropriate without complete payment" or "with intent to defraud an owner of the value of the property." The term "defraud" is not defined in the current offense and there is no case law on point for shoplifting. The revised shoplifting statute inserts the current statute's definition of "appropriate"—"to take or make use without authority or right"[3]—into the intent requirement "to appropriate without complete payment," and eliminates the intent to defraud alternative requirement. "Defraud" is a common law term with an unclear meaning. In the context of shoplifting, it is unclear what the use of "defraud" would criminalize that is not already covered by conduct undertaken "with intent to take or make use of the property without complete payment." This change in the revised shoplifting statute clarifies the offense.

Second, the revised shoplifting statute deletes from the qualified immunity provision in subsection (d)(1) the requirement that the offense be "committed in that person's presence." The current qualified immunity provision requires that the "person detaining or causing the arrest had, at the time thereof, probable cause to believe that the

[2] D.C. Code § 22-3216(a)(3) ("knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.").
[3] D.C. Code § 22-3201(1).

person detained or arrested had committed in that person's presence, an offense described in this section."[4] There is no case law interpreting the scope of "committed in that person's presence," and it is unclear if it includes the use of technology such as surveillance equipment and anti-theft devices to identify an alleged shoplifter. Instead of this ambiguity, the revised qualified immunity provision deletes the requirement "committed in that person's presence" and relies on the probable cause requirement to ensure that that detention or ensuing arrest is reasonable. This revision clarifies the provision and fills a potential gap in current District law.

Third, the revised shoplifting statute replaces "within a reasonable time" with "as soon as practicable" in subsection (d)(3) and subsection (d)(4) of the qualified immunity provision. The current qualified immunity provision requires that "[l]aw enforcement authorities were notified within a reasonable time"[5] and "[t]he person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time."[6] The scope of "within a reasonable time" is unclear and there is no DCCA case law on point. Instead of this ambiguity, the revised qualified immunity provision requires "as soon as practicable. This revision improves the clarity of the revised statute.

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

First, subsection (a)(1) of the revised shoplifting offense applies a culpable mental state of "knowingly" to each type of proscribed conduct in subsection (a)(1)(A), subsection (a)(1)(B), and subsection (a)(1)(C) and to whether the property is "displayed or offered for sale" (subsection (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)). The current shoplifting statute[7] requires, in part, a "knowingly" culpable mental state,[8] but it is unclear to which elements the culpable mental state applies. However, it would be difficult for a defendant to satisfy either of the "with intent to" requirements in the current statute without knowing that it was the personal property of another that is offered for sale. The requirement of a "knowingly" culpable mental state for subsections (a)(1) and (a)(2) is not intended to change existing law on shoplifting.

Second, in subsection (a)(1)(B), "transfers" has been added so that the subsection prohibits conduct which "removes, alters, or transfers" price tags or other specified marks. The current shoplifting statute is limited to "removes or alters" price tags or other specified marks. There is no case law interpreting the scope of this language.

[4] D.C. Code § 22-3213(d)(1).
[5] D.C. Code § 22-3213(d)(3).
[6] D.C. Code § 22-3213(d)(4).
[7] D.C. Code § 22-3216.
[8] D.C. Code § 22-3213(a) ("A person commits the offense of shoplifting if, with intent to appropriate without complete payment any personal property of another that is offered for sale or with intent to defraud the owner of the value of the property, that person: (1) Knowingly conceals or takes possession of any such property; (2) Knowingly removes or alters the price tag, serial number, or other identification mark that is imprinted on or attached to such property; or (3) Knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.").

Transferring a price tag is accomplished by removing or altering the price tag, an action already covered in the current statute. Adding "transfers" to the statute merely clarifies the scope of the revised shoplifting offense in a common situation.

Third, the revised shoplifting statute clarifies the type of property at issue by requiring either that the property is "displayed or offered for sale" (subsection (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)). The current shoplifting statute requires that the property be "offered for sale."[9] However, in *Harris v. United States*, the DCCA held that the current shoplifting statute extended "at least to merchandise held . . . in reasonably close proximity to the customer area and intended for prompt availability to customers when and as needed."[10] The addition of "displayed or offered for sale" (subsection (a)(2)(A)) and "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subsection (a)(2)(B)) codifies *Harris* as to the scope of "offered for sale" in the current shoplifting statute and is not intended to change District law on shoplifting. Under the revised element in subsection (a)(2), the property should be in "reasonably close proximity" to the customer area and readily available to customers as needed. Merchandise on a truck in a loading dock, for example, would not fall within the scope of the revised offense.

Lastly, there are two minor changes to the language in the qualified immunity provision in subsection (e). The current qualified immunity subsection refers to, "A person who offers tangible personal property for sale to the public."[11] The term "offers" is not defined in the statute and there is no case law on point. The revised subsection (e) expands "offers" to "displays, holds, stores, or offers for sale" in order to match the scope of the revised elements in subsection (a)(2). Similarly, the revised shoplifting statute no longer refers to "tangible personal property." Instead, it refers to "personal property" as specified in subsection (a)(2) so that the qualified immunity provision matches the element.

[9] D.C. Code § 22-3213(a).
[10] *Harris v. United States*, 602 A.2d 1140, 1142 (D.C. 1992). The court further characterized the merchandise at issue in the case as "merchandise contained in a storeroom off the customer sales area, which is used to replenish stock in the sales area or which is available as a source of sizes, colors, or the like not on display in the sales area." *Id.* at 1141.
[11] D.C. Code § 22-3213(d).

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

Explanatory Note. *This section establishes the unlawful creation or possession of a recording (UCPR) offense and penalty gradations for the Revised Criminal Code (RCC). The revised offense proscribes making, obtaining, or possessing a sound recording that is a copy of an original sound recording fixed before February 15, 1972, or a sound recording or audiovisual recording of a live performance, without the effective consent of an owner and with intent to derive commercial gain or advantage. The revised offense is structured to avoid criminalizing conduct that is preempted by federal legislation protecting copyright. The revised offense is graded based on the number of recordings that the defendant made, obtained, or possessed. The revised UCPR offense replaces the commercial piracy statute*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct for first degree UCPR—making, obtaining, or possessing an item. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) to be "knowingly," a term defined at RCC § 22E-206 that here requires the accused be aware to a practical certainty that his or her conduct is making, obtaining, or possessing an item.

Subparagraph (a)(1)(A) and subparagraph (a)(1)(B) state that the accused must make, obtain, or possess either a sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972, or a sound recording or audiovisual recording of a live performance. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) also applies to the elements in subparagraph (a)(1)(a) and subparagraph (a)(1)(B), here requiring the accused to be aware to a practical certainty that the item is the specified kind of audiovisual or sound recording.

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no consent, or the consent was obtained by means of physical force, an express or implied coercive threat, or deception. "Owner" is defined in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), and here requires the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Paragraph (a)(3) requires proof of "with intent to" sell, rent, or otherwise use the recording for commercial gain or advantage. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would sell, rent, or otherwise use the recording for commercial gain or advantage. 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

[1] D.C. Code § 22-3214.

phrase. It is not necessary to prove that such a use actually occurred, only that the defendant believed to a practical certainty that such a use would result.

"Intent" is a defined term in RCC § 22E-206 that here meaning the defendant believed his or her conduct was practically certain to sell, rent, or otherwise use the recording for commercial gain or advantage. It is not necessary to prove that such commercial advantage occurred, just that the defendant believed to a practical certainty that such advantage would result.

Paragraph (a)(4) requires that "in fact," the number of recordings made, obtained, or possessed was 100 or more for first degree UCPR. In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for the fact the number of recordings made, obtained, or possessed was 100 or more.

Subsection (b) specifies the requirements for second degree UCPR. The requirements in paragraph (b)(1), subparagraphs (b)(1)(A) and (b)(1)(B), paragraph (b)(2), and paragraph (b)(3) are identical to those in paragraph (a)(1), subparagraphs (a)(1)(A) and (a)(1)(B), paragraph (a)(2), and paragraph (a)(3) for first degree unlawful creation or possession of a recording. Paragraph (b)(4) requires that "any number" of recordings were made obtained, or possessed for second degree UCPR. In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for the fact that "any number" of recordings were made, obtained, or possessed.

Subsection (c) contains two broad exclusions from liability under the revised UCPR statute for copying of recordings permitted by federal law and copying by licensed radio, television, and cable broadcasters for broadcast or archival use.

Subsection (d) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

Subsection (e) provides judicial discretion to order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

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

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

First, the revised UCPR offense no longer includes proprietary information within its scope. The current commercial piracy statute concerns not only sound recordings, but "proprietary information" which is broadly defined to include "any [] information, the primary commercial value of which may diminish if its availability is not restricted."[2] In contrast, the revised UCPR offense eliminates the current statute's definition of "proprietary information" as well as references to "proprietary information" in the offense elements. This revision improves the clarity of the revised UCPR offense and

[2] D.C. Code § 22-3214(a)(2) ("'Proprietary information' means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information, the primary commercial value of which may diminish if its availability is not restricted.").

reduces unnecessary overlap that currently exists between commercial piracy, theft, and other property offenses in the D.C. Code.[3]

Second, the revised UCPR offense applies a "knowingly" mental state to the element that the defendant acted "without the effective consent of an owner." The current commercial piracy statute requires "knowing or having reason to believe" for the "without the consent of the owner" element. There is no case law interpreting "having reason to believe" in the current commercial piracy statute, however legislative history suggests that it may be intended to be a lesser culpable mental state than "knowingly."[4] In contrast, the revised UCPR offense applies a "knowingly" culpable mental state to the element that the defendant acted "without the effective consent of an owner." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[5] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[6] This revision improves the consistency and proportionality of the revised statute.

Third, the revised UCPR offense increases the number and type of grades of the offense. The current commercial piracy offense is a misdemeanor, regardless of the number of recordings the defendant at issue.[7] In contrast, the revised UCPR statute has two gradations, depending on the number of recordings the defendant makes, obtains, or possesses. This revision improves the proportionality of the offense and creates consistency with the gradations in the revised unlawful labeling of a recording statute.[8]

Fourth, subsection (f) of the revised UCPR offense permits the Superior Court for the District of Columbia to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The

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[3] This overlap exists because the current definition of "property" is "anything of value," D.C. Code § 22-3201(3), which would appear to include intellectual property. Per this broad definition of "property," the current theft, taking property without right, and other property offenses create liability for taking proprietary information, independent of the inclusion of "proprietary information" in the current commercial piracy statute. Since the RCC retains the broad definition of "property" as "anything of value" (RCC § 22E-701), multiple property offenses will continue to cover takings of proprietary information without effective consent or consent.

It should also be noted that federal law makes theft or misappropriation of trade secrets a federal offense, but allows for state action. U.S. Economic Espionage Act of 1996, effective January 1, 1997.

[4] The legislative history suggests that a mistake as to whether or not a person has permission must be reasonable. "[I]t is a defense under this section that the defendant honestly and reasonably believed that he or she made the copy with the owner's permission or possessed a copy which was legitimate." Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 28.

[5] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[6] *See, e.g.*, RCC § 22E-2101.

[7] D.C. Code § 22-3214(d) ("Any person convicted of commercial piracy shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

[8] RCC § 22E-2207.

current commercial piracy offense does not contain a forfeiture provision. In contrast, the revised statute allows judges to order forfeiture in order to destroy illegal copies and potentially deter large-scale prohibited copying. The current[9] and revised[10] unlawful labeling of a recording statute and several other offenses[11] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

Fifth, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," allows aggregation of the number of recordings based on a single scheme or systematic course of conduct to determine the gradation of the revised UCPR offense. The current commercial piracy offense is not part of the current aggregation of value provision for property offenses.[12] This revision improves the proportionality of the revised statute.

Sixth, the revised UCPR offense eliminates any statutory presumption of intent. The current commercial piracy statute states that, "A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance."[13] The legislative history does not clearly state whether the presumption is mandatory or permissive, although some language suggests a mandatory presumption.[14] There is no case law on point. In contrast, the revised UCPR statute eliminates the presumption because it may run afoul of District and Supreme Court case law requiring that even permissive (non-mandatory) inferences be "more likely than not to flow from the proved fact"[15] of possession of 5 or more copies of a recording. While possession of a large number of copies of a recording appears more likely than not to indicate an intent to distribute the copies, the number of recordings alone indicates nothing regarding the purpose of distribution. Without other evidence, such possession also is consistent with a desire to gift or share for purposes other than commercial gain or advantage. This revision improves the proportionality, and perhaps the constitutionality, of the revised statute.

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[9] D.C. Code § 22-3214.01(e) ("Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.").

[10] RCC § 22E-2207.

[11] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).

[12] D.C. Code § 22-3202. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[13] D.C. Code § 22-3214(b) ("A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance.").

[14] *Extension of Comments on Bill No. 4-193* at 29 ("If such a fact is established, the offender will be presumed to have acted with the requisite intent.").

[15] 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." *Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969)).

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

First, the revised UCPR offense explicitly applies to audiovisual recordings for live performances. The current commercial piracy statute, through its definition of "phonorecords,"[16] excludes sound recordings of audiovisual works. However, the current commercial piracy statute separately criminalizes obtaining a copy of "proprietary information" without consent, which may cover illicit audiovisual recordings. State protection of live performances is not limited by federal copyright law[17] and the current deceptive labeling statute[18] and the revised deceptive labeling statute[19] extend to audiovisual recordings. Including audiovisual recordings for live performances in the revised UCPR statute potentially fills a gap in existing law or, to the extent there is liability in current law, improves the clarity and consistency of the offense.[20]

Second, the revised statute requires a culpable mental state of "knowingly" as to the elements "makes, obtains, or possesses" and to the requirements for the unlawful sound recording (subparagraphs (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B)). No mental state is provided in the current statute regarding these elements, and there is no clear case law on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[21] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[22]

Third, the revised UCPR offense uses a new definition of "owner," the same definition consistently applied to other property offenses.[23] The current commercial piracy offense's definition of "owner"[24] is very specific, referring either to the person who owns the original fixation, the exclusive licensee with reproduction and distribution rights, or in the case of a live performance, the performer. No case law exists construing

[16] D.C. Code § 22-3214(a)(3).
[17] 17 USC 1101(d).
[18] D.C. Code § 22-3214.01.
[19] RCC § 22E-2206.
[20] It should be noted that nothing about expanding the unlawful creation or possession of a recording statute to included audiovisual recordings of live performances changes the offense's limited protection of sound recordings. As under the current commercial piracy statute, D.C. Code § 22-3214(e), the unlawful creation or possession of a recording statute is limited to sound recordings fixed prior to February 15, 1972. This limitation exists to avoid preemption by federal copyright law. 17 U.S.C. § 301(c).
[21] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[22] *See, e.g.*, RCC § 22E-2101.
[23] RCC § 22E-701 ("'Owner' means a person holding an interest in property with which the actor is not privileged to interfere without consent.").
[24] D.C. Code § 22-3214(a)(1):

> (1) "Owner", with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.

this definition. However, the definition's rigid categories may lead to unintuitive outcomes in some fact patterns.[25] The revised UCPR statute is intended to more broadly identify the relevant person whose consent must be obtained. Ordinarily, it is expected that the parties specified under the current statute would be the relevant owners, but the revised definition provides flexibility where property rights are not arranged in the manner anticipated by the current statute. The revised UCPR is intended to reduce potential gaps in the offense and improve the consistency of definitions across property offenses.

Fourth, the revised UCPR offense, by use of the phrase "in fact," codifies that no culpable mental state is required as to the number of recordings made, obtained, or possessed. The current statute is silent as to what culpable mental state applies to these circumstances. There is no District case law on what mental state, if any, applies to the current gradations based on the number of recordings. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[26] Clarifying that the number of unlawful recordings is a matter of strict liability in the revised UCPR gradations clarifies District law.

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

First, the revised UCPR statute requires that the defendant "makes, obtains, or possesses." This language, particularly "possesses," is intended to include all the conduct prohibited by "reproduces or otherwise copies, possesses, buys or otherwise obtains" in the current commercial piracy statute. "Possesses" is defined in RCC § 22E-701 and discussed further in the commentary to that statute.

Second, the revised UCPR statute requires that the defendant act without the "effective consent of an owner." The current commercial piracy statute simply requires that the defendant act "without the consent of the owner."[27] There is no legislative history or District case law discussing the scope of "consent" in the current commercial piracy statute, or how the statute operates when there is more than one owner. The revised statute uses standardized definitions, discussed more fully in RCC § 22E-701, that exclude UCPR liability where consent is improperly gained and extend UCPR liability for unlawful conduct with respect to any owner where there are several. Using "effective consent" and "an owner" in the revised UCPR statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. The change in

[25] E.g., a person who has reproduction but not distribution rights (the current statute refers to a licensee with rights to "reproduce and distribute"), or a person who by contractual agreement with someone other than the performer has the rights to reproduce recordings of a live performance, may not be considered an "owner" under the current definition.

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

[27] D.C. Code § 22-3214(b).

language improves the clarity and consistency of definitions throughout property offenses.

Third, the revised UCPR statute requires that the actor's conduct be "with intent to sell, rent, or otherwise use the sound recording for commercial gain or advantage." By contrast, the wording in the current commercial piracy statute is "with the intent to sell, to derive commercial gain or advantage, or to allow another person to derive commercial gain or advantage." The revised UCPR statute's addition of "rent" clarifies a common way of gaining commercial advantage. Deletion of the current statute's intent "to allow another person to derive commercial gain or advantage" prong reflects the fact that ordinary aiding and abetting or conspiracy liability applies to the offense. Consistent with prior legislative history,[28] the revised UCPR statute's language "sell, rent, or otherwise use the recording for commercial gain or advantage" is to be broadly construed.

[28] *Extension of Comments on Bill No. 4-193* at 29 ("The phrase 'derive commercial gain or advantage' is intended to encompass any transaction where the person reproducing or possessing the unauthorized phonorecord or copy of proprietary information surrenders ownership and control over it for consideration or any related form of compensation. Consequently, even an individual who does not hold himself or herself out to the public as engaging in a commercial enterprise can be subjected to criminal liability.").

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater.

Explanatory Note. *This section establishes the unlawful operation of a recording device in a motion picture theater offense (revised unlawful recording offense) and penalty gradations for the Revised Criminal Code (RCC). The revised offense proscribes operating a recording device within a motion picture theater without the effective consent of an owner and with the intent to record a motion picture. The revised offense has a single penalty gradation. The revised unlawful recording offense replaces the unlawful operation of a recording device in a motion picture theater statute*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct—operating a recording device within a motion picture theater. "Recording device" and "motion picture theater" are defined terms in RCC § 22E-701. Paragraph (a)(1) specifies that the culpable mental state for this conduct is "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to all the elements in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain this his or her conduct will operate a recording device within a motion picture theater.

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was induced by means of physical force, an express or implied coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 that means a person holding an interest in property with which the accused is not privileged to interfere without consent. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), and here requires that the accused be practically certainty that he or she lacks effective consent of an owner of the motion picture theater.

Paragraph (a)(3) requires "with the intent" to record a motion picture. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would record a motion picture. 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 a motion picture was actually recorded, only that the defendant believed to a practical certainty that a motion picture would be recorded.

Subsection (b) specifies the penalty for the offense. [*See* Second Draft of Report #41.]

Subsection (c) provides qualified immunity to specified individuals for detention, false imprisonment, malicious prosecution, defamation, and false arrest in any proceedings arising from the detention or arrest of a person suspected of unlawfully

[1] D.C. Code § 22-3214.02.

operating a recording device within a motion picture theater. The subsection lists requirements for the detention or arrest that must be met for the immunity to apply.

Subsection (d) provides judicial discretion to order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

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

Relation to Current District Law. *The revised unlawful recording offense changes existing District law in two main ways.*

First the revised unlawful recording statute requires conduct be "with the intent to record a motion picture." The current unlawful recording statute does not have such an intent requirement and broadly prohibits "operat[ing] a recording device" within the premises of a motion picture theater.[2] The current statute would appear to include the use of a recording device (including a cell phone's audio, photo, or video recording features) in a motion picture theater, even if someone or something other[3] than the motion picture being exhibited is recorded. In contrast, the revised unlawful recording statute requires that the defendant have the intent to record a motion picture. This change improves the clarity and proportionality of the revised statute.

Second, subsection (d) of the revised unlawful recording statute permits the Superior Court for the District of Columbia to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current unlawful recording offense does not contain a forfeiture provision. In contrast, the revised unlawful recording statute allows judges to order forfeiture in order to destroy illegal copies and potentially deter large-scale prohibited copying. The current[4] and revised[5] unlawful labeling of a recording statutes and several other offenses[6] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

Beyond these two main changes to current District law, seven other aspects of the revised unlawful recording offense may constitute substantive changes of law.

First, the revised unlawful recording statute requires that the defendant operate the recording device "within a motion picture theater." The current unlawful recording statute requires that the defendant operate a recording device "within *the premises* of a motion picture theater."[7] It is unclear if "within the premises" is meant to include areas of a motion picture theater where a motion picture is not being exhibited—for example, a

[2] D.C. Code § 22-3214.02(b).

[3] For example, taking a photo or video chatting with someone while within a movie theater waiting for a movie to start would appear to satisfy the plain language of the current offense.

[4] D.C. Code § 22-3214.01(e) ("Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.").

[5] RCC § 22E-2207.

[6] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).

[7] D.C. Code § 22-3214.02(b) (emphasis added).

lobby or a restroom of a motion picture theater. Resolving this ambiguity, the revised unlawful recording statute requires that the defendant operate the recording device within the motion picture theater. This change improves the clarity and consistency of the revised statute.

Second, through the revised definition of "motion picture theater" in RCC § 22E-701, the revised unlawful recording statute includes venues they may not qualify as a "theater" or "other auditorium" under the current definition. The current definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[8] It is unclear whether this definition extends to other venues where a movie may be exhibited, such as a drive-in theater or a concert hall. Resolving this ambiguity, the revised definition of "motion picture" in RCC § 22E-701 includes "other venue[s]" that are "being utilized primarily for the exhibition of a motion picture to the public." This change improves the clarity and completeness of the revised statute.

Third, through the revised definition of "motion picture theater" in in RCC § 22E-701, the revised unlawful recording statute excludes the use of a recording device in venues where a motion picture is exhibited, but such an exhibition is not the primary purpose of the venue. The current definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[9] Due to this definition, it is unclear whether the current unlawful recording statute extends to the operation of a recording device in venues where a motion picture may be exhibited, incidental to the primary purpose of the venue—such as a salesperson at an electronics store who records portions of a movie being shown to demonstrate the capabilities of a widescreen television. The revised definition of "motion picture theater," and, by extension, the revised unlawful recording offense, require that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current unlawful recording statute[10] and a comparable federal offense.[11] This change improves the clarity and proportionality of the revised offense.

Fourth, through the revised definition of "motion picture theater" in RCC § 22E-701, the revised unlawful recording statute excludes the use of a recording device in venues where a motion picture is being exhibited, but the exhibition is not open to the

[8] D.C. Code § 22-3214.02(a)(1).
[9] D.C. Code § 22-3214.02(a)(1).
[10] The legislative history for the current unlawful recording statute indicates that the statute was part of an effort to combat "film and video piracy" on a "local level." Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.
[11] A substantively similar federal offense exists in 18 U.S.C. § 2319B, enacted after the District's current statute. The legislative history for the federal statute notes that "the bill is not intended to permit a prosecution of . . . a salesperson at a store who uses a camcorder to record portions of a movie playing to demonstrate the capabilities of a widescreen television" or "a university student who records a short segment of a film being show in film class." Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3. In these instances, the venue is not being used "primarily" to exhibit a motion picture. *Id.* The legislative history for the federal statute notes that it "deals with the very specific problem of illicit 'camcording' of motion pictures in motion picture exhibition facilities. Typically, an offender attends a pre-opening 'screening' or a first-weekend theatric release, and uses sophisticated digital equipment to record the movie. A camcorded version is then sold to a local production factory or to an overseas producer where it is converted into DVDs or similar products and sold on the street for a few dollars per copy." *Id*. at 2.

public. The current definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[12] Due to this definition, it is unclear whether the current unlawful recording statute extends to the operation of a recording device in venues where a motion picture may be exhibited, but the exhibition is not open to the public—such as a person who records movies off the television screen in his or her home. The revised definition of "motion picture theater," and, by extension, the revised unlawful recording offense, require that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current unlawful recording statute[13] and a comparable federal offense.[14] This change improves the clarity and proportionality of the revised offense.

Fifth, the revised unlawful recording statute requires a "knowingly" culpable mental state for "operating a recording device in a motion picture theater." The current unlawful recording statute does not have a mental state for these elements, and there is no case law on point. The current statute would appear to criminalize a person with a recording device that is "on" even if the person does not know the device is "on." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Requiring a knowing culpable mental state also makes the revised unlawful recording offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[16]

Sixth, the revised unlawful recording statute requires that the defendant act without the "effective consent" of an owner of a motion picture theater and requires a "knowingly" culpable mental state for this element. The current unlawful recording statute requires that the defendant act "without authority or permission" of the owner.[17] There is no case law interpreting the meaning of "without authority or permission" in the current statute. The revised unlawful recording statute instead requires that the defendant lack the "effective consent" of an owner. "Effective consent" is defined in RCC § 22E-701 and is consistently used in the RCC property offenses. Using "effective consent" in the revised statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. This change improves the clarity and consistency of definitions throughout property offenses.

Seventh, the revised unlawful recording statute deletes from the qualified immunity provision in paragraph (c)(1) the requirement that the offense be "committed in that person's presence." The current qualified immunity provision requires that the

[12] D.C. Code § 22-3214.02(a)(1).
[13] Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.
[14] Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3
[15] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[16] *See, e.g.*, RCC § 22E-2101.
[17] D.C. Code § 22-3214.02(b).

owner had at the time, probable cause to believe that the person detained or arrested had committed "in [the owner's] presence, an offense described in this section."[18] There is no case law interpreting the scope of "committed in [the owner's] presence," and it is unclear if it includes the use of technology such as surveillance equipment. Instead of this ambiguity, the revised qualified immunity provision deletes the requirement "committed in [the owner's] presence" and relies on the probable cause requirement to ensure that that detention or ensuing arrest is reasonable. This revision clarifies the provision and fills a potential gap in current District law.

Eighth, the revised unlawful recording statute replaces "within a reasonable time" with "as soon as practicable" in paragraph (c)(3) and paragraph (c)(4) of the qualified immunity provision. The current qualified immunity provision requires that "[l]aw enforcement authorities were notified within a reasonable time"[19] and "[t]he person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time."[20] The scope of "within a reasonable time" is unclear and there is no DCCA case law on point. Instead of this ambiguity, the revised qualified immunity provision requires "as soon as practicable." This revision improves the clarity 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 unlawful recording statute uses the definition of "owner" in RCC § 22E-701, the same definition that is consistently applied to other RCC property offenses. The current recording statute does not define the term "owner"[21] and there is no DCCA case law on the issue. "Owner" is defined in RCC § 22E-701 as a person holding an interest in property with which the actor is not privileged to interfere without consent. The definition establishes that there may be multiple owners of property, in this case, a movie theater. This change clarifies the revised statute.

Second, the revised unlawful recording statute deletes the reference to "or his or her agent" in the offense definition.[22] The RCC relies on civil law for determining agency and it is unnecessary to specify that consent may be given by authorized persons. The definitions of "effective consent" and "owner" are discussed in the commentary to RCC § 22E-701. This change improves the clarity of the revised statute.

[18] D.C. Code § 22-3214.02(d)(1).
[19] D.C. Code § 22-3213(d)(3).
[20] D.C. Code § 22-3214.02(d)(4).
[21] D.C. Code § 22-3214.02(b).
[22] D.C. Code § 22-3213(b).

RCC § 22E-2201. Fraud.

Explanatory Note. *This section establishes the fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes a broad range of conduct in which a person obtains property of another by means of deception. The penalty gradations are based on the value of the property involved in the crime. The revised fraud offense is closely related to the revised theft and extortion offenses.*[1] *It differs from theft because theft requires the lack of the owner's consent to take, obtain, transfer or exercise control over the property. It differs from extortion because extortion requires obtaining the owner's consent by use of a coercive threat, instead of deception. The revised fraud offense replaces both the general fraud statute*[2] *and, to the extent it criminalizes deceptive forms of theft, the theft statute*[3] *in the current D.C. Code.*

Subsection (a) specifies the elements of first degree fraud. Paragraph (a)(1) specifies alternative elements that a person must engage in—conduct that takes, obtains, transfers, or exercises control over property of another.[4] "Property," is a term defined in RCC § 22E-701, means something of value which includes goods, services, and cash. Further, the property must be "property of another," a term defined in RCC § 22E-701, which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon without consent. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would take, obtain, transfer, or exercise control over property of another.

Paragraph (a)(2) states that the proscribed conduct must be done with "consent" of an owner. The term consent requires some words or actions that indicate an owner's agreement to allow the accused to take, obtain, transfer, or exercise control over the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with without consent.[5] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element "with the consent of an owner" in paragraph (a)(2), which requires that the accused was practically certain that he or she had an owner's consent.

Paragraph (a)(2) also codifies the element that distinguishes fraud from the revised theft and extortion offenses—that the consent of an owner be obtained by deception, a term defined in RCC § 22E-701. Deception includes a variety of ways of creating or reinforcing false impressions as to material information. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element, which here requires that the accused was practically certain that the

[1] RCC § 22E-2101 and RCC § 22E-2301, respectively.
[2] D.C. Code § 22-3221.
[3] *Id*. Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.
[4] This conduct includes "causing" the taking, obtaining, transfer, etc. of property by indirect means, that meets the RCC § 22E-204 provisions regarding causation.
[5] The determination of who an owner is depends on civil law, including agency law regarding which persons are authorized to act on behalf of another. Thus, for example, a store employee who is authorized to sell merchandise may be an "owner" for purposes of the statute although the merchandise is in fact owned by the store company itself.

misimpression was actually false. In addition, fraud requires reliance; the deception must have caused the owner to provide consent, and the accused must have known that the deception caused the owner to provide consent. If the deception does not cause the owner to provide consent, there is no fraud.[6]

Paragraph (a)(3) requires that the defendant act "with intent to" deprive an owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. 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 a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(4) requires that the property other than labor or services was, in fact, valued at $500,000 or more; or that the property, in fact, was more than 2080 hours of labor or services. When fraud involves taking labor or services, the market value of the labor or services is not used to determine the property penalty grade. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property, or the number of hours of labor or services.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree fraud. The elements of each grade of fraud are identical to the elements of first degree fraud, except for the value of the property. Each subsection specifies a minimum required property value or number of hours of labor or services, except for fifth degree fraud, which has no specific minimum value.[7] As with first degree fraud, strict liability applies to value of the property other than labor or services, or the hours of labor or services in each grade of fraud.

Subsection (f) specifies penalties for each grade of the fraud offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised fraud statute changes current District law in five main ways.*

First, the revised fraud statute requires that the accused "takes, obtains, transfers, or exercises control over" the property of another. The current D.C. Code fraud statute requires proof that the accused "obtains property of another or causes another to lose property"[8] and the current theft statute refers to "obtaining property by trick, false

[6] For example, if a person sells a watch falsely claiming that the watch is made of gold, but the buyer did not care at all what the watch was made of, and would have purchased it regardless, the seller has not committed fraud.

[7] However, as defined in RCC § 22E-701, "property" means "anything of value" and includes services. Therefore, although fifth degree fraud does not specify any minimum value or number of hours of labor or services, as defined in the RCC, the "property" (including labor or services) must have *some* value.

[8] D.C. Code § 22-3221.

pretense, false token . . . or deception[.]"[9] These terms are not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. In contrast, the revised statute lists conduct that is consistent with the revised theft and extortion offenses. The revised statute is broader insofar as the accused is liable for many actions besides actually gaining the property himself, the typical meaning of "obtain."[10] The phrase "takes, obtains, transfers, or exercises control over" is identical to language in the revised theft statute, which is to be construed broadly to include any unauthorized use or disposition of property.[11] Less clear is whether the revised statute's various alternate elements cover all the possibilities covered by the current "causes another to lose property." For instance, the revised statute would reach conduct that causes the transfer of the victim's property (and otherwise satisfies the elements of the offense), whether or not the transfer is to the accused or received by the accused.[12] The breadth of the new language in practice may cover all or nearly all fact patterns covered under the prior "causes another to lose" language. This change improves the clarity and consistency of the revised statute.

Second, the revised offense defines and punishes attempted fraud consistent with attempt liability and penalties in other revised offenses. The current D.C. Code first degree fraud statute requires that the accused either obtains property or causes another to lose property, but second degree fraud, identical in every other element, requires neither.[13] In other words, second degree fraud in the current D.C. Code is akin to an attempt to commit first degree fraud. In contrast, under the revised fraud statute, if a person fails to obtain property, that person cannot be convicted of the completed offense but still may be convicted of an attempt under the RCC general attempt statute.[14] The elimination of the inchoate version of fraud does not decriminalize any behavior. Rather the change makes the revised fraud offense consistent with other property offenses in how attempt liability affects the scope and punishment for the offense. This change improves the completeness, consistency, and proportionality of the revised statute.

Third, the revised offense provides liability for a single fraudulent act. The current D.C. Code statute refers to a "scheme or systematic course of conduct,"[15] but does not define these terms. Construing this language, the D.C. Court of Appeals (DCCA) has held that a scheme or systematic course of conduct requires "at least two acts calculated to deceive, cheat or falsely obtain property."[16] There is no case law as to what minimal conduct would satisfy the current "two acts" requirement. In contrast, the revised fraud statute does not require proof of two or more acts constituting a scheme or systematic course of conduct. The practical effect of this change is unclear given the

[9] *Id*. Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.
[10] https://www.merriam-webster.com/dictionary/obtain.
[11] As described in the commentary to the revised theft statute, language such as "unauthorized use" or "disposition" were not used in the current theft statute as duplicative and unnecessary, not to substantively change the broad scope of the offense.
[12] For example, a door-to-door salesman who uses deception to induce a customer to purchase items from the company the salesman works for not only has caused a loss to the homeowner, but has knowingly engaged in conduct that causes the transfer of funds from the homeowner to the company.
[13] D.C. Code § 22-3221.
[14] RCC § 22E-301.
[15] D.C. Code § 22-3221.
[16] *Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011).

possibility that the two acts referred to in the current statute might be robustly construed to require what would amount to two separate instances of theft by deception,[17] or could be minimally construed so as to constitute separate acts only in the most technical sense.[18] In either case, because the revised fraud statute is replacing theft by deception, the revised offense preserves the theft offense's requirement that only one act is sufficient to establish liability for fraud. This is not to say that each act that satisfies the requirements for fraud liability, however slight in distinction, must be charged separately, but they may be so charged if the harms are distinct.[19] This change improves the clarity and consistency of the revised statute.

Fourth, the revised fraud statute increases the number and type of gradations based on the value of the property or number of hours of labor or services lost. The current D.C. Code fraud offense is divided into two grades, with first degree fraud requiring that the accused actually obtained property or caused another to lose property.[20] Each grade of fraud is then divided into felony and misdemeanor versions. Felony first degree fraud requires that the accused obtained property, or caused another to lose property, valued at $1,000 or more. Felony second degree fraud requires that the object of the fraud is $1,000 or more, and there is no requirement that the accused actually obtained the property, or caused anyone to lose property. Misdemeanor versions of first and second degree fraud require that the property gained, property lost, or the object of fraud had any value, and have identical maximum allowable sentences.[21] In contrast, the

[17] Notably, in *Warner v. United States*, 124 A.3d 79, 86 (D.C. 2015) the DCCA held that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." The implication is that every fraud charge could, in the alternative, be charged as theft by deception. Lending support to this notion that fraud may be viewed as two instances of theft by deception, the legislative history of the current fraud statute states that, "[t]he gravamen of the offense of fraud which distinguishes it from theft, is that fraud involves a scheme or systematic course of conduct to defraud or obtain property of another." Committee Report to the Theft and White Collar Crime Act of 1982 at 40.

[18] Under a longstanding fork-in-the-road test, a defendant's momentary, entirely subjective consideration of another matter may be sufficient to break the defendant's conduct into two acts, cognizable as fraud. For example, a defendant convincing a victim to purchase unneeded home repair services (based on defendant's lie about the condition of the home) who pauses momentarily to mention the hot weather before resuming the conversation may be deemed to have engaged in a fresh, second act by continuing the conversation, thereby incurring liability for a "scheme."

[19] The holding in *Youssef v. United States*, to the extent it relied on the requirement of a scheme to determine the relevant unit of prosecution, is no longer compelled under the revised fraud statute. In *Youssef*, the defendant deposited several checks into his Chevy Chase bank account at several locations throughout the city. The accounts he drew on had insufficient funds to cover the checks. However, before the checks cleared, Chevy Chase still allowed him to draw funds from his Chevy Chase account. The defendant ultimately made twenty-nine withdrawals from his Chevy Chase account over a one week period. This scheme was prosecuted as a single count of first degree fraud, as it constituted a single scheme or systematic course of conduct. Under the revised fraud statute, it is possible that these distinct withdrawals could be prosecuted as separate counts. However, if these incidents were prosecuted as separate counts, the *Youssef* holding as to a special unanimity instruction would also no longer apply. On appeal, the defendant argued that because the single count of fraud was premised on allegations of several withdrawals, the trial judge should have instructed the jury that in order to convict, it must be unanimous as to which particular fraudulent transactions it believed occurred. The DCCA rejected this argument, holding that he jury need not be unanimous as to which facts satisfy the elements of the offense. *Youssef*, 27 A.3d at 1207.

[20] D.C. Code § 22-3221.

[21] D.C. Code § 22-3222.

revised fraud offense has a total of five gradations which span a much greater range in value or loss of labor or services, with a value of $250,000 or more, or 2080 hours of labor, required for the most serious grade. In addition, by eliminating the inchoate version of fraud criminalized currently in the D.C. Code as second degree fraud, the penalty gradations for the revised offense will penalize attempted fraud more consistently under the general attempt penalty provision,[22] the same as in other offenses. The change improves the proportionality of the revised offense.

Fifth, the revised fraud statute's grades conduct that involves taking labor or services by the number of hours of labor or services taken. The current D.C. Code fraud offense is graded on the market value of property, not on the number of hours of labor or services. In contrast, the revised statute's separate calculation for the fraudulent taking of labor or services does not distinguish between the harm to persons with different hourly income levels.[23] Grading fraud based on market value risks disproportionately severe penalties in cases involving the fraudulent taking of high cost labor, and disproportionately lenient penalties in cases involving the fraudulent taking of minimum wage or near minimum wage labor. This change improves the proportionality of the revised criminal code.

Beyond these five main changes to current District law, five other aspects of the revised fraud statute may constitute substantive changes of law.

First, the revised fraud offense eliminates the "intent to defraud" means of proving fraud, and therefore requires that the accused obtain property of another for liability as a completed[24] fraud offense. The current D.C. Code fraud statute criminalizes engaging in a scheme "with intent to defraud *or* to obtain property of another[.]"[25] The use of the word "or" suggests that "intent to defraud" could include conduct other than obtaining property by deception. However, neither District statutory nor case law provides a definition of "defraud" and the DCCA has not determined whether the current fraud statute criminalizes conduct beyond obtaining property by deception.[26] Federal courts and courts in other jurisdictions have interpreted fraud statutes with "intent to defraud" elements to include conduct that arguably goes beyond the scope of the revised fraud offense.[27] However, it is unclear if these types of cases would be covered under

[22] RCC § 22E-301(c).

[23] For example, if a person defrauds a person of 10 hours of labor, this constitutes fourth degree fraud, even if the market value of the labor would be sufficient for a higher grade of fraud.

[24] Attempted fraud liability may exist, per RCC § 22E-301, where the actor does not succeed in obtaining property of another.

[25] D.C. Code § 22-3221.

[26] *But see*, *United States v. Lewis*, 716 F.2d 16 (D.C. Cir. 1983) (affirming convictions under prior version of D.C. Code § 22-1805a for conspiracy to defraud the District of Columbia, on theory that the defendants deprived the District of Columbia of right to "faithful services").

[27] So-called "honest services frauds" do not involve deceptive taking of property, but involve a public official, executive, or other person with a fiduciary duty, depriving another person of a right to honest services. For example, if a public official awards a government contract to a bidder, in exchange for a kickback, the official would have deprived the public to its right to honest services, but did not obtain property by deception. *See Skilling v. United States*, 561 U.S. 358 (2010) (holding that honest services frauds are limited to kick back or bribery schemes); *see generally* Judge Pamela Mathy, *Honest Services Fraud After Skilling*, 42 St. Mary's L.J. 645, 704 (2011). Second, obtaining property by means that do not

current District law. Moreover, some DCCA fraud case law indicates that the current fraud offense should be construed to cover only deceptive thefts.[28] To resolve these ambiguities, the revised fraud statute eliminates separate liability for "intent to defraud," focusing the statute on conduct to obtain property of another by deception. This change improves the clarity of the revised statute.

Second, the revised fraud statute defines "deception" to specify the particular means of committing fraud. The current D.C. Code fraud statute generally refers to conduct that obtains property "by means of a false or fraudulent pretense, representation, or promise" in the current fraud statute. The phrase is undefined in current District statutory or case law, however there is scant District case law applying the phrase.[29] To resolve these ambiguities, the revised statute uses a standardized statutory definition of "deception"[30] that broadly provides fraud liability to cover conduct that historically was criminalized at common law as "larceny by trick . . . , and false pretenses."[31] The revised definition of deception is consistent with the limited case law applying the fraud statute's requirement that conduct be "by means of a false or fraudulent pretense, representation, or promise," and is consistent with numerous other revised statutes.[32] This change improves the clarity and consistency of the revised statute.

Third, the revised fraud statute requires that the accused act knowingly with respect to the elements in paragraphs (a)(1)-(a)(2), (b)(1)-(b)(2), (c)(1)-(c)(2), (d)(1)-(d)(2), and (e)(1)-(e)(2). The current D.C. Code fraud statute requires the conduct be committed "with intent to defraud or to obtain property of another" and explicitly references knowledge or intent in a separate provision in the fraud statute explaining liability for a false promise as to future performance.[33]

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involve deception as defined under the statute would also not constitute fraud. *See e.g., People v. Reynolds*, 667 N.Y.S.2d 591 (Sup. Ct. 1997) (defendants convicted of fraud had engaged in a scheme in which plaintiffs' attorneys who had won personal injury judgments paid kickbacks to expedite payment of the judgments by an insurance adjustor).

[28] See *Warner v. United States*, 124 A.3d 79, 86 (D.C. 2015) holding that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." Although the DCCA was not considering the outer bounds of the current fraud statute, the *Warner* holding implies that schemes to deprive others of honest services or to obtain property by wrongful, but not deceptive conduct, are not covered by the current fraud statute.

[29] For example *Youssef v. United States*, 27 A.3d 1202, 1207 (D.C. 2011) (noting that fraud requires acts "calculated to deceive, cheat, or falsely obtain property"; *Cf. Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977) (holding that elements of common law civil fraud are "(1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation"); *see also*, Committee Report for the Theft and White Collar Crime Act of 1982 at 40 (The language 'intent to defraud' expresses the concept of an intent to deceive or cheat someone.").

[30] For a detailed description of the definition of "deception," see the commentary entry to RCC § 22E-701.

[31] Conduct previously known as larceny by trust or embezzlement remains part of theft, except insofar as such conduct operates by means of deception and is therefore part of the revised fraud statute (22E-2201).

[32] *See, e.g.*, RCC § 22E-1401 (kidnapping, including as one form an interference with another's freedom of movement by deception, under specified circumstances) and the many revised offenses that use a definition of "effective consent" in RCC § 22E-701, which in relevant part refers to consent other than consent obtained by deception.

[33] D.C. Code 22-3221(c) ("Fraud may be committed by means of false promise as to future performance which the accused does not intend to perform or knows will not be performed. An intent or knowledge shall not be established by the fact alone that one such promise was not performed").

However, the fraud statute is silent as to the applicable culpable mental state requirements for other elements of the offense. The DCCA has recognized a knowledge requirement in the context of a false promise,[34] but there is no other case law on point. Current practice in the District may apply a less stringent culpable mental state of recklessness, based on case law in other jurisdictions.[35] To resolve these ambiguities, the revised statute requires knowing culpable mental states as to the elements of "takes, obtains, transfers, or exercises control over property of another" and acting "with the consent of an owner obtained by deception." Requiring knowing culpable mental states for these fraud elements is consistent with the current theft statute, which requires that the accused knew he or she lacked consent to take property of another,[36] and the revised theft and other property offenses. This change improves the clarity, consistency, and completeness of the revised statute.

Fourth, the gradations of the revised statute use the term "in fact," to specify that no culpable mental state is required as to the value of the property or number of hours of labor or services. The current statute is silent as to what culpable mental state, if any, applies to the value of property. There is no DCCA case law on point, although District practice does not appear to require a culpable mental state as to the monetary values in the current gradations.[37] To resolve these ambiguities, the revised statute specifies that strict liability applies to the elements regarding the value of the property or the number of hours of labor or services. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[38] This change improves the clarity, consistency, and completeness of the revised statute.

Fifth, the revised statute extends jurisdiction for fraud only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3224.01 states that jurisdiction extends to cases in which "[t]he person who was defrauded is a resident of, or located in, the District of Columbia at the time of the fraud;" or "[t]he loss occurred in the District of Columbia[.]" The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a

[34] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]"

[35] *See*, D.C. Crim. Jur. Instr. § 5-200 ("A showing of reckless indifference for the truth will support a charge of fraud. *See U.S. v. Frick*, 588 F.2d 531 (5th Cir. 1979); *U.S. v. Amrep Corp.*, 560 F.2d 539 (2d Cir. 1977); *U.S. v. Love*, 535 F.2d 1152 (9th Cir. 1976).").

[36] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted); *Nowlin v. United States*, 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").

[37] D.C. Crim. Jur. Instr. § 5.200.

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

District resident, or was located in the District at the time of the fraud.[39] 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.[40] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[41] and such an extension, if intended, may be unconstitutional.[42] This change improves the clarity and perhaps the constitutionality of the revised statutes.

One other change to the revised fraud statute is clarificatory in nature and are not intended to substantively change District law.

The revised fraud statute eliminates the special fine enhancement which provides an alternative fine of "twice the value of the property obtained or lost, whichever is greater" for first and second degree fraud of property worth $1,000 or more does not affect available punishments. An equivalent provision in RCC § 22E-604(c) provides an alternate maximum fine of not more than twice the pecuniary gain or loss caused.

[39] For example, a District resident while on vacation in Florida is deceived into buying a fake gold watch. Under the revised statute, District courts would not have jurisdiction in this case since the relevant conduct occurred entirely outside the District.
[40] *See, Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
[41] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[42] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

RCC § 22E-2202. Payment Card Fraud.

Explanatory Note. *This section establishes the payment card fraud offense and penalty gradations for the Revised Criminal Code (RCC). This offense criminalizes the use of a payment card, typically a credit card, to pay for or obtain property without the consent of the person to whom the card was issued, or the use of a payment card with knowledge that the card has already been canceled or revoked, or that the card had never actually been issued. It is also payment card fraud if the person uses for his or her own purposes a card that was issued to that person by an employer or contractor for the employer's purposes. The penalty gradations are determined by the value of the property obtained or amount paid using the payment card. The revised offense replaces the current credit card fraud[1] statute in the current D.C. Code.*

Subsection (a) specifies the elements for first degree payment card fraud. Paragraph (a)(1) specifies the element that a person must obtain or pay for property by using a payment card. The term "property" is a defined in RCC § 22E-701 to mean "something of value," including goods and services. "Payment card" is a defined in § 22E-701 as an instrument of any kind issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card.[2] Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would obtain or pay for property by using a payment card.

Paragraph (a)(1) also specifies four additional alternate elements, at least one of which must be proven beyond a reasonable doubt. Subparagraph (a)(1)(A) states that the accused must use the payment card "without the effective consent of the owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "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." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. "Owner" is defined in § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with, without consent. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(1)(A), here requiring the accused to be aware to a practical certainty that he or she lacked effective consent of the owner to use the payment card.

Subparagraph (a)(1)(B) states that the accused must use the payment card after the card was revoked or canceled. The term "revoked or canceled" is defined in RCC § 22E-701, to means that notice, in writing, of revocation or cancellation either was received by the named holder, as shown on the payment card, or was recorded by the issuer. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(2)(B), here requiring the accused to be aware to a practical certainty that the card had been revoked or canceled.

[1] D.C. Code § 22-3223.

[2] The definition includes not only credit and debit cards, but common items such as gift cards, membership cards, and metro cards used to obtain or pay for goods, services, or any kind of property.

Subparagraph (a)(1)(C) states that the accused must use a payment card that had never actually been issued. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(1)(C), here requiring the accused to be aware to a practical certainty that the card had never actually been issued.

Subparagraph (a)(1)(D) states that the accused must use the payment card for his or her own purposes, when the person is an employee or contractor, and the payment card was issued to the person for the employer's purposes.[3] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subparagraph (a)(1)(D), here requiring the accused to be aware to a practical certainty that the card had been issued to or provided for the employer's purposes, and that the accused was using the card for his or her own purposes.

Paragraph (a)(2) specifies that the property a person pays for or obtains was, in fact, valued at $500,000 or more. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree payment card fraud. The elements of each grade of fraud are identical to the elements of first degree payment card fraud, except for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree fraud, which has no specific minimum value.[4] As with first degree fraud, strict liability applies to value of the property other than labor or services, or the hours of labor or services in each grade of fraud.

Subsection (f) specifies relevant penalties for each grade of payment card fraud. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised payment card fraud statute changes current District law in one main way.*

First, the revised payment card fraud statute increases the number of grade distinctions and dollar value cutoffs. Under the current D.C. Code statute, first degree payment card fraud involves property with a value of $1,000 or more and is punished as a serious felony; second degree payment card fraud involves property valued at less than $1,000 and is a misdemeanor.[5] By contrast, the revised payment card fraud offense has a total of five gradations which span a much greater range in value, with a value of $500,000 or more being the most serious grade. The revised offense's gradations are consistent with other revised property offense gradations. This change improves the consistency and proportionality of the revised offense.

[3] For example, if a payment card is issued to an employee and that employee is authorized to use the card for the employer's purposes, if that employee uses the card to purchase goods or services for his own personal use, that employee may be found guilty of payment card fraud.

[4] However, as defined in RCC § 22E-701, "property" means "anything of value."

[5] D.C. Code § 22-3223(d) ("(1) Except as provided in paragraph (2) of this subsection, any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both. (2) Any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, if the value of the property or services obtained or paid for is $1,000 or more.").

Beyond this one main change to current District law, five other aspects of the revised payment card fraud statute may constitute substantive changes of law.

First, the revised statute eliminates the current statute's requirement that the accused act "with intent to defraud."[6] The current statute does not define the term "defraud," and the D.C. Court of Appeals (DCCA) has never defined the meaning of the language in the credit card fraud statute. Current District practice does not appear to include an "intent to defraud" element.[7] To resolve this ambiguity, the revised statute eliminates the term. An additional "intent to defraud" element is not necessary to distinguish innocent from criminal conduct in the revised offense because the revised statute requires the accused actually pay for the property, and the accused must know one of the elements in subparagraphs (a)(1)(A)-(D) and comparable provisions in other paragraphs were satisfied. This change clarifies the revised statute.

Second, the revised statute requires that the accused act knowingly with respect to the elements in paragraphs (a)(1), (b)(1), (c)(1), (d)(1), and (e)(1). The current statute itself is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] Requiring a knowing culpable mental state also makes the elements of payment card fraud consistent with the revised fraud statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[9] This change clarifies the revised statute.

Third, the revised statute does not expressly criminalize using a "falsified, mutilated or altered" card as provided in the current D.C. Code statute.[10] The current statute does not define these terms, and there is no case law interpreting the provision. To clarify the revised statute, specific reference to use of a "falsified, mutilated or altered" card is removed. The other provisions of the revised offense in subparagraphs (a)(1)(A)-(D) and comparable provisions in other paragraphs cover many instances apparently criminalized under the eliminated "falsified, mutilated or altered" provision. Knowing uses of a "falsified mutilated or altered" card may also be criminalized under the revised forgery offense, RCC § 22E-2204. This change clarifies and reduces unnecessary overlap between revised offenses.

Fourth, subsections (a)-(e), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property obtained or paid for by using the payment card. The current D.C. Code statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the current payment card fraud value gradations, although District practice does not appear to apply a mental state to the monetary values in the current

[6] D.C. Code § 22-3223 ("A person commits the offense of credit card fraud if, with intent to defraud, that person.").
[7] D.C. Crim. Jur. Instr. § 5.201.
[8] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[9] *See, e.g.*, RCC § 22E-2201.
[10] D.C. Code § 22-3223 (3).

gradations.[11] To resolve this ambiguity, the revised statute specifies that the value of the property is a matter of strict liability. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[12] This change improves the clarity and completeness of the revised statute.

Fifth, the revised statute extends jurisdiction for payment card fraud only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3224.01 states that jurisdiction extends to cases in which "1) The person to whom a credit card was issued or in whose name the credit card was issued is a resident of, or located in, the District of Columbia; (2) The person who was defrauded is a resident of, or located in, the District of Columbia at the time of the fraud; (3) The loss occurred in the District of Columbia[.]" The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a District resident, or was located in the District at the time of the fraud.[13] 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.[14] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[15] and such an extension, if intended, may be unconstitutional.[16] This change improves the clarity and perhaps the constitutionality of the revised statutes.

[11] D.C. Crim. Jur. Instr. § 5.201.
[12] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").
[13] For example, person A resides in Florida, and while on vacation in the District, a person in Florida uses A's credit card to fraudulently purchase items from a store in Florida without A's permission. Under the revised statute, District courts would not have jurisdiction in this case.
[14] *See, Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
[15] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[16] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

RCC § 22E-2203. Check Fraud.

Explanatory Note. *This section establishes the check fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes using a check to obtain or pay for property, with intent that the check will not be honored in full. The penalty gradations are determined by the value of the loss to the check holder. The revised offense replaces the current making, drawing, or uttering check, draft, or order with intent to defraud*[1] *statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree check fraud. Paragraph (a)(1) specifies that a person must obtain or pay for "property," a defined term in RCC § 22E-701 meaning anything of value.[2] The accused must obtain or pay for the property by using a check. "Check" is a defined term in RCC § 22E-701, and includes any written instrument for payment of money by a financial institution. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she obtains or pays for property by a check.

Paragraph (a)(2) specifies that the use of the check must be "with intent that" the check not be honored in full upon presentation to the bank or depository institution. "Intent" is a defined term in RCC § 22E-206 meaning here that the defendant was practically certain that a bank or depository institution would not honor the check in full. Per RCC § 22E-205, the object of the phrase "with intent that" 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 bank or financial institution did not actually honor the check in full, just that the defendant believed to a practical certainty, or desired, that the check would not be honored in full. The specific basis for why a person believes the bank or depository institution will not honor the check is not specified in the offense, and all that must be proven is the actor's belief at the time that the check will not be honored, whatever the basis.[3] This element requires that the accused believe to a practical certainty that the bank or depository institution will not honor the check *when it is presented* to the bank or depository institution, which may occur after the check is actually used to pay for property.[4]

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[1] D.C. Code § 22-1510.

[2] E.g., the property received may be cash, goods, or services.

[3] For example, a person may believe that their check will not be honored because they have insufficient funds or credit, but other bases for expecting a check will not be honored may include having a hold on an account.

[4] For example a person who knowingly tries to cash a check at his bank that draws upon his overdrawn account would be simultaneously "presenting" the check at the same time as he uses it to obtain property (cash). However, perhaps more typically, the accused would use the check to obtain property (goods) at a business which only later would present the check to the bank for deposit. The possibility of a time lapse between the time of using the check and it being presented to the financial institution may be important to proving the offense, because it may indicate the defendant did not have a culpable mental state. For example, a person would not be liable when that person presents a check to a business owner that draws upon his overdrawn account, but lacks knowledge that the check will not be honored upon presentation to the financial institution because he or she plans to immediately go make a deposit in the account to cover the check. Similarly, a person who spoke with a merchant and was told her check wouldn't be deposited for two weeks would not be liable for check fraud if she then used a check that she knew would not be

Paragraph (a)(3) specifies that there must be a loss to the check holder that is, in fact, $5,000 or more. Paragraph (a)(3) uses the term "in fact," which is defined in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the amount of loss to the check holder. The amount of the loss to the check holder may differ from the face value of the check.[5] A person who pays for or obtains property with the necessary intent need not be aware that the check holder actually experienced a loss, or the amount of the loss. Practically, very high value checks are unlikely to be accepted by a person without bank verification, resulting in few or no completed instances of very high value check fraud.[6]

Subsection (b) specifies the elements of second degree check fraud. The elements of second degree check fraud are identical to the elements of first degree check fraud, except that that there must be a loss to the check holder that is, in fact, $500 or more.

Subsection (c) specifies the elements of third degree check fraud. The elements of third degree check fraud are identical to the elements of first degree check fraud, except that that there is no minimum required amount of loss to the check holder. Any amount of loss to a check holder is sufficient for third degree check fraud.

Subsection (d) specifies penalties for each grade of the check fraud offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised check fraud statute changes current District law in five main ways*.

First, the revised statute requires that the accused obtain or pay for property or services with a check. Under the current D.C. Code statute, merely making, drawing, uttering, or delivering a bad check is sufficient.[7] Such language is not defined by the current statute,[8] and case law provides no precise definition either. However, the plain language of the current statute appears to include a broad range of conduct that ordinarily would be considered inchoate in most property offenses because no actual harm to anyone is required.[9] In contrast, the revised check fraud statute requires that the accused actually obtains or pays for property by using a check. By requiring that the accused

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honored by the financial institution if presented that day, but she planned to take action to ensure the check would be honored in two weeks.

[5] *E.g.*, if a person writes a check to a merchant for $2500 dollars, but upon presentation to the financial institution the bank honors the check for a value of $1000 and there is a $20 fee by the bank on the check holder based on the fact that the account drawn upon was insufficient, the loss for purposes of grading would be $1520.

[6] However, a person may be liable for attempt check fraud per RCC § 22E-301 even when there is no loss to the check holder.

[7] D.C. Code § 22-1510 ("Any person within the District of Columbia who…shall make, draw, utter, or deliver…").

[8] However, "utter" is statutorily defined in the District's forgery statute. See D.C. CODE § 22-1510 ("Utter" means to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or certify.").

[9] *E.g.*, the ordinary meaning of "drawing" a check is to "create and sign" a check. Black's Law Dictionary (10th ed. 2014). Such conduct, when done with intent to defraud, knowing that insufficient funds are available to cover the check would complete the existing offense—even if the accused did it while at home alone one evening, communicating the drawn check to no one.

actually obtain or pay for property or services, the revised offense significantly narrows liability for the completed offense to situations where the harm has been completed (i.e. the bad check has been used to obtain something of value) or is very nearly completed (i.e. payment is made, whether or not the property is obtained). Additional liability for *attempted* check fraud would continue to exist, potentially covering much of the conduct criminalized under the current statute.[10] This change improves the consistency and proportionality of the revised statute.

Second, the revised check fraud statute does not provide an evidentiary inference regarding the check user's bad intent based on their failure to timely repay a bounced check. The current D.C. Code statute specifies that, "it shall be prima facie evidence of the intent to defraud . . . [if the accused] shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within 5 days after receiving notice in person, or writing, that such check, draft, order, or other instrument has not been paid."[11] There is no DCCA case law interpreting this provision.[12] In contrast, the RCC omits this statutory inference of intent because it appears to be unconstitutional.[13] However, even with this language omitted, the government may still present evidence of the accused's failure to pay the check holder after receiving notice that the check was not honored, and a fact finder may consider this evidence in determining whether the accused knew at the time the check was used that it would not be honored in full. This change improves the proportionality of the revised statute.

Third, the revised check fraud statute increases the number of penalty gradations, changes the dollar value cutoffs, and specifies that it is the value of the loss to the check holder that should be used to determine gradations. The current D.C. Code check fraud offense is divided into two penalty grades, and turns on the amount of the check, being a

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[10] *E.g.*, Drawing a check, with intent to defraud, knowing that insufficient funds are available to cover the check may well constitute attempted check fraud if the accused did so at the counter of a check cashing business while waiting for the clerk. *See*, generally, RCC § 22E-301 Criminal Attempt.

[11] D.C. Code § 22-1510.

[12] However, the D.C. Court of Municipal Appeals, the pre-cursor to the DCCA, has held that the "the presumption of fraudulent intent created by the statute" may still apply even when the check was used to "in payment of an antecedent debt." *Clarke v. United States*, 140 A.2d 181, 182 (D.C. 1958), *aff'd*, 263 F.2d 269 (D.C. Cir. 1959).

[13] In *Reid v. United States*, 466 A.2d 433 (D.C. 1983), the DCCA considered whether part of a statute criminalizing obliterating identifying marks on a pistol was constitutional. The statute in part, read "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia[.]" D.C. Code § 22-4512. The DCCA stated that "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.'" *Id.* (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)).

Although the issue has not been litigated before the DCCA, it appears that the portion of the current uttering statute which allows an inference of "intent to defraud" would similarly fail. It does not seem that it can be said "with substantial assurance" that it is "more likely than not" that a person who fails to pay back the check holder within 5 days of learning that the check was not honored had "intent to defraud" at the time the check was used. For example, a person may use a check to pay for property, genuinely believing that the check would be honored, and simply not have enough money to pay the check holder in full within 5 days of learning that the check was not honored.

three-year felony if the offense is $1,000 or more, otherwise a misdemeanor.[14] The current statute's grading based on the amount of the check may lead to counterintuitive liability in instances where there are nearly, but not fully, sufficient funds to cover a large value check.[15] By contrast, the revised check fraud offense is divided into three penalty grades based on the actual loss to the check holder, and the threshold values are set at $500 and $5,000. The $5.000 threshold for first degree check fraud is consistent with other revised property offenses, which generally adopt a $5,000 threshold for property offenses to be subject to felony penalties. This change improves the consistency and proportionality of the revised statute.

Fourth, the provision in RCC § 22E-2001, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised check fraud offense based on a single scheme or systematic course of conduct. In the current D.C. Code, the statutory provision that allows for aggregation of value across many property offenses[16] does not include the current check fraud offense, which is located in another chapter of the D.C. Code. In contrast, the revised check fraud statute permits aggregation for determining the appropriate grade of check fraud to ensure penalties are proportional to the accused's actual conduct. This change improves the consistency, and proportionality of the revised offense.

Fifth, the revised statute makes liability turn on a person's belief that his or her check will not be honored by the bank or depository institution. The current D.C. Code statute requires, more narrowly, that the accused know that he or she has insufficient funds or credit to cover the check.[17] There is no case law interpreting the scope of this element. In contrast, the revised statute provides liability in instances where the accused knows of other reasons[18]—besides insufficient funds or credit—why the bank or depository institution will deny payment and cause a loss to the check holder. This change may fill a gap in existing law.

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[14] D.C. Code § 22-1510 ("Any person…shall, if the amount of such check, draft, order, or other instrument is $1,000 or more, be guilty of a felony and fined not more than the amount set forth in § 22-3571.01 or imprisoned for not less than 1 year nor more than 3 years, or both; or if the amount of such check, draft, order, or other instrument has some value, be guilty of a misdemeanor and fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both.").

[15] E.g., a person who writes a check for $1,001, knowing there is only $1,000 available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a three year felony under current law. By contrast, a person who writes a check for $999, knowing there is no money available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a 180-day misdemeanor under current law.

[16] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[17] D.C. Code § 22-1510 ("…knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument….").

[18] E.g., if an account is frozen for legal or investigatory reasons, or the accused has closed the type of account the check purports to draw upon.

Beyond these five main changes to current District law, three other aspects of the revised check fraud statute may constitute substantive changes of law.

First, the revised statute requires that the accused act knowingly with respect to obtaining or paying for property by using a check. The current statute is silent as to the culpable mental state requirements applicable to the clause "make, draw, utter, or deliver any check, draft, order, of other instrument for the payment of money upon any bank or other depository,"[19] and no case law exists on point.[20] To resolve this ambiguity, the revised statute applies a knowledge culpable mental state requirement. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[21] Requiring a knowing culpable mental state also makes check fraud consistent with the revised fraud statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[22] The change improves the clarity and completeness of the revised offense.

Second, the revised statute requires that the accused acted with intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon. The current statute requires that the actor "with intent to defraud,"[23] and that the person act "knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument in full upon its presentation."[24] The current statute does not define the terms "defraud" or "knowing" and the DCCA has never defined the meaning of the language in the uttering a check, draft, or order with intent to defraud statute. To resolve these ambiguities, the revised statute applies a "with intent" culpable mental state requirement to the element that the check not be honored in full. A person who believes to that the check they are using to gain property will not be honored in full has an intent to deceive the recipient, and belief to a practical certainty appears to be equivalent to the level of certainty ordinarily associated with knowledge. The revised statute's "with intent" requirement is consistent with the revised fraud[25] statute and other property offenses, using the RCC's standardized definition. This change improves the clarity and consistency of the revised statute.

Third, first degree check fraud uses the phrase "in fact," to codify that no culpable mental state is required as to the value of the loss to the check holder. The current statute is silent as to what culpable mental state, if any, applies to this element. There is no District case law on what mental state, if any, applies to the current check fraud value gradations, although District practice does not appear to apply a mental state to the

[19] D.C. Code § 22-1510.
[20] There is a DCCA case suggesting that the culpable mental state of the current uttering offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565–66 (D.C. 1996). However, in that case, the DCCA quoted the Redbook Jury Instructions, and did not make a ruling based on the offense being a specific intent crime.
[21] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[22] *See, e.g.*, RCC § 22E-2201.
[23] D.C. Code § 22-1510.
[24] D.C. Code § 22-1510.
[25] RCC § 22E-2201.

monetary values in the current gradations.[26] To resolve this ambiguity, the revised statute applies strict liability as to the amount of loss. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[27] This change clarifies and potentially fills a gap in the revised statute.

[26] D.C. Crim. Jur. Instr. § 5.211.

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

RCC § 22E-2204. Forgery.

Explanatory Note. *This section establishes the forgery offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes making, completing, altering, using, or transmitting falsified written instruments, when the accused has intent to use the written instrument to obtain property by deception, or to otherwise harm another person. The revised offense replaces the current forgery[1] statutes and the recordation of deed, contract, or conveyance with intent to extort money[2] in the current D.C. Code.*

Subsection (a) specifies the elements of first degree forgery. First degree forgery requires that the accused commits third degree forgery, and in addition the written instrument falls into one of the categories specified in subparagraphs (a)(2)(A)-(E). These subparagraphs describe various public records or documents of legal import, such as wills and contracts, as well as any written instrument with a value of more than $50,000. Paragraph (a)(2) uses the term "in fact," a defined term in RCC § 22E-207, which indicate that there is no culpable mental state requirement as to the type or value of written instrument.

Subsection (b) specifies the elements of second degree forgery. Second degree forgery requires that the accused commits third degree forgery, and in addition the written instrument falls into one of the categories specified in subparagraphs (b)(2)(A)-(C). These subparagraphs describe various prescriptions and tokens, fair cards, public transportation transfer certificates, or other articles intended as symbols of value for use as payment for goods and services, as well as any written instrument with a value of more than $5,000. Paragraph (b)(2) uses the term "in fact," a defined term in RCC § 22E-207, which indicates that there is no culpable mental state requirement as to the type or value of written instrument.

Subsection (c) specifies three alternate means of committing third degree forgery. Paragraph (c)(1) specifies that the accused knowingly does any of the acts described in subparagraphs (c)(1)(A)-(C). Subparagraph (c)(1)(A) provides that the accused alters a written instrument without authorization, and the written instrument is reasonably adapted to deceive a person into believing it is genuine. Subsection (c)(1) specifies that a knowingly culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she altered was a written instrument, that he or she lacked authority to do so, and that the alteration was reasonably adapted to deceive a person into believing it is genuine. This subsection covers unauthorized alterations to written instruments even if they were originally genuine.

Subparagraph (c)(1)(B) requires that that the accused make or complete a written instrument. In addition, when making or completing the item, the written instrument must appear: to be the act of someone who did not authorize the making or creating; to have been made or completed at a time or place or in a numbered sequence other than was in fact the case; or to be a copy of an original when no such original existed. Further, under subparagraph (c)(1)(B)(ii), the written instrument must be reasonably adapted to deceive a person into believing the written instrument is genuine. Per the rule

[1] D.C. Code §§ 22-3241 - 22-3242.
[2] D.C. Code §22-1402.

of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (c)(1) also applies to all of the elements in subparagraph (c)(1)(B).

Subparagraph (c)(1)(C) requires that that the accused transmits or uses a written instrument that was made, signed, or altered as described in subparagraphs (c)(1)(A) or (c)(1)(B). The accused must have known he was transmitting or using the instrument, and known that the instrument was altered, made, or completed in a manner listed under subparagraphs (c)(1)(A) or (c)(1)(B). Subparagraph (c)(1)(C) codifies conduct previously known as "uttering."[3]

Paragraph (c)(2) further requires that, whichever alternative means of committing forgery occurs, the accused also must act "with intent to" obtain property of another by deception, or to otherwise harm another person. "Intent" is a defined term in RCC § 22E-206 that here means the accused was practically certain he or she would obtain property by deception or harm another person. The word harm does not require bodily injury and should be construed more broadly to include causing an array of adverse outcomes.[4] 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 accused actually obtained property or harmed another, only that the accused believed to a practical certainty that he or she would do so. In a forgery prosecution predicated on intent to obtain property by deception, the deception must relate to the *genuineness* of the written instrument, not false information contained within the instrument.[5]

Subsection (d) specifies penalties for each grade of the forgery offense.

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

Relation to Current District Law. *The revised forgery statute changes current District law in four main ways.*

First, the revised offense makes forgery, by any means, one offense. Despite the fact that its text makes no indication of the matter, the current forgery statute has been recognized by the D.C. Court of Appeals (DCCA) as codifying two separate legal offenses—forgery and uttering a forged document.[6] Under current law, a person can be convicted of both forgery and uttering, based on forging and then using a single written instrument.[7] In contrast, although multiple forgery convictions with respect to a single

[3] D.C. Code § 22-3241(a)(2).

[4] For example, forging business documents with intent to harm the business reputation of a business rival would constitute forgery.

[5] *See* Lafave, Wayne, 3 Subst. Crim. L. § 19.7 (2d ed.) ("Though forgery, like false pretenses, requires a lie, it must be a lie about the document itself: the lie must relate to the genuineness of the document."); Commentary to MPC § 224.1 at 289 ("Where the falsity lies in the representation of facts, not in the genuineness of the execution, it is not forgery.)

[6] *White v. United States*, 582 A.2d 774, 778 (D.C. 1990) ("it should be noted that forgery and uttering constitute two distinct offenses, albeit contained in a single statutory provision") *aff'd* 613 A.2d 869, 872 (D.C. 1992) (en banc). The DCCA ruling on this point follows apparent legislative intent. See COMMENTARY TO THEFT AND WHITE COLLAR CRIME ACT of 1982 at 60.

[7] *Id. at* 872 n.4 (D.C. 1992) (rejecting claim that uttering and forgery convictions should merge); *see also, Driver v. United States*, 521 A.2d 254, 256 (D.C. 1987) (defendant convicted of both forgery and uttering based on forging, and attempting to cash a single check).

written instrument may still occur under the revised statute,[8] the revised statute would change current law by barring convictions for both creating and using a forged document as part of the same act or course of conduct. The combined, revised offense eliminates unnecessary overlap in the revised statute.

Second, the revised statute replaces the "intent to defraud" element in the current statute with "intent to obtain property of another by deception." The current statute does not define the term "defraud," and DCCA has never defined the meaning of the language in forgery.[9] Consequently, the precise effect of the revision is unclear. In contrast, the revised statute requires that the accused act with intent to obtain property by deception. This revised language is intended to be broad enough to cover all, or nearly all, [10] the wrongful intentions that currently fall under the "intent to defraud" language in the current statute. Moreover, there remains the alternative element of committing the offense "with intent to harm another person," which broadly criminalizes forgery with ill-intent. The revised offense improves the clarity and consistency of the revised statute.

Third, the revised statute no longer grades forgery of payroll checks as first degree forgery. Under current law, forging payroll checks is subject to the highest maximum penalties allowed for forgery.[11] By contrast, under the revised statute, if a person commits forgery involving a payroll check, or an instrument that appears to be a payroll check, the gradation would be determined by the value of that instrument. This revision treats the forgery of payroll checks the same as forgeries of any other kinds of checks. This change improves the consistency and proportionality of the revised offense.

Fourth, the provision in RCC § 22E-2001, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised forgery offense based on a single scheme or systematic course of conduct. The current forgery offense is not part of the current D.C. Code aggregation of value provision for property offenses.[12] In contrast, the revised forgery statute permits aggregation for determining the appropriate grade of forgery. This change improves the proportionality of the revised statute.

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[8] *E.g.*, If a person forges a written instrument, and uses it to obtain property from another, then as part of a different act or course of conduct, uses the same forged written instrument to obtain different property, then multiple convictions might be warranted. Multiple convictions with respect to a single forged instrument may or may not be appropriate depending on the facts of a particular case.

[9] Note though that other jurisdictions have held that intent to defraud includes "the purpose of causing financial loss to another," and to "prejudice . . . the rights of another[.]" People v. Lawson, 28 N.E.3d 210, 215–16 (Ill. Ct. App. 2015); *State v. Bourgeois*, 113 So. 3d 225, 230 (La. Ct. App. 2013).

[10] For example, a person could conceivably commit an "honest services fraud" by using forged documents. "Honest services fraud" does not involve obtaining property by deception, but instead involves depriving another of a right to honest or fair services. For example, if a public official used a forged document in an act of nepotism, this could constitute an honest services fraud, but would not involve obtaining property by deception. It is unclear if this type of conduct is covered by the current statute, but it would be excluded under the revised statute, except to the extent that it constituted an "intent to harm" another person.

[11] D.C. Code § 22-3242 (5).

[12] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

Beyond these four main changes to current District law, two other aspects of the revised forgery statute may constitute a substantive change of law.

First, the revised statute requires that the accused act knowingly with respect to the elements in subparagraphs (c)(1)(A)-(C).[13] The current D.C. Code forgery statute is silent as to the applicable culpable mental state requirements, and no case law exists on point.[14] To resolve this ambiguity, the revised statute applies a culpable mental state requirement of knowledge. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Requiring knowing culpable mental states also makes forgery consistent with the fraud statute, which requires that the accused knew that he or she used deception to obtain consent to take property.[16]

Second, the revised statute clarifies that a person is strictly liable as to the type or value of written instrument for purposes of grading forgery. Under the current D.C. Code statute and case law it is unclear what culpable mental state, if any, is required as to the type or value of written instrument involved in the forgery, and no case law exists on point. To resolve this ambiguity, the revised statute specifies that there is no culpable mental state required as to the type or value of written instrument. While applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[17] the presumption that the accused must have a subjective intent has not typically been applied to facts that merely distinguish the degree of wrongdoing.[18] The particular type of written instrument that has been forged does not distinguish innocent from criminal conduct, so no culpable mental state is assumed to apply to that fact. Applying no culpable mental state requirement to statutory elements that do not

[13] There is some DCCA case law suggesting that the culpable mental state of the current forgery offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565 (D.C. 1996). However, in this case, the DCCA was quoting the Redbook Jury Instructions, and not making an actual holding.

[14] There is one possible exception. In *Ashby v. United States*, 363 A.2d 685 (D.C. 1976), the defendant was convicted of forgery for signing a false name to a check. On appeal, the defendant argued that there was insufficient to find that he had the requisite "intent to defraud." Although the D.C. Court of Appeals did not specifically define what is required for "intent to defraud," it noted that the defendant's "*awareness* that the name he affixed to the check for the purpose of cashing it was not his own" served as evidence of his "intent to defraud." *Ashby*, 363 A.2d at 687. At least in regards to the element under subsection (a)(1)(B)(i), there is some case law suggesting that a culpable mental state of "knowing" is appropriate.

[15] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[16] RCC § 22E-2201.

[17] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[18] *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 325 (2012) ("State and federal courts frequently cite the U.S. Supreme Court for this point. Relying on United States v. X-Citement Video, Inc., courts emphasize 'the presumption in favor of a scienter requirement should apply to each of the statutory elements [of an offense] that criminalize otherwise innocent conduct'--but no elements beyond those.").

distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[19]

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

First, the revised forgery statute deletes the definition of "forged written instrument" and instead separately specifies conditions in which altering, making, completing, transmitting, or using a written instrument constitutes forgery. The current statute defines "forged written instrument" to include written instruments that have "been *falsely* made, altered, signed, or endorsed[.]"[20] The DCCA has clarified however that an instrument is falsely made, altered, or signed, when the person making, altering, or signing the instrument lacked authority to do so.[21] The revised statute includes this requirement; when a forgery prosecution is premised on altering an instrument, the accused must have lacked authority to do so. The current definition of "forged written instrument" also includes instruments that "contain[] a false addition or insertion."[22] Again, the revised statute's reference to altering a written instrument without authorization is intended to cover all instruments that "contain a false addition or insertion" under the current statute. Finally, the current definition of "forged written instrument" also includes instruments that are a "combination of parts of 2 or more genuine written instruments."[23] Correspondingly, the revised statute's reference to making or completing a written instrument that appears to have been made or completed at a time or place or in a numbered sequence other than was in fact the case, is intended to cover cases in which two otherwise genuine instruments are combined. The DCCA has not precisely defined when an instrument has been falsely made, altered, signed, or endorsed, or when an addition or insertion is false. The direct integration into the revised offense of elements in the current definition of "forged written instrument," and the clarification of those requirements, is not intended to substantively alter the scope of the offense.

Second, the revised statute requires that the accused "alters," "makes," "completes," "transmits," or "uses" a written instrument. These verbs are intended to encompass the words "makes, draws," or "utters"—the last being a term defined to mean, "to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or

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

[20] D.C. Code § 22-3241 (a)(1)(A) (emphasis added).

[21] *See, Martin v. United States*, 435 A.2d 395, 398 (D.C. 1981) (noting that "It is the unauthorized completion of the stolen money orders which renders the instruments "falsely made or altered"); *Hall v. United States*, 383 A.2d 1086, 1089–90 (D.C. 1978) ("to establish falsity in a forgery charge it must be made to appear not only that the person whose name is signed to the instrument did not sign it, but also it must be established by competent evidence that the name was signed by defendant without authority") (quoting Owen v. People, 195 P.2d 953 (Colo. 1948)).

[22] D.C. Code § 22-3241 (a)(1)(B).

[23] D.C. Code § 22-3241 (a)(1)(C).

certify."[24] The verbs "draws," and "issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, [], or certify," appear to be duplicative[25] and their elimination is intended only to clarify, not change, current law.

Third, the revised statute requires that the forged instruments be "reasonably adapted to deceive a person into believing it is genuine." Although the current forgery statute does not include this language, the requirement is based on current DCCA case law. The DCCA has held that forgery requires that the forged written instrument "must be apparently capable of effecting a fraud."[26] The "reasonably adapted" language in the revised statute is intended to codify this element recognized in case law.

Fourth, the revised statute eliminates as a separate offense the current offense of recordation of deed, contract, or conveyance with intent to extort money under D.C. Code § 22-1402.[27] Under that statute, it is a crime for a person to cause any instrument purporting to convey or relate to land in the District to be recorded in the office of the Recorder of Deeds, when that person has no title or color of title to the land, and with intent to extort money or anything of value from the true owner. Insofar as it involves use of a forged instrument with intent to harm another, the conduct constituting an offense under D.C. Code § 22-1402 would necessarily satisfy the elements under the revised forgery statute. Due to the complete overlap between D.C. Code § 22-1402 and the revised forgery statute, D.C. Code § 22-1402 is deleted as redundant.

[24] D.C. Code § 22-3241.
[25] *E.g.*, anytime a person "endorses," a written instrument, that person would also have necessarily either altered, made, completed, transmitted, or otherwise used the written instrument.
[26] *Martin*, 435 A.2d at 398 (D.C. 1981); *Hall*, 383 A.2dat 1089–90 (D.C. 1978). *See also*, Commentary to 1982 Theft and White Collar Crime Act. ("The final element which must be proven is that the falsely made or altered writing was apparently capable of effecting a fraud.").
[27] D.C. Code §22-1402.

RCC § 22E-2205. Identity Theft.

Explanatory Note. *This section establishes the identity theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes possessing, using, or creating a wide array of personal identifying information, without consent of the owner, for specified wrongful ends. The penalty gradations are based on the value of property obtained, payment avoided, or the financial loss caused, by the identity theft. The revised identity theft offense replaces the criminal identity theft*[1] *statutes in the current D.C. Code.*

Subsection (a) specifies the elements of first degree identity theft. First degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greatest, in fact, is $500,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[2] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (b) specifies the elements of second degree identity theft. Second degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greatest, in fact, is $50,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[3] Subsection (b) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (c) specifies the elements of third degree identity theft. Third degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greatest, in fact, is $5,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[4] Subsection (c) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (d) specifies the elements of fourth degree identity theft. Fourth degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greater, in fact, is $500 or

[1] D.C. Code §§ 22-3227.01 - § 22-3227.04; D.C. Code §§ 22-3227.06 - § 22-3227.08. Provisions relating to record corrections due to identity theft are codified in RCC § 22E-2006 (Identity Theft Civil Provisions).
[2] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[3] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[4] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[5] Subsection (d) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property sought to be obtained or the amount of the payment intended to be avoided or the financial injury.

Subsection (e) specifies the elements of fifth degree identity theft. Paragraph (e)(1) requires that the accused knowingly created, possessed, or used "personal identifying information" belonging to or pertaining to another person. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "personal identifying information" is defined in RCC § 22E-701. This subsection specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she would create, possess, or use personal identifying information belonging or pertaining to another person.

Paragraph (e)(2) requires that the accused must have created, possessed, or used personal identifying information belonging to or pertaining to another person without that person's effective consent. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "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." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. Per the rule of interpretation in § 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to paragraph (e)(2), here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of the other person.

Paragraph (e)(3) requires that the accused acted "with intent to" use the identifying information accomplish one of three goals: obtain property of another by deception; avoid payment due for any property, fines, or fees by deception; or give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception and without that victim's consent. "Intent" is a defined term in RCC § 22E-206 meaning the accused was practically certain that he or she would achieve one of the goals listed in (e)(3)(A)-(C). 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 accused actually achieved any of the goals listed in (e)(3)(A)-(C), just that the accused consciously desired, or was practical certain, that he or she would achieve one of them.

Subsection (f) clarifies jurisdictional rules for prosecution of identity theft.

Subsection (g) clarifies that obtaining, creating, or possessing a single person's identifying information constitutes a single violation of this statute. A person who possesses multiple pieces of identifying information pertaining to a single person, with a required criminal purpose, is still only liable for one count of identity theft. Subsection (g) also specifies for purposes of the statute of limitations under D.C. Code § 23-113 that

[5] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

an identity theft offense is deemed to have been committed after the course of conduct has been completed or terminated.

Subsection (h) specifies penalties for each grade of the identity theft statute.

Subsection (i) specifically requires the Metropolitan Police Department to report each complaint of identity theft and provide copies of such reports.

Subsection (j) cross references other terms defined elsewhere in the RCC.

Relation to Current District Law. *The revised identity theft statute changes current District law in three main ways.*

First, the revised statute eliminates reference to use of another person's identifying information to falsely identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime—conduct included in the current identity theft statute.[6] The current identity theft statute includes using identifying information to avoid detection, apprehension or prosecution for a crime. In contrast, the revised identity theft statute does not criminalize this conduct. Most such conduct already is criminalized under other offenses, including the obstructing justice,[7] false or fictitious reports to Metropolitan Police,[8] and false statements.[9] All such conduct is criminalized under other offenses in the RCC, including the revised obstructing justice[10] and revised false statements offenses.[11] This change eliminates unnecessary overlap, and improves the proportionality of the revised statute.

Second, the revised statute criminalizes creating, possessing, or using another person's identifying information, without effective consent, with intent to avoid payment due for any property, fines, or fees by deception. The current D.C. Code identity theft statute does not criminalize use of identifying information with intent to avoid payments. In contrast, the revised statute explicitly criminalizes possessing, creating, possessing, or using identifying information with intent to avoid payments. This change improves the proportionality of the revised statute and fills a possible gap in offense liability.

Third, the revised statute increases the number of penalty grades. The current identity theft offense is limited to two gradations based solely on value of the property obtained, attempted to be obtained, or amount of the financial injury. The current first degree identity theft offense involves property with a value, or a financial injury, of $1,000 or more and is punished as a serious felony; second degree identity theft offense involves property with a value, or a financial injury, of less than $1,000 and is a misdemeanor. In contrast, the revised identity theft offense has a total of five gradations which span a much greater range in value, with a value or financial injury of $500,000 or

[6] D.C. Code § 22-3227.02(3). Notably, while the current identity theft statute purports to criminalize use of another's personal identifying information without consent to identify himself at arrest, conceal a crime, etc., current D.C. Code § 22-3227.03(b) only provides a penalty for such conduct in the limited circumstance where it results in a false accusation or arrest of another person.
[7] D.C. Code § 22-722(6).
[8] D.C. Code § 5-117.05.
[9] D.C. Code § 22-2405. Further supporting treating this offense as more akin to false statements is the fact that under current law penalty for 22-3227.02(3) versions of identity theft is just 180 days.
[10] RCC § 22E-XXXX.
[11] RCC § 22E-XXXX.

more being the most serious grade. This change improves the proportionality of the revised offense.

Beyond these three main changes to current District law, three other aspect of the revised identity theft statute may constitute a substantive change of law.

First, the revised identity theft offense specifies that there is no culpable mental state required as to the value of property obtained or sought to be obtained, amount of payment intended to be avoided, or the amount of financial injury. The current D.C. Code statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the value of property of financial injury caused, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[12] To resolve this ambiguity, the revised statute specifies that the value of the property is a matter of strict liability. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[13] This change improves the clarity and completeness of the revised statute.

Second, by referencing the RCC's "financial injury" definition, the revised identity theft may change how the offense is graded. Under current law, "financial injury" is defined as "*all* monetary costs, debts, or obligations incurred by a person [as a result of violation of the identity theft statute.]"[14] It is unclear if the current definition of financial injury would include truly unreasonable costs incurred, or costs incurred by a non-natural person. To resolve this ambiguity, the revised statute defines financial injury as the "*reasonable* monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act[.]"[15] The RCC's definition improves the clarity and proportionality of the revised offense.

Third, the revised statute extends jurisdiction for identity theft only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3227.06 states that jurisdiction extends to cases in which "The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia[.]" The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a District resident, or was located in the District at the time the identity theft occurred.[16] 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.[17] There is no clear precedent

[12] D.C. Crim. Jur. Instr. § 5.220.
[13] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X–Citement Video*, 513 U.S. 64 at 72 (1994)).
[14] D.C. Code § 22-3227.01.
[15] RCC § 22E-701.
[16] For example, person A resides in Florida, and while on vacation in the District, a person in Florida uses A's personal identifying information to fraudulently purchase items from a store in Florida without A's permission. Under the revised statute, District courts would not have jurisdiction in this case.
[17] *See, Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

for states to extend jurisdiction based solely on the residency of the alleged victim,[18] and such an extension, if intended, may be unconstitutional.[19] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Four other changes to the revised identity theft statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute no longer explicitly refers to "obtaining" identifying information of another. "Obtaining" is not defined in the current statute or case law. Instead the revised statute requires that the accused "creates, possesses, or uses" identifying information. "Obtaining" appears to be superfluous,[20] and no change in the scope of the statute is intended by omitting the word from the revised statute.

Second, the revised statute no longer explicitly refers to using identifying information to obtain property "fraudulently." "Fraudulently" is not defined in the statute or, for this offense, in case law. Instead the revised statute refers only to intent to obtain property by deception, avoid payment due fine by deception, or facilitate another person in obtaining property by deception. "Fraudulently" appears to be unnecessarily ambiguous and superfluous. No change in the scope of the statute is intended by that word's elimination from the revised statute.

Third, the revised statute does not explicitly criminalize using identifying information to obtain property of another.[21] The current statute criminalizes using identifying information to "obtain, or attempt to obtain, property[.]"[22] This provision of the current statute is duplicative given that it provides as an alternative basis of liability merely using identifying information to attempt to obtain property of another. There is no penalty difference in the current statute between actually obtaining or attempting to obtain property of another in this manner.

Fourth, the revised statute eliminates references in the current identity theft statutes to restitution[23] and fines at twice the amount of the financial injury.[24] Both provisions are superfluous under both current law[25] and the RCC.[26] No change in the scope of the statute is intended by elimination of these provisions.

[18] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[19] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(a) (3d ed.).
[20] E.g., person who obtains information would, at least temporarily, possess such information.
[21] D.C. Code § 22-3227.02(1).
[22] D.C. Code § 22-3227.02 (2).
[23] D.C. Code § 22-3227.04.
[24] D.C. Code § 22-3227.03(a).
[25] D.C. Code § 16-711 (Restitution or reparation); § 22–3571.02(b). (Applicability of fine proportionality provision).
[26] RCC § 22E-604(c).

RCC § 22E-2206. Identity Theft Civil Provisions.

Explanatory Note. *This section establishes the identity theft offense civil provisions concerning record correction for the Revised Criminal Code (RCC). The revised identity theft civil provisions are identical to the identity theft corrections of police records*[1] *statute in the current D.C. Code.*

[1] D.C. Code § 22-3227.05.

RCC §22E-2207. Unlawful Labeling of a Recording.

Explanatory Note. *This section establishes the unlawful labeling of a recording (ULR) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes possession of a recording with a label that fails to identify the true manufacturer, with intent to sell or rent the recording. The penalty gradations are based on the number of recordings that the accused possessed. The revised unlawful labeling of a recording offense replaces the deceptive labeling offense in the current D.C. Code.*[1]

Subsection (a) specifies the elements of first degree ULR. Paragraph (a)(1) requires that the accused knowingly possesses 100 or more sound recordings or audiovisual recordings that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets. This subsection specifies that a "knowingly" culpable mental state applies to most elements, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she possessed sound recordings or audiovisual recordings, and that those recordings did not conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The terms "sound recording" and "audiovisual recording" are defined in RCC § 22E-701. Sound and audiovisual recordings are discrete physical objects upon which sounds or images are fixed. The term "manufacturer" is defined for the purposes of this section to mean the person or entity who actually affixed the sounds or images to the sound or audiovisual recording. The term "manufacturer" does not refer to the original artist, or person who holds the copyrights to the sound or audiovisual work. This paragraph uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state required as to the total number of sound or audiovisual recordings being 100 or more.

Paragraph (a)(2) requires that the accused possessed the recordings "with intent to" sell or rent the recordings. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that he would sell or rent the recordings. 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 accused actually sold or rented the recordings, only that the accused was practically certain that he or she would sell or rent them.

Subsection (b) specifies the elements of second degree ULR. The elements of second degree ULR are identical to the elements of first degree ULR, except that there is no requirement as to the number of sound or audiovisual recordings. Possession of just a single sound or audiovisual recording is sufficient for second degree ULR.

[1] D.C. Code § 22-3214.01.

Subsection (c) provides an exception from liability if a person transfers a recording as part of a broadcast transmission or for the purposes of archival preservation, or transfers recordings at home for personal use.[2]

Subsection (d) specifies penalties for both grades of ULR. [*See* Second Draft of Report #41.]

Subsection (e) provides that courts may order forfeiture of certain assets related to violation of this statute in addition to penalties otherwise authorized.

Subsection (f) cross reference definitions found elsewhere in the RCC, and defines the term "manufacturer" as used in this section.

Relation to Current District Law. *The unlawful labeling of a recording statute changes current District law in five main ways.*

First, ULR requires that the accused had intent to rent or sell the recordings. Any other intended uses of the recordings do not constitute ULR. The current statute uses broader language, covering conduct committed for "commercial advantage or private financial gain[.]"[3] The statute does not define these terms and there is no relevant D.C. Court of Appeals (DCCA) case law. However, the current statute's language could arguably include possessing a sound recording for commercial advantage or financial gain by means that do not involve selling or renting the recording.[4] In contrast, the revised statute requires intent to sell or rent the recordings, and intent to use the recordings for other purposes are not covered. To the extent that the current statute is broad enough to cover these uses of recordings, the revised statute is narrower than the current statute. The revision improves the proportionality of the revised offense.

Second, the revised ULR statute changes the penalty structure to equate penalties for ULR with respect to sound or audiovisual recordings. Under the current statute, a person commits a felony if he or she possessed 1,000 or more sound recordings, or 100 or more audiovisual recordings; and the person commits a misdemeanor if he or she possessed fewer than 1,000 sound recordings, or fewer than 100 audiovisual recordings. In contrast, under the revised statute, sound recordings and audiovisual recordings are no longer treated differently, either for determining the unit of prosecution or for the penalty. A person who possesses 100 improperly labeled sound recordings is subject the same penalties as a person who possesses 100 improperly labeled audiovisual recordings. In addition, the revised statute does not permit multiple convictions simply because the accused possessed two different types of recordings, contrary to the DCCA's holding in *Plummer v. United States*, [5] which allowed for two convictions based on the accused's possession of both sound and audiovisual recordings. Also, penalties are the same

[2] The exclusion regarding a person at home acting for personal use improves the notice of the statute, but is not otherwise necessary. As described below, any person who acts for his or her personal use rather than with intent to sell or rent the recording, would not satisfy the offense's elements.

[3] D.C. Code § 22-3214.01(b).

[4] *E.g.*, conduct covered under the current statute might include possession of improperly labeled recordings with intent to play them in a store to entertain customers.

[5] 43 A.3d 260 (D.C. 2012). In *Plummer*, the DCCA reasoned that two convictions were warranted because the statute "explicitly treats audiovisual works as different from sound recordings" for sentencing purposes. *Id.* at 274.

whether the recordings are sound or audiovisual recordings. The revision improves the consistency and proportionality of the revised statute.

Third, the penalty provisions of the revised ULR do not allow the number of recordings to be aggregated across a 180 day period. Under the current statute, the penalty gradations are based on the number of sound or audiovisual recordings possessed "during any 180 day period."[6] There is no case law regarding how the 180 day period is to be determined, and there is no legislative history on the provision. In contrast, under the revised statute, the penalty gradations are based solely on the number of recordings possessed at a single point in time, or as described immediately below, where the government aggregates the number of recordings involved in a single scheme or systematic course of conduct per RCC § 22E-2002, Aggregation To Determine Property Offense Grades. This revision improves the proportionality of the revised statute.

Fourth, the provision in RCC § 22E-2002, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised ULR offense based on a single scheme or systematic course of conduct. The current ULR offense is not part of the current aggregation of value provision for property offenses,[7] however, as discussed immediately above, the current ULR statute has a special provision allowing the number of recordings to be aggregated across a 180 day period. In contrast, the revised ULR statute permits aggregation for determining the appropriate grade of ULR to ensure penalties are proportional to the accused's actual conduct. This change improves the proportionality of the revised statute.

Fifth, subsection (e) of the revised ULR offense permits a court to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current D.C. Code deceptive labeling offense contains a forfeiture provision that is mandatory.[8] In contrast, the revised statute allows, but does not require, judges to order forfeiture in order to destroy illegally labeled copies and potentially deter large-scale prohibited copying. The revised unlawful creation or possession of a recording statute[9] and several other offenses[10] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

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

The revised statute eliminates the phrase "that person knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes, or transports" a sound or audiovisual recording. The verbs in this phrase are not statutorily defined and there is no

[6] D.C. Code § 22-3214.01.

[7] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[8] D.C. Code § 22-3214.01.

[9] RCC § 22E-2105.

[10] *See, e.g.,* D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).

relevant DCCA case law. Nonetheless, this language appears to be redundant, given that the revised statute requires that the accused possesses a recording, with intent to sell or rent it. However, insofar as the current language creates liability for knowingly advertising or offering recordings for sale, but without actually possessing them, a person engaged in such conduct could likely be prosecuted for ULR as an accomplice or for attempted ULR. It is also possible that a person who advertises or offers for sale such recordings will have committed a conspiracy to commit ULR. Practically, there appears to be little or no change to current law in relying solely on conduct that results in possession of an improperly labeled recording. This revision improves the clarity of the revised offense.

One other change to the revised ULR statute is clarificatory in nature and is not intended to substantively change District law.

The revised statute simplifies the definition of manufacturer to refer to "the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording." The current statute refers to "the person who authorizes or causes the copying, fixation, or transfer of sounds or images to sound recordings or audiovisual works subject to this section."[11] The elimination of "copying" and "transfer" is not intended to change the definition. Since a recording, as defined in the statute, is a material object, any copying or transfer that is relevant to the statute is necessarily a form of affixation.

[11] D.C. Code § 22-3214.01(a)(2).

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

Explanatory Note. *This section establishes the financial exploitation of vulnerable adults (FEVA) and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes acquisition or use of the property of a vulnerable adult by means of undue influence and with intent to deprive the person of the property, with recklessness as to the complainant being a vulnerable adult or elderly person. The offense also includes committing theft, extortion, forgery, fraud, or identity theft with recklessness as to the complainant being a vulnerable adult or elderly person. The penalty gradations are based on the value of the property involved in the crime, or by the amount of financial injury inflicted.*

Subsection (a) specifies the elements of first degree FEVA. First degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $500,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[1] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (b) specifies the elements of second degree FEVA. Second degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $50,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[2] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (c) specifies the elements of third degree FEVA. Third degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $5,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[3] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (d) specifies the elements of fourth degree FEVA. Fourth degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $500 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[4] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is

[1] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[2] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[3] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[4] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (e) specifies the elements of fifth degree FEVA. Paragraph (e)(1) requires that the accused knowingly takes, obtains, transfers, or exercises control over property of another. The term "property" is defined in RCC § 22E-701, and means anything of value. Further, the property must be "property of another," a term defined in in RCC § 22E-701, which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon. Paragraph (e)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she would take, obtain, transfer, or exercise control over property of another.

Subparagraph (e)(1)(A) requires that the accused act with consent of the owner. The term "consent" is defined in RCC § 22E-791, and requires some indication (by words or actions) of the owner's agreement to allow the accused to take the property. The term "owner" is also defined in RCC § 22E-701, and means a person holding an interest in property that the accused is not privileged to interfere with, and it specifically includes those persons who are authorized to act on behalf of another.[5] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to subparagraph (e)(1)(A), which requires that the accused be practical certain that he or she had the consent of the owner.

Subparagraph (e)(1)(A) also requires that the consent of the owner was obtained by "undue influence." "Undue influence" is defined subsection (h) to mean "mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being." Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to subparagraph (a)(1)(A), which here requires that the accused was practically certainty or owner's consent is obtained by undue influence.

Subparagraph (e)(1)(B) specifies that the owner must be to a "vulnerable adult or elderly person", terms defined in RCC § 22E-701 to mean a person who is either 18 years of age or older and has one or more substantial physical or mental impairments, or 65 years of age or older. This subparagraph specifies that a "recklessness" mental state applies a term defined in RCC § 22E-206, which here requires the accused consciously disregarded a substantial risk that the owner was a "vulnerable adult or elderly person."

Subparagraph (e)(1)(C) requires that the accused act "with intent to" deprive the owner of the property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. 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

[5] The definition of "owner" specifically includes specifically includes those persons who are authorized to act on behalf of another. For example, a store employee who is authorized to sell merchandise is an "owner," although the merchandise is in fact owned by the store company itself.

necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (e)(2) defines FEVA to include committing theft, extortion, forgery, fraud, payment card fraud, check fraud, or identity theft, with recklessness that the complainant is a vulnerable adult or elderly person. This paragraph specifies that a "recklessness" mental state applies a term defined in RCC § 22E-207, which here requires the accused consciously disregarded a substantial risk that the complainant was a "vulnerable adult or elderly person."

Subsection (f) specifies penalties for each grade of FEVA. [*See* Second Draft of Report #41.]

Subsection (g) specifies that if any restitution is ordered, the accused must pay the restitution before paying any criminal or civil fines imposed for violation of this section.

Subsection (h) cross-references applicable definitions located elsewhere in the RCC, and defines the term "undue influence."

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

First, the revised FEVA statute applies a "reckless" culpable mental state as to the complainant being a vulnerable adult or elderly person. The current statute does not specify any required mental state as to whether the person was an elderly or vulnerable adult, and there is no case law on point. However, the current statute provides an affirmative defense if 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."[6] Further, the statute states that "[t]his defense shall be established by a preponderance of the evidence."[7] In contrast, under the revised statute, the government would bear the burden of proving that the accused was reckless as to the complainant being a vulnerable adult or elderly person. This requires that the accused consciously disregarded a substantial risk that the complainant was 65 years or older, or was at least 18 years of age, and had one or more physical or mental limitations that substantially impair his or her ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] However, a reckless culpable mental state requirement is consistent with other circumstances regarding victims that are aggravators in the RCC.[9] This change improves the clarity and completeness of the revised statute.

Second, the revised FEVA statute increases the number of penalty grade distinctions. The current FEVA statute is limited to two gradations based on the value of

[6] D.C. Code § 22-933.01 (b).
[7] *Id.*
[8] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[9] *See, e.g.*, RCC § 22E-1202 Assault.

the property or legal obligation.[10] In contrast, the revised FEVA offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. In addition, the revised FEVA statute also grades penalties based on the value of the property involved, or the amount of financial injury caused, whichever is greater. This change improves the proportionality of the revised offense.

Third, the revised FEVA statute includes committing payment card fraud and check fraud, with recklessness that the complainant is a vulnerable adult or elderly person. The current FEVA statute includes committing other property and fraud-related offenses, but does not include payment card fraud or check fraud. In contrast, the revised FEVA statute includes these offenses as vulnerable adults and elderly persons may be particularly vulnerable to these types of fraudulent offenses. This change improves the proportionality of the revised offense.

Fourth, the revised FEVA statute eliminates the special recidivist penalty authorized under current law.[11] Under current law, if a person with two prior FEVA convictions is convicted of FEVA, the maximum allowable sentence is 15 years, regardless of the value of property involved in either of the convictions. In contrast, the revised FEVA statute no longer authorizes this increased penalty. This special enhancement is highly unusual in current District law, and there is no clear basis for singling out recidivist FEVA violations as compared to other offenses of equal seriousness. The general repeat offender enhancement in RCC § 22E-606 will provide enhanced punishment for recidivist FEVA violations, consistent with the treatment of recidivism in other offenses. This change reduces unnecessary overlap with other criminal provisions.

Fifth, by referencing the RCC's "financial injury" definition, the revised FEVA statute changes how the offense is graded. Under current law, FEVA is graded based on the value of the property obtained, or the legal obligation incurred by the complainant. In contrast, by referencing the RCC's "financial injury" definition,[12] FEVA may be graded based on *reasonable* costs incurred as a result of the offense.[13] The RCC's definition improves the proportionality of the revised offense by excluding unreasonable costs incurred from affecting penalty gradations.

Sixth, the provision in RCC § 22E-2002, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised FEVA offense based on a single scheme or systematic course of conduct. The current FEVA offense is not part of the current aggregation of value provision for property offenses.[14] In contrast, the

[10] D.C. Code § 22-936.01. Felony FEVA involves property or legal obligations with a value of $1,000 or more and is punished as a serious felony; misdemeanor FEVA involves property or legal obligations valued at less than $1,000 and subject to a 180 day maximum sentence

[11] D.C. Code § 22-936.01

[12] RCC § 22E-701. The RCC defines financial injury as the "reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act[.]"

[13] For example, if a complainant incurred reasonable legal expenses as a result of a violation of this section, those costs could be used to determine the appropriate penalty gradation.

[14] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211

revised FEVA statute permits aggregation for determining the appropriate grade of FEVA to ensure penalties are proportional to the accused's actual conduct.

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

First, paragraph (e)(1) specifies a culpable mental state of "knowingly" for all offense elements other than value of the property involved or the amount of financial loss, or the complainant's status as an elderly person or vulnerable adult. The current statute requires that the accused acted "intentionally and knowingly[.]"[15] The current statute does not define "intentionally" or "knowingly," and there is no case law on point. By applying a culpable mental state of "knowingly," the revised FEVA statute requires that the accused was practically certain that he or she would take, obtain, or exercise control over property of another, with consent obtained by undue influence. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[16] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud and extortion statutes, and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[17] This change improves the clarity and completeness of the revised offense.

Second, the revised statute provides liability only for conduct with intent to deprive the vulnerable adult or elderly person of property. The current D.C. Code statute provides liability for conduct with intent to use the property "for the advantage of anyone other than the vulnerable adult or elderly person[.]"[18] There is no case law regarding this phrase. However, the revised statute refers to an intent to deprive where the term "deprive" is defined in the RCC to include withholding property permanently for "so extended a period or under such circumstances that a substantial portion of its value or a substantial portion of its benefit is lost" or "to dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it."[19] Consequently, taking property with intent to benefit another person is already within the scope of the RCC's definition of "deprive" if doing so would deny the owner a substantial benefit of the property. The primary effect of the revised FEVA offense eliminating liability for acting with intent to use property "for the advantage of anyone other than the vulnerable adult or elderly person" is to bar prosecution for temporary unauthorized uses of the property. However, the revised unauthorized use of property[20] criminalizes even

(Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[15] D.C. Code § 22-933.01.

[16] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[17] See, e.g., RCC § 22E-2201.

[18] D.C. Code § 22-933.01.

[19] RCC § 22E-701.

[20] RCC § 22E-2102.

temporary uses of a person's property without effective consent. This change clarifies the revised statute and reduces unnecessary overlap among offenses.

Third, the revised offense no longer specifically criminalizes causing a vulnerable adult or elderly person to assume a legal obligation. The current D.C. Code statute specifically criminalizes causing a vulnerable adult or elderly person to assume a legal obligation on behalf of, or for the benefit of, anyone other than the vulnerable adult or elderly person.[21] However, the revised FEVA statute already provides liability for engaging in conduct (with consent obtained by undue influence) that causes a transfer of property or involves exercising control over property with intent to deprive the owner. And the term "property" as defined in RCC § 22E-701 includes anything of value, including real property and interests in real property, as well as credit.[22] Consequently, it appears that most, if not all, instances of causing a vulnerable adult or elderly person to assume a detrimental legal obligation (with consent obtained by undue influence) are criminalized under the currents statute are also covered by the revised FEVA statute.[23] This change clarifies and reduces unnecessary overlap in provisions of the revised offense.

Fourth, subsections (a)-(d) of the revised offense, by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property or the amount of financial loss. The current statute is silent as to what culpable mental state applies to these elements, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity the revised statute makes the amount of loss or value of property a matter of strict liability. Requiring no culpable mental state to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[24] This change clarifies the revised offense.

Fifth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of

[21] D.C. Code § 22-933.01.

[22] Commentary to definition of "property" in RCC § 22E-701.

[23] For example, a person who knowingly uses undue influence to cause an elderly person to take out a second mortgage and give over the proceeds may well be guilty under the revised FEVA statute. Such a defendant would have caused the transfer (subsection (a)(1)) of an interest in real property (subsection (a)(2)) with the consent of the owner (subsection (a)(3)), who is elderly (subsection (a)(4)), using undue influence (subsection (a)(5)), believing that in doing so he or she will cause the owner to lose a substantial portion of the property's value (subsection (a)(6)).

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

current Chapter 32 of Title 22 despite a similar scope of conduct.[25] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

One other change to the revised FEVA statute is clarificatory in nature and does not substantively change current District law.

The revised statute requires that the accused use "undue influence" to obtain, take, transfer, or exercise control over property, but does not separately include use of "deception" or "intimidation" as does the current statute.[26] However, omitting these words is not intended to change current law. Obtaining property of a vulnerable adult or elderly person by use of deception or intimidation will still be covered by the revised FEVA statute. First, the definition of "undue influence" includes "mental, emotional, or physical coercion[.]"[27] This definition is broad enough to cover any use of "intimidation." Second, FEVA is also defined as committing theft, extortion, forgery, fraud, or identity theft, with recklessness that the complainant is a vulnerable adult or elderly person. Under the RCC, fraud is defined as taking, obtaining, transferring, or exercising control over property, with consent of the owner obtained by deception.[28] Taking property of a vulnerable adult or elderly person by deception is therefore still criminalized under the revised FEVA statute.

[25] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g. the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").
[26] D.C. Code § 22-933.01.
[27] RCC § 22E-2208 (h).
[28] RCC § 22E-2201.

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions

Explanatory Note. *RCC § 22E-2209 is a combination of two current statutes, D.C. Code §§ 22-937 and 22-938. The text from the two current D.C. Code statutes has been copied verbatim, with the exception of technical changes to update cross-references, and to add headings to some subsections. However these changes are purely technical, and do not substantively alter current District law.*

RCC § 22E-2210. Trademark Counterfeiting.

Explanatory Note. *The section establishes the trademark counterfeiting offense for the Revised Criminal Code (RCC). The offense criminalizes manufacturing, possessing with intent to sell, or offering for sale property bearing or identified by a counterfeit mark. The term "counterfeit mark" is defined in the statute. The revised trademark counterfeiting statute replaces the trademark counterfeiting statute,[1] definitions for the trademark counterfeiting statute[2], and forging or imitating brands or packaging of goods[3] statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree trademark counterfeiting. Paragraph (a)(1) specifies that first degree trademark counterfeiting requires that the accused knowingly manufactures for sale, possesses with intent to sell, or offers for sale, property. "Sell" is an undefined term, intended to include any exchange of property for anything of value. "Knowingly" is a defined term[4] and applied here means that the person must be practically certain that he or she is manufacturing, possessing with intent to sell, or offering for sale. The term "property" is defined in RCC § 22E-701, to mean "anything of value" and can include tangible or intangible property, and services. Paragraph (a)(1) also requires that the property bears, or is identified by, a counterfeit mark. The term "counterfeit mark" is defined in RCC § 22E-701. It is not necessary that the counterfeit mark is on the property, as long as the property is identified by the counterfeit mark.[5] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that what is being manufactured, sold, etc. is something of value and that it bears a counterfeit mark.

Paragraph (a)(2) requires that the property, in fact, consists of 100 or more items, or has a total retail value of $5,000 or more.[6] The term "retail value" is defined in RCC § 22E-701. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the number of items or value of the property involved in the offense.

Subsection (b) specifies the elements of second degree trademark counterfeiting. The elements of second degree trademark counterfeiting are identical to the elements of first degree trademark counterfeiting, except that there is no quantity or value requirement as to the property involved in the offense.

Subsection (c) provides an exclusion to liability under this section if the use of the counterfeit mark would be legal under civil law.[7] There are numerous uses of valid trademarks without the permission of the owner of the trademark, service mark, trade

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[1] D.C. Code § 22-902.
[2] D.C. Code § 22-901.
[3] D.C. Code § 22-1502.
[4] "Knowingly" is defined in RCC § 22E-206.
[5] For example, if a person places a counterfeit mark on a storefront and sells goods within that do not bear the counterfeit mark, the person may still be guilty of trademark counterfeiting if the goods are identified by the counterfeit mark on the storefront.
[6] The relevant value is of the property *bearing* the counterfeit mark. For example, if an item is contained in packaging that includes a counterfeit mark, the value of the item shall be used to determine the appropriate penalty grade, not the value of the packaging.
[7] *See generally*, 74 Am. Jur. 2d Trademarks and Tradenames § 134; William McGeveran, *Rethinking Trademark Fair Use*, 94 Iowa L. Rev. 49 (2008).

name, label, term, picture, seal, word, or advertisement that meet the definition of a "counterfeit mark" but do not constitute trademark infringement.[8] Any use of a valid trademark that does not constitute trademark infringement is not criminalized under this section.[9]

Subsection (d) specifies rules for seizure and disposal of items seized that bear counterfeit marks, and property used in conjunction with violation of this section. Under this provision, items that bear counterfeit marks must be seized, and must be released to the owner of the trademark upon request. If the trademark owner does not request that the items be destroyed, the items must be destroyed or disposed of in a manner requested by the owner. Seizure of other items employed or used in conjunction with violation of this section is discretionary. These items may be seized in accordance with the rules set forth in D.C. Code § 48-905.02.

Subsection (e) specifies that any state or federal certificate of registration of any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement shall be prima facie evidence of the facts stated therein.

Subsection (f) specifies penalties for each grade of the trademark counterfeiting offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised trademark counterfeiting law changes current District law in six main ways.*

First, the revised statute only includes two penalty gradations based on whether the property, in fact, has a total retail value of $5,000 or more. The current D.C. Code statute includes three penalty grades, with each penalty grade applicable depending on the number of items, the aggregate value of the items, and the number of prior convictions for trademark counterfeiting.[10] By contrast, the revised statute only includes two penalty gradations, eliminating the top gradation and making a $5,000 value the threshold for first degree liability. This change distinguishes between low and high volume conduct and aligns the number of gradations with other current D.C. Code and

[8] For example, using a trademark for satirical purposes constitutes fair use. *E.g.*, *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 807 (9th Cir. 2003) (affirming grant of summary judgment denying trademark infringement claim against photographer who produced and sold images of Barbie dolls in absurd positions and situations).

[9] In addition to non-infringing uses recognized under trademark law, this exclusion to liability applies to any uses of trademarks that are legal under civil law. For example, if a trademark owner authorizes another party to use the trademark under terms of a contract, but the owner disputes the validity of the contract, if the contract is upheld, use of the trademark would not constitute an offense under this section.

[10] Under the current statute, the lowest penalty grade has no minimum number or value of items or services bearing or identified by a counterfeit mark. The second penalty grade requires that the offense involved at least 100, but fewer than 1,000, items bearing a counterfeit mark; items with a total retail value of more than $1,000, but less than $10,000; or that the defendant has one prior conviction for trademark counterfeiting. The highest penalty grade requires that the offense involved at least 1,000 or more items bearing a counterfeit mark; items with a retail value of $10,000 or more; or that the defendant has two or more prior convictions for trademark counterfeiting.

RCC offenses criminalizing the creation and possession of illicit copies of an item.[11] A $5,000 threshold is consistent with other RCC property offense gradations. This change improves the clarity, consistency, and proportionality of the revised criminal code.

Second, the revised statute does not codify an evidentiary presumption regarding intent to sell or distribute. The current D.C. Code statute contains a "rebuttable presumption" in subsection (a) that a person having possession, custody, or control of more than fifteen items bearing a counterfeit mark had intent to sell or distribute the items. There is no D.C. Court of Appeals (DCCA) case law on point. By contrast, the RCC omits this statutory inference of intent because it is of questionable constitutionality.[12] However, even with this language omitted, the government may still present evidence of the accused's intent to sell or distribute where there are more than fifteen items and, depending on the nature of the items at issue and other circumstances, an inference of an intent to sell or distribute may well be warranted. This change improves the clarity and proportionality of the revised statute.

Third, the revised statute eliminates the special recidivist penalty for the offense. The current D.C. Code statute is divided into three penalty grades determined, in part, by the total number of items, or the aggregate value of the property. However, regardless of the number or value of the items, a person may be liable under the second highest penalty grade if the actor has one prior conviction for trademark counterfeiting, and the highest penalty grade if the actor has two or more prior convictions for trademark counterfeiting.[13] By contrast, the revised statute treats repeat offenders in a manner consistent with other offenses. The general repeat offender provisions under RCC § 22E-606 may apply to the revised offense. This change improves the consistency and proportionality of the revised criminal code.

Fourth the revised statute does not specify a minimum fine for this offense. The current D.C. Code statute requires that criminal fines imposed "shall be no less than twice the value of the retail value of the items bearing, or services identified by, a counterfeit mark, unless extenuating circumstances are shown by the defendant."[14] The meaning of "extenuating circumstances" in this provision is unclear, and there is no DCCA case law

[11] RCC § 22E-2105, Unlawful Creation or Possession of a Recording; RCC § 22E-220. Unlawful Labeling of a Recording.

[12] In *Reid v. United States*, 466 A.2d 433 (D.C. 1983), the DCCA considered whether part of a statute criminalizing obliterating identifying marks on a pistol was constitutional. The statute in part, read "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia[.]" D.C. Code § 22-4512. The DCCA stated that "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.'" *Id.* (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)).

Although the issue has not been litigated before the DCCA, it may be that the portion of the current trademark counterfeiting statute which allows an inference of "intent to sell or distribute" would similarly fail. It is questionable whether it can be said "with substantial assurance" that it is "more likely than not" that a person who possesses more than 15 items had "intent to sell or distribute" them. For example, a person may have a box of more than 15 superhero toy figurines, a set of dinnerware, or t-shirts bearing the counterfeit marking of a brand name for their own personal use.

[13] D.C. Code § 22-902 (b).

[14] D.C. Code §22-902 (d).

on point. By contrast, the revised statute provides for possible fines in a manner consistent with other offenses, using the standard RCC penalty classifications. This change improves the clarity, consistency, and proportionality of the revised criminal code.

Fifth, the revised statute does not include a mandatory seizure and forfeiture provision regarding all personal property used in conjunction with violation of this section. The current D.C. Code statute states that any items bearing a counterfeit mark and all personal property used in connection with a violation of this chapter shall be seized and be subject to forfeiture.[15] There is no DCCA case law on point. By contrast, the revised statute does not mandate that personal property used in connection with violations of this section be seized or subject to forfeiture.[16] However, omitting this language does not preclude such items from being seized or subject to forfeiture. Omitting this language improves the proportionality of the revised criminal code.[17]

Sixth, the revised trademark counterfeiting statute replaces the separate forging or imitating brands or packaging of goods offense under D.C. Code § 22-1502 and, in doing so, eliminates liability for mere use of a counterfeit mark. The forging or imitating brands offense makes it a crime to "forge[], or counterfeit[], or make[] use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such[.]"[18] There is no DCCA case law interpreting the current forging or imitating brands or packaging of goods statute. By contrast, under the RCC, conduct constituting forging or imitating brands or packaging is only criminalized if it falls under the revised trademark counterfeiting statute. By contrast, the revised statute clarifies that merely using a counterfeit mark, without intent to sell property bearing or identified by a

[15] D.C. Code §22-902 (e) ("Any items bearing a counterfeit mark and all personal property, including any items, objects, tools, machines, equipment, instrumentalities, or vehicles of any kind, employed or used in connection with a violation of this chapter shall be seized by any law enforcement officer, including any designated civilian employee of the Metropolitan Police Department, in accordance with the procedures established by § 48-905.02. (1) All seized personal property shall be subject to forfeiture pursuant to the standards and procedures set forth in D.C. Law 20-278.").

[16] In the revised offense items bearing a counterfeit mark still must be seized.

[17] The DCCA has recognized that under the excessive fines clause of the 8th Amendment, asset forfeiture must be proportional. *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 560-561 (D.C. 1998) (citing *United States v. Bajakajian*, 524 U.S. 321 (1998)). The DCCA noted that under the proportionality requires that "the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 565. Given that many offenses more serious than trademark counterfeiting do not have mandatory forfeiture provisions, it is unnecessary to include one in this statute.

[18] The statute reads in its entirety: "Whoever wilfully forges, or counterfeits, or makes use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

counterfeit mark, is not criminalized. Omitting this conduct from the revised statute improves the clarity and proportionality of the revised criminal code.

Beyond these six substantive changes to current District law, six other aspects of the revised trademark counterfeiting statute may be viewed as substantive changes of law.

First, the revised trademark counterfeiting statute specifies that the actor must "knowingly" manufacture, possess, or offer property for sale. Both the current trademark counterfeiting and forging or imitating brands statutes require that the actor must act "willfully."[19] The term "willfully" is not defined in either statute, and there is no DCCA case law on point with respect to either statute. To resolve this ambiguity, the revised statute requires the actor engage in conduct "knowingly," a defined term in 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.[20] This change improves the clarity and consistency of the revised criminal code.

Second, under the revised trademark counterfeiting statute, prosecutions based on manufacturing property bearing or identified with a counterfeit mark require that the property be for commercial sale. The current D.C. Code statutory language clearly covers manufacturing property bearing or identified by a counterfeit mark, but it is unclear whether manufacturing property not for commercial sale constitutes a violation of the statute.[21] There is no relevant DCCA case law. To resolve this ambiguity, the revised statute clarifies that manufacturing that is not for commercial sale is not prohibited. The property loss to the rightful holder of a trademark appears to be extremely low or negligible for an actor's misuse of the trademark in making property not offered for sale. This change improves the proportionality of the revised criminal code.

Third, the revised trademark counterfeiting statute replaces the separate forging or imitating brands or packaging of goods offense under D.C. Code § 22-1502 and, in doing so, does not specifically include reference to imitations of a "wrapper," "bottle," or "package." The current forging or imitating brands or packaging of goods statute refers to the use of a wrapper, bottle, or package,[22] although it is unclear whether the current forging or imitating brands or packaging of goods covers the use of wrappers, bottles, or packages that do not include any trademarks, trade names, labels, or other information that would constitute a "counterfeit mark." There is no relevant DCCA case law. To

[19] D.C. Code §§ 22-902, 22-1502.

[20] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[21] For example, if a person makes a handbag or t-shirt with a counterfeit trademark drawn on it, for his or her own personal use, it is unclear if that constitutes a violation of the current statute.

[22] The statute reads in its entirety: "Whoever wilfully forges, or counterfeits, or makes use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

resolve this ambiguity, the definition of "counterfeit mark" does not specifically include wrappers, bottles or packages. Use of wrappers, bottles, or packaging may be covered by the revised statute only if they constitute a "counterfeit mark."[23] Omitting reference to wrappers, bottles, or packages improves the clarity, consistency, and proportionality of the revised criminal code.

Fourth, the revised trademark counterfeiting statute replaces the separate forging or imitating brands or packaging of goods offense under D.C. Code § 22-1502 and, in doing so, does not specify that it includes counterfeits with "colorable difference or deviation" from the original. The forging or imitating brands or packaging of goods statute specifies that it covers "any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package…." It is unclear what constitutes a "colorable difference or deviation," and whether it is possible that use of a mark that significantly differs from a valid trademark is covered by the forging or imitating brands statute. There is no DCCA case law on point. To resolve this ambiguity, the revised statute extends liability only for a "counterfeit mark" and does not define "counterfeit mark" as including (or excluding) items with a colorable difference or deviation from the original. Omitting this language improves the clarity and proportionality of the revised criminal code.

Fifth, the revised statute codifies an exclusion from liability if the use of a trademark does not constitute infringement under civil law. The current statute does not include any reference to non-infringing uses of trademarks. However, under current civil law, in certain circumstances a person may copy or use a valid trademark without permission, even for commercial purposes.[24] There is no DCCA case law on point. To resolve this ambiguity, the revised statute clarifies that uses of trademarks that are legal under civil law are not criminalized. This change improves the clarity and proportionality of the revised criminal code.

Sixth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[25] Resolving this

[23] Many wrappers, bottles or packages have trademarks, trade names, or labels affixed to them. Use of such wrappers, bottles, or packages could constitute trademark counterfeiting.

[24] *E.g.*, *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 807 (9th Cir. 2003) (affirming grant of summary judgment denying trademark infringement claim against photographer who produced and sold images of a Barbie doll in absurd positions and situations).

[25] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the

ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

The remaining changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, under the revised statute, the definition of the term "counterfeit mark" replaces the current definitions for both "counterfeit mark" and "intellectual property." However, the revised definition is not intended to substantively change current District law. The current definition of "counterfeit mark" includes "any *unauthorized* reproduction or copy of intellectual property" or "intellectual property affixed to any item knowingly sold, offered for sale, manufactured, or distributed, or identifying services offered or rendered *without the authority* of the owner of the intellectual property[.]"[26] In turn, "intellectual property" is defined as "any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement or any combination of these adopted or used by a person to identify such person's goods or services and which is lawfully filed for record in the Office of the Secretary of State of any state or which the exclusive right to reproduce is guaranteed under the laws of the United States or the District of Columbia."[27] The revised definition of "counterfeit mark" incorporates the current definition of "intellectual property," and requires that the mark be used "without the permission of the owner[.]" The term "without the permission" is intended to have the same meaning as "without authority" or "unauthorized." The revised definition of "counterfeit mark" is not intended to substantively change current District law.

Second, the revised statute does not specify that the value of the items involved in the offense be determined by the aggregate value of the items or services bearing or identified by a counterfeit mark. This change is not intended to change current District law. The general aggregation of value statute[28] will apply to the revised trademark counterfeiting statute.

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reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g. the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[26] D.C. Code § 22-901 (emphasis added).

[27] D.C. Code § 22-901.

[28] RCC § 22E-2001.

RCC § 22E-2301. Extortion.

Explanatory Note. *This section establishes the extortion offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes taking another person's property by inducing their consent by means of coercive threat. The penalty gradations are based on the value of the property involved in the crime. The revised extortion offense is closely related to the revised theft and fraud offenses.*[1] *It differs from theft because in extortion the defendant has the owner's consent obtained by using a coercive threat. It differs from fraud because in fraud the defendant uses deception, rather than a coercive threat, to obtain the owner's consent. The revised extortion offense replaces the extortion*[2] *and, to the extent that it involves conduct with intent to obtain property, blackmail*[3] *statutes in the current D.C. Code.*

Subsection (a) specifies the elements of first degree extortion. Paragraph (a)(1) requires that the defendant takes, obtains, transfers, or exercises control over property of another. "Property," a term defined in RCC § 22E-701, means something of value and includes goods, services, and cash. Further, the property must be "property of another," a term defined in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon without consent. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would take, obtain, transfer, or exercise control over property of another.

Paragraph (a)(2) states that the must take, obtain, transfer, or exercise control over property with "consent" of an owner. The term consent is defined in RCC § 22E-701, and chiefly requires some words or actions that indicate an owner's agreement to allow the accused to take, obtain, transfer, or exercise control over the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with without consent.[9] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element "with the consent of an owner" in paragraph (a)(2), which requires that the accused was practically certain that he or she had an owner's consent.

Paragraph (a)(3) codifies the element that distinguishes extortion from the revised theft and fraud offenses—that the consent in paragraph (a)(2) be obtained by an explicit or implicit coercive threat, a term defined in RCC § 22E-701.[4] Coercive threats a variety of threats that pressure a person to agree to give the defendant the property.[5] Per the rule of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1)

[1] RCC § 22E-2101 and RCC § 22E-2201, respectively.
[2] D.C. Code § 22-3251.
[3] D.C. Code § 22-3252.
[4] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, depending on the context, saying "it would be a shame if anything happened to your store," may constitute an implicit threat of property damage.
[5] *See*, Commentary to definition of "coercive threat" accompanying RCC § 22E-701.

also applies to paragraph (a)(3), requiring the defendant to be aware to a practical certainty that victim's consent is obtained by coercive threat.

Paragraph (a)(4) requires that the defendant acted "with intent to" deprive an owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" an owner of the property. 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 a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(5) requires that the property, in fact, has a value of more than $500,000. "Value" is a defined elsewhere in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree extortion. The elements of each grade of extortion are identical to the elements of first degree extortion, except for the value of the property. Each subsection specifies a minimum value required for the property, except for fifth degree extortion, which has no specific minimum value.[6] As with first degree extortion, strict liability applies to value of the property in each grade of extortion.

Subsection (f) specifies penalties for each grade of the extortion offense. [*See* Second Draft of Report #41.]

Subsection (g) cross references definitions found elsewhere in the RCC.

Relation to Current District Law. *The revised extortion statute changes current District law in five main ways.*

First, the revised extortion statute no longer specially punishes attempts to commit the offense the same as the completed offense. The current extortion statute[7] states that it is an offense if the person "obtains or *attempts* to obtain" property, and the current blackmail statute[8] is an inchoate offense that does not require the defendant to actually obtain property. There is no clear rationale for such a special attempt provision for extortion as compared to other offenses. Under the revised extortion statute, the General Part's attempt provisions[9] will establish liability for attempted extortion consistent with other offenses. Differentiating conduct that does and does not result in depriving someone of property improves the proportionality of the offense.

Second, by its use of the new definition of coercive threat in RCC § 22E-701 the revised extortion statute makes several changes to the means by which the defendant

[6] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree extortion does not specify any minimum value, as defined in the RCC, "property" must have *some* value.
[7] D.C. Code § 22-3251.
[8] *Id.* ("A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens….").
[9] RCC § 22E-301.

induces the owner's consent. The current extortion statute prohibits four means of obtaining consent: (1) the use of actual force or violence, (2) the threatened use of force or violence, (3) a wrongful threat of economic injury, and (4) under color or pretense of official right.[10] The current blackmail offense[11] prohibits additional means of obtaining consent, including threats "to accuse any person of a crime; to expose a secret or publicize an asserted fact, whether or true or false, tending to subject any person to hatred, contempt, or ridicule; or to impair the reputation of any person, including a deceased person."[12] In contrast, the revised extortion statute is somewhat narrower than the current extortion and blackmail offenses insofar as actual use of force has been eliminated from the statute as a means of obtaining property to reduce overlap with robbery.[13] However, the revised extortion offense also is broader than either the current extortion or blackmail statutes by including new conduct—threatening to "[n]otify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status" or to "[c]ause harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply."[14] Otherwise, the means by which the defendant induces the victim's consent in revised extortion offense is generally the same as the current extortion and blackmail offenses. The current "threatened use of force or violence" prong is covered by the revised offense's inclusion of threats to engage in conduct constituting an "offense against persons" or a "property offense."[15] And the final alternative in the current statute, involving obtaining property under color or pretense of right, also remains in the revised statute.[16] The revised extortion includes each of these forms of conduct via the definition of coercive threat. These changes reduce unnecessary gaps and overlap among revised offenses.

Third, the revised extortion statute requires that the defendant has intent to deprive an owner of the property. Neither the current extortion statute nor the current blackmail statute has comparable provisions;[17] and there is no relevant D.C. Court of Appeals (DCCA) case law. Instances where the defendant extorts property for temporary use or causes the owner to lose a slight benefit are covered by the revised unauthorized use of property offense,[18] which is a lesser-included offense of extortion. Inclusion of the "intent to deprive" element reduces unnecessary overlap between offenses, creates

[10] D.C. Code § 22-3251. It is unclear what difference, if any, exists between "force" and "violence;" neither term is defined in the statute, and no DCCA case law has provided definitions.
[11] D.C. Code § 22-3252.
[12] *Id.*
[13] RCC § 22E-1201.
[14] RCC § 22E-701.
[15] RCC § 22E-701. *See also* Committee on the Judiciary, Report on Bill 4-193 at 69 ("The threat of force or violence may be against any person and is intended to cover threats that anyone will cause physical injury to or kidnapping of any person. The threat of force or violence also covers a threat of property damage or destruction.").
[16] RCC § 22E-701. A "coercive threat" includes threatening to "take or withhold action as a government official, or cause a government official to take or withhold action."
[17] D.C. Code § 22-3251; D.C. Code § 22-3252.
[18] RCC § 22E-2102.

consistent offense definitions across extortion, theft,[19] and fraud,[20] and improves the proportionality of the revised offense.

Fourth, the revised extortion statute increases the number and type of grade distinctions, grading based on the value of the property extorted. The current extortion and blackmail offenses are not graded at all, and give a flat penalty that does not vary based on whether the offender obtains expensive property or merely attempts to obtain or intends to obtain an item of trivial value.[21] By contrast, the revised extortion offense has a total of five gradations based on the value of the property involved, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.[22] The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft[23] and fraud[24] offenses.

Fifth, the provision in RCC § 22E-2001, "Aggregation to Determine Property Offense Grades," allows aggregation of value for the revised extortion offense based on a single scheme or systematic course of conduct. The current extortion and blackmail offenses are not part of the current aggregation of value provision for property offenses.[25] As noted above, the current extortion and blackmail offenses are not graded based on value of the property involved. The revised extortion statute permits aggregation for determining the appropriate grade of extortion to ensure penalties are proportional.

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

First, the revised extortion offense requires a culpable mental state of knowledge for paragraphs (a)(1)-(a)(3), (b)(1)-(b)(3), etc. The current extortion statute does not specify a culpable mental state and the blackmail statute only refers to an "intent to obtain property of another or to cause another to do or refrain from doing any act."[26] No case law exists on point, although legislative history suggests that the Council expected some mental state would apply via the use of the term "wrongful" in the current extortion

[19] RCC § 22E-2101.
[20] RCC § 22E-2201.
[21] D.C. Code § 22-3251(b) ("Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.); D.C. Code § 22-3252(b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.")
[22] Under the revised extortion statute and both the current extortion and blackmail statutes, a wide range of behavior is punished equally. E.g., threats of both a trivial amount of property damage and threats of serious bodily harm equally satisfy the current and revised extortion statutes. However, grading based on the value of property involved may not only improve proportionality with respect to the property loss, but, indirectly, the seriousness of the coercion. Relatively minor forms of coercion would seem inherently unlikely to be successful in causing a person to consent to giving up very high value property.
[23] RCC § 22E-2101.
[24] RCC § 22E-2201.
[25] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")
[26] D.C. Code § 22-3252(a).

statute's text.[27] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[28] Requiring a knowing culpable mental state also makes the revised extortion offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[29]

Second, the revised extortion offense uses the phrase "takes, obtains, transfers, or exercises control over property of another[.]"[30] The current extortion[31] and blackmail[32] statutes require proof of an attempt to, or intent to, "obtain" the property of another. The term "obtain" is not statutorily defined, nor is there any relevant DCCA case law. It is possible that the current term "obtain" does not include all conduct that constitutes transferring or exercising control over property.[33] Using the revised language of "takes, obtains, transfers, or exercises control over" improves the clarity of the statute, reduces possible unnecessary gaps, and makes the revised extortion offense consistent with the revised fraud statute and other property offenses.

Third, the revised extortion statute does not explicitly include making a "wrongful threat of economic injury." The current extortion statute[34] includes the phrase "wrongful threat of economic injury," but the phrase is not defined in the statute, and there is no relevant DCCA case law. The legislative history notes that this language was "not intended to cover the threat of labor strikes or other labor activities," or "consumer boycotts,"[35] but is intended to cover "a leader of an organization [who] threatens to strike or boycott in order to extort anything of value for his personal benefit, unrelated to the interest of the group he represents."[36] However, the RCC's definition of "coercive threats" does not specifically include a "wrongful threat of economic injury." While the revised extortion statute is not intended to criminalize threats of labor strikes or consumer boycotts, certain types of threats of economic injury may still satisfy the catch-all provision in the "coercive threat" definition.[37] However, because it is not clear exactly

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[27] The Judiciary Committee's report, which accompanied the bill creating the current extortion offense, states that the threat in extortion "must be 'wrongful,'" and that "the term 'wrongful' when used in criminal statutes implies an evil state of mind." Committee on the Judiciary, Report on Bill 4-164 at 69 citing *Masters v. United States*, 42 App. D.C. 350, 358 (D.C. Cir. 1914).

[28] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[29] *See, e.g.*, RCC § 22E-2201.

[30] RCC § 22E-2301(a)(1).

[31] D.C. Code § 22-3251.

[32] D.C. Code § 22-3252.

[33] For example, if a defendant uses a coercive threat to compel another person to transfer funds to a bank account that the defendant does not control, under the current statute it is unclear whether the defendant has "obtained" those funds.

[34] D.C. Code § 22-3251.

[35] Judiciary Committee, Report on Bill No. 4-193, the D.C. Theft and White Collar Crime Act of 1982, at 69 (hereinafter, "Judiciary Committee Report").

[36] *Id.* at 70.

[37] RCC § 22E-701 (A "coercive threat" includes threatening to "[c]ause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply."

what constitutes a "wrongful threat of economic injury under current law," it is unclear whether the catch-all provision would necessarily cover all such threats. This change clarifies and improves the consistency of the revised statute.

Fourth, by reference to the RCC's definition of coercive threat, the revised extortion statute includes threats to "distribute a photograph, video or audio recording . . . that tends to subject another person to, or perpetuate: Hatred, contempt, ridicule, or other significant injury to personal reputation; [or] significant injury to credit or business reputation."[38] The current blackmail statute covers threatening to "expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, ridicule, embarrassment, or other injury to reputation[.]"[39] The current blackmail statute does not specify whether distributing photographs, videos, or audio recordings, constitutes "expos[ing] a secret or publiciz[ing] an asserted fact[.]"[40] The current blackmail statute also does not specify whether threatening to expose secrets or assert facts that *perpetuate* hatred, contempt, or ridicule[41] are covered. There is no relevant DCCA case law addressing either issue. By contrast, through reference to the definition of "coercive threat," the revised extortion statute clarifies that the revised offense includes threats to distribute photographs, videos, or audio recordings, and to expose or publicize information that would subject a person to, or *perpetuate,* hatred, contempt, ridicule, or other significant injury to personal reputation, or significant injury to credit or business reputation. This change improves the clarity of the revised offense and may close gaps in current law.

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

First, the revised extortion offense uses the phrase "consent of an owner". The phrase "the other's consent" is used in the current extortion statute,[42] and is implicit in the blackmail statute insofar as it supposes the threat will cause a person to engage in conduct that results in the defendant obtaining property.[43] The term "consent" is not defined in the current statute. Per RCC § 22E-701, "consent" is a defined term, here chiefly meaning that the owner of the property gives words or actions that indicate a preference for particular conduct. Reference to this definition is not intended to change current District law.

[38] RCC § 22E-701.
[39] D.C. Code § 22-3252. The words "embarrassment, or other injury to reputation" were added as part of the Sexual Blackmail Elimination and Immigration Protection Amendment Act of 2018.
[40] For example, a nude photo arguably does not necessarily expose secrets or expose facts.
[41] For example, if it is already publicly known that a person is habitually unfaithful to his spouse, it is unclear if the current blackmail statute covers threats to expose an additional act of infidelity.
[42] D.C. Code § 22-3251(a).
[43] D.C. Code § 22-3252(a).

RCC § 22E-2401. Possession of Stolen Property.

Explanatory Note. *This section establishes the possession of stolen property (PSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly buying or possessing property, believing the property to be stolen, with intent to deprive an owner of the property. The five penalty gradations vary based on the value of the property. The revised PSP offense replaces the receiving stolen property*[1] *statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree PSP. Paragraph (a)(1) requires that the accused knowingly buys or possesses property. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Property is a term defined in RCC § 22E-701, to mean something of value which includes goods, services, and cash. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused was practically certain that he or she would buy or possess property.

Paragraph (a)(2) requires that the accused acted "with intent that" the property be stolen. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that the property was stolen. Per RCC § 22E-205, the object of the phrase "with intent that" 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 property was actually stolen, just that the accused believed to a practical certainty that the property was stolen.

Paragraph (a)(3) requires that the accused acted with intent to deprive an owner of property. "Deprive" is a defined term in RCC § 22E-701 meaning an owner is unlikely to recover the object or it is withheld permanently or long enough to lose a substantial part of its value or benefit. "Intent" also is a defined term in RCC § 22E-701 meaning the accused was practically certain he or she would "deprive" an owner of the property. It is not necessary to prove that such a deprivation actually occurred, just that the accused was practically certain that a deprivation would result. If a person only intends to temporarily possess the stolen property, or to return it to its rightful owner or to law enforcement, he has not committed PSP.

Paragraph (a)(4) requires that the property, in fact, has a value of more than $500,000. "Value" is a defined elsewhere in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree PSP. The elements of each grade of PSP are identical to the elements of first degree PSP, except for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree PSP, which has no specific minimum value.[2] As with first degree PSP, strict liability applies to value in each grade of PSP.

[1] D.C. Code § 22-3232.

[2] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree PSP does not specify any minimum value, as defined in the RCC, "property" must have *some* value.

Subsection (f) specifies penalties for each grade of the PSP offense. [*See* Second Draft of Report #41.]

Subsection (g) cross references definitions found elsewhere in the RCC.

Relation to Current District Law. *The revised PSP statute changes current District law in two main ways.*

First, the revised PSP statute requires that the defendant have "intent to deprive" an owner of the property. The current D.C. Code statute does not require intent to deprive.[3] Consequently, appears that a person commits a crime even if he or she only intends to temporarily possess the stolen property, or intends to return the stolen property to its rightful owner. Case law has not directly addressed the matter.[4] In contrast, by including intent to deprive as a statutory element, the revised offense ensures that a person who possesses stolen property with intent to return it to its rightful owner is not liable for PSP and places the burden of proof as to the element of intent on the government.[5] Under the RCC definition of "deprive,"[6] the PSP offense's intent to deprive element requires that the accused possessed or bought the property intending to permanently deprive an owner of the property or of a substantial benefit of the property. This change clarifies and improves the proportionality of the revised offense.

Second, the revised statute increases the number of penalty gradations. The current D.C. Code receiving stolen property offense is limited to two gradations based solely on value—first degree receiving stolen property involves property with a value of $1,000 or more and is punished as a felony; second degree receiving stolen property involves property valued at less than $1,000 and is a misdemeanor. In contrast, the revised PSP offense has a total of five gradations which span a much greater range in value, with a value of $500,000 or more being the most serious grade. The increase in

[3] Although requiring intent to deprive is a departure from current District law, it is worth noting that up until 2012, the District's receiving stolen property offense included an intent to deprive element. RECEIVING STOLEN PROPERTY AND PUBLIC SAFETY AMENDMENT ACT of 2011. D.C. Law 19-120. D.C. Act 19-262.

[4] The D.C. Court of Appeals, in interpreting the prior version of the statute, had held that receiving stolen property is a "specific intent" crime. *Lihlakha v. United States*, 89 A.3d 479, 489 n.26 (D.C. 2014). In *Lihlakha*, the DCCA discussed whether there was sufficient evidence for "finding that, at the time appellant acted in receiving the stolen property, she intended to deprive Banks of the right to her computer or a related benefit." 89 A.3d at 484. The Court noted that although the "intent to deprive" element had been deleted from the receiving stolen property statute after the defendant's alleged conduct at issue, under the Ex Post Facto Clause, the prior statute's "intent to deprive" element was still required. This suggests that under the current statute, which does not include an intent to deprive element, a person could be convicted of receiving stolen property, even if he possesses the stolen property with intent to return it. However, the DCCA has never squarely addressed this issue for the current statute, since its holding in *Lihlakha*.

[5] Including an intent to deprive element is also intended to codify the return-for-reward defense recognized by the DCCA in *Lihlakha v. United States*, 89 A.3d 479, 786-87 (D.C. 2014) (Four conditions must be satisfied for the accused to have a valid defense that he or she intended to return the property for a reward: (1) The reward had been announced, or was believed to have been announced, before the property was possessed or agreed to be possessed; (2) the person claiming the reward had nothing to do with the theft; (3) the possessor returned the property without unreasonable delay to the rightful owner or to a law enforcement officer; and (4) the possessor imposed no condition on return of the property.).

[6] RCC § 22E-701.

gradations, differentiated by offense seriousness, improves the proportionality of the revised offense.

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

The revised PSP offense requires that the accused knowingly buys or possesses property. The current receiving stolen property statute does not specify a culpable mental state for these elements and there is no D.C. Court of Appeals (DCCA) case law on point. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to buying or possessing property appears appropriate. Requiring a knowing culpable mental state also makes the revised PSP offense consistent with the revised trafficking stolen property statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[7] This change improves the clarity, completeness, and consistency of the revised offense.

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

First, the revised statute criminalizes buying or possessing stolen property, but omits the words "receives" or "obtains control over." Omission of these words is not intended to change the scope of the offense. The words "buys" and "possesses" are intended to be broad enough to cover every instance in which a person receives or obtains control over property.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the accused must have had an actual subjective belief that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the accused either knew, or "[had] reason to believe that the property has been stolen[.]"[8] Although this language could be interpreted to mean that the accused *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA has rejected this interpretation. Instead, the DCCA has held that this language requires that the accused had an actual subjective belief, even if erroneous, that the property was stolen.[9] Using the "with intent" inchoate mental state is consistent with this case law. The current statute's subsection (b) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[10] The elimination of the current offense's subsection (b) is consistent with the revised definition's use of "intent" to indicate that the property need not actually be stolen so long as the accused was practically certain that it was stolen.

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[7] *See, e.g.*, RCC § 22E-2101.
[8] D.C. Code § 22-3232.
[9] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[10] D.C. Code § 22-3231(b).

RCC § 22E-2402. Trafficking of Stolen Property.

Explanatory Note. *This section establishes the trafficking in stolen property (TSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly buying or possessing stolen property, on two or more occasions, with intent to sell, trade, or pledge the property in exchange for anything of value. The five penalty gradations are based on the aggregate value of the property involved in the crime. The revised TSP offense replaces the trafficking stolen property[1] statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree TSP. Paragraph (a)(1) requires that the accused knowingly buys or possesses property. Possess is a term defined in RCC § 22E-701 to mean "to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Property," is a term defined in RCC § 22E-701, means something of value which includes goods, services, and cash. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would buy or possess property.

Paragraph (a)(1) also specifies that the accused must have bought or possessed property on two or more occasions, an element that distinguishes TSP from the possession of stolen property (PSP) revised offense. TSP is directed at the conduct of habitual fences, who provide a market for stolen goods and thereby create further incentive for theft. An isolated incident of possessing stolen property with intent to sell, trade, or pledge it does not constitute a violation of this section. Even if a person sells multiple pieces of stolen property in a single transaction, this does not constitute two separate occasions required under the revised statute. The two occasions must be based on possession of different pieces of property at different points in time.[2] The "knowingly" mental state also applies to the "two or more separate occasions" element.

Paragraph (a)(2) requires that the accused acted "with intent that" the property be stolen. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that the property was stolen. Per RCC § 22E-205, the object of the phrase "with intent that" 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 property was actually stolen, just that the accused believed to a practical certainty that the property was stolen.

Paragraph (a)(3) requires that the accused possessed the property with intent to sell, pledge as consideration, or trade the property. It is not required that the accused actually sells, pledges, or trades the property, but he or she must have consciously desired, or been practically certain that he or she would do so. If the accused possesses or buys stolen property on two separate occasions, but in only one of those occasions had intent to sell, pledge, or trade the property, that is insufficient for a TSP conviction.

Paragraph (a)(4) requires that the property, in fact, has a value of more than $250,000. "Value" is a defined in RCC § 22E-701. "In fact" is a defined term in RCC §

[1] D.C. Code § 22-3231.
[2] *See also* D.C. Crim. Jur. Instr. § 5-305.

22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree TSP. The elements of each grade of TSP are identical to the elements of first degree TSP, expect for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree TSP, which has no specific minimum value.[3] As with first degree TSP, strict liability applies to value in each grade of TSP.

Subsection (f) grades TSP according to the value of the total property trafficked.[4] The value of the property that the defendant bought or possessed with intent to sell or trade may be aggregated to determine the appropriate grade of the offense.[5] The words "in fact" are a defined term in the RCC, and are used in every penalty gradation to specify that there is no culpable mental state as to the aggregated value of the property. The defendant is strictly liable as to the aggregated value of the property.

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

Relation to Current District Law. *The revised TSP statute changes current District law in one main way.*

The revised statute increases the number and type of grade distinctions. The current TSP offense is limited to one penalty grade, irrespective of the value of the property involved.[6] In contrast, the revised TSP offense has a total of five gradations which span the same range in value as the possession of stolen property offense and other property offenses, with a value of $500,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.

[3] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree TSP does not specify any minimum value, as defined in the RCC, "property" must have *some* value.

[4] For example, if the value of the property is less than $250, it is fifth degree TSP; if the value of the property is $250,000 or more, it is first degree TSP.

[5] RCC § 22E-2001. The revised TSP statute allows for considerable prosecutorial discretion in determining how many counts to charge if the defendant has trafficked in stolen property on several occasions. For example, if a person traffics in stolen property on four separate occasions, and the value of the stolen property in each occasion is $525, the defendant could be charged with a single count of fourth degree TSP, since the aggregate value of the property is $2100, which falls within the value threshold for fourth degree TSP. This person at most could be convicted of a single count with a maximum [] sentence. However, the defendant could also be charged with *two* counts of fourth degree TSP, with each count relying on two occasions of trafficking stolen property with an aggregate value of $1050, which also falls within the value threshold for fourth degree TSP. Due to charging decisions, the person could face two convictions, and a maximum allowable sentence of six years. In these cases, even if the government could prove each occasion of trafficking and obtain two convictions, the sentencing judge would still retain discretion to merge the convictions if a single conviction were sufficient given the severity of the defendant's conduct. Alternatively, even if the defendant were convicted and sentenced on multiple counts, the sentencing judge could also order that the sentences be served concurrently.

[6] D.C. Code § 22-3231(d). Whether a person traffics in $1 stolen pens, or $1000 stolen watches, the current statute authorizes a ten year maximum sentence.

Beyond this main change to current District law, one other aspect of the revised TSP statute may constitute a substantive change of law.

The revised TSP offense requires that the accused knowingly buys or possesses property on two or more separate occasions. The current statute does not specify a culpable mental state for these elements and there is no relevant D.C. Court of Appeals (DCCA) case law. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to buying or possessing property appears appropriate. Requiring a knowing culpable mental state also makes the revised TSP offense consistent with the revised possession of stolen property statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[7] This change improves the clarity, completeness, and consistency of the revised offense.

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

First, the revised statute requires that the accused either possess or buy property, with intent to sell, pledge as consideration, or trade the property. This is in contrast to the current statute, which, in part, defines "traffics" as "to buy, receive, possess, or obtain control of property with intent to [sell, pledge, transfer, distribute, dispense, or otherwise dispose of property to another]."[8] The revised offense eliminates redundant wording. The words "sell, pledge as consideration, or trade" in the revised statute are intended to be broad enough to cover conduct covered by "transfer, distribute, dispense, or otherwise dispose of property" as used in the current statute. Similarly, "buys" and "possesses" in the revised offense are intended to be broad enough to cover every instance in which a person receives or obtains control over property. The RCC's definition of possession requires that the person exercises control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property. However, reference to this definition does not change the scope of the offense. Any time a person engages in conduct to "transfer, distribute, dispense, or otherwise dispose of property" that person necessarily exercises control over property for a period of time sufficient to allow the actor to terminate his or her control of the property.[9] The revised offense makes no change to the statute's scope by only requiring proof the accused buys or possesses property with intent to sell, pledge as consideration, or trade it.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the accused must have had an actual subjective belief that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the accused either knew, or "[had] reason to believe that the property has been stolen[.]"[10] Although this language could be interpreted to mean that the accused *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA has rejected this interpretation for

[7] *See, e.g.*, RCC § 22E-2101.
[8] D.C. Code § 22-3231.
[9] RCC § 22E-202.
[10] D.C. Code § 22-3231.

identical language in the current receiving stolen property statute.[11] The DCCA held that such language requires that the accused had an actual subjective belief, even if erroneous, that the property was stolen.[12] Using the "with intent" inchoate mental state is consistent with this case law. The current TSP statute's subsection (c) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[13] The elimination of the current statute's subsection (c) is consistent with the revised statute's use of "intent" to indicate that the property need not actually be stolen so long as the accused believed it was stolen.

[11] D.C. Code § 22-3232.
[12] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[13] D.C. Code § 22-3231(c).

RCC § 22E-2403. Alteration of a Motor Vehicle Identification Number.

Explanatory Note. *This section establishes the alteration of a vehicle identification number (AVIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a vehicle identification number (VIN) with intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. The revised AVIN offense replaces the existing offense of altering or removing motor vehicle identification numbers*[1] *in the current D.C. Code.*

Subsection (a) specifies the elements of first degree AVIN. Paragraph (a)(1) requires that the accused knowingly alters an identification number of a motor vehicle or motor vehicle part. "Alters" is an undefined term, intended to be broadly construed. "Motor vehicle" is a defined term in RCC § 22E-701, and includes any vehicle designed to be propelled only by an internal-combustion engine or electricity.[2] The term "identification number" is also a defined term in RCC § 22E-701, and means "a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for purposes of identification." Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would alter an identification number of a motor vehicle or motor vehicle part.

Paragraph (a)(2) further specifies that the accused must alter a VIN "with intent to" conceal or misrepresent the identity of the motor vehicle or motor vehicle part. "Intent" is a defined term in RCC § 22E-206, which here means the accused was practically certain that he or she would conceal or misrepresent the identity of the motor vehicle or motor vehicle part. 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 required that the accused actually conceals or misrepresents the identity of the motor vehicle or motor vehicle part, only that the accused was practically certain that he or she would do so.

Paragraph (a)(3) requires that the value of such motor vehicle or motor vehicle part, in fact, is $5,000 or more. The reference in paragraph (a)(3) to "such" motor vehicle or motor vehicle part refers to paragraph (a)(2) and the object that the actor intended to conceal or misrepresent, be it a part or the whole motor vehicle. When the accused acts with intent to conceal or misrepresent the identity of a motor vehicle part, the value of that part, not the vehicle from which it was taken, shall be used to determine if this element is satisfied.[3] The term "in fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the motor vehicle or part.

Subsection (b) specifies the elements of second degree AVIN. The elements of second degree AVIN are identical to the elements of first degree AVIN, expect that there is no value requirement for the motor vehicle or motor vehicle part.

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[1] D.C. Code § 22-3233.

[2] RCC § 22E-701. For example, an electric bicycle that is designed to be propelled both by electricity and human effort does not constitute a "motor vehicle."

[3] For example, if a person alters a VIN, with intent to conceal the identity of that part, the value of the motor vehicle is irrelevant—it is the value of the part that determines whether the conduct can be charged as first degree AVIN.

Subsection (c) specifies penalties for each grade of the AVIN offense. [*See* Second Draft of Report #41.]

Subsection (d) cross references penalties found elsewhere in the RCC.

Relation to Current District Law. *The revised AVIN statute changes current District law in four main ways.*

First, the revised AVIN statute requires that the accused have intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. Under the current D.C. Code statute, it appears that a person commits an offense by knowingly altering a VIN, regardless of the purpose for doing so.[4] No case law exists as to whether a person would be guilty under the current statute for altering a VIN for some other purpose. In contrast, the revised statute eliminates liability for a person who alters[5] a VIN for purposes besides concealing or misrepresenting identity. The change improves the proportionality of the revised offense.

Second, the provision in RCC § 22E-2001, "Aggregation to Determine Property Offense Grades," allows aggregation of value for the revised AVIN offense based on a single scheme or systematic course of conduct. The current AVIN offense is not part of the current aggregation of value provision for property offenses.[6] The revised AVIN statute permits aggregation for determining the appropriate grade of AVIN to ensure penalties are proportional to the accused's actual conduct.[7]

Third, by reference to the RCC's definition of "motor vehicle," the revised AVIN statute changes the scope of the offense. The term "motor vehicle" as used in the current AVIN statute is defined to include a "vehicle propelled by an internal-combustion engine, electricity, or steam[.]"[8] In contrast, the RCC's definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity."[9] This language excludes vehicles like mopeds that are designed to be propelled, in part, by human exertion, as well as steam powered vehicles. Vehicles that are designed to be propelled in part by human exertion are generally not as expensive and do not pose the same safety risks to others that a "motor vehicle" does. Steam powered vehicles have fallen out of use, and it is unnecessary to include them in the definition of "motor vehicle." This change improves the clarity and proportionality of the revised statute.

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[4] D.C. Code § 22-3233.

[5] *E.g.* knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

[6] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[7] Inclusion of AVIN in RCC § 22E-2001 does not suggest however that multiple convictions are categorically barred when the accused alters multiple VINs, on multiple motor vehicles or motor vehicles parts, even when the alterations occur as part of a single act or course of conduct.

[8] D.C. Code § 22-3233.

[9] RCC § 22E-701.

Fourth, the threshold value of the motor vehicle or motor vehicle part that determines liability for first degree AVIN is $2,500. The current statute sets the value threshold for the higher grade of AVIN at $1,000.[10] In contrast, the revised statute's $2,500 aligns with the grading differences in value in the RCC theft,[11] criminal damage to property,[12] possession of stolen property,[13] and other comparable offenses. This change improves the consistency and proportionality of the revised offense.

Beyond these four changes to current District law, two other aspects of the revised AVIN statute may constitute a substantive change of law.

First, by reference to the RCC's definition of "motor vehicle," the revised AVIN statute may change the scope of the offense as compared to current law. The current statute defines "motor vehicle" to include "any non-operational vehicle that is being restored or repaired." The RCC's "motor vehicle" definition omits this language, and is intended to include non-operational vehicles regardless of whether they are being restored or repaired, if they meet the other requirements of the definition. It is unclear whether the current definition of motor vehicle excludes non-operational vehicles that are *not* being restored or repaired, and there is no relevant DCCA case law. This change clarifies the revised statute.

Second, determination of value for the revised first degree AVIN statute depends on the object that the actor intended to conceal or misrepresent, be it a part or the whole motor vehicle. The current D.C. Code statute says a person is subject to the higher gradation "if the value of the motor vehicle or motor vehicle part is $1,000 or more…."[14] There is no case law interpreting this provision. To resolve ambiguities about the relevant value when a car contains a part with an obliterated identification number, paragraph (a)(3) of the first degree AVIN statute refers to "such" motor vehicle or motor vehicle (in paragraph (a)(2)) that the actor intended to conceal or misrepresent. Consequently, when the accused acts with intent to conceal or misrepresent the identity of just a motor vehicle part, the value of that part, not the vehicle from which it was taken, shall be used to determine valuation. This change clarifies the revised statute.

One other change to the revised AVIN statute is clarificatory in nature and is not intended to substantively change District law.

The current statute makes it a crime to "remove, obliterate, tamper with, or alter" a VIN.[15] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a VIN. The change is not intended to narrow the scope of the offense.

[10] D.C. Code § 22-3233(b)(2).
[11] RCC § 22E-2101.
[12] RCC § 22E-2503.
[13] RCC § 22E-2401.
[14] D.C. Code § 22-3233(b)(2).
[15] D.C. Code § 22-3233.

RCC § 22E-2404. Alteration of Bicycle Identification Number.

Explanatory Note. *This section establishes the alteration of a bicycle identification number (ABIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a bicycle identification number (BIN), with the intent to conceal or misrepresent the identity of the bicycle or bicycle part. The revised ABIN offense replaces the current altering or removing bicycle identification numbers[1] statute in the current D.C. Code.*

Paragraph (a)(1) requires that the accused knowingly alters an identification number of a bicycle or bicycle part. "Alters" is an undefined term, intended to be broadly construed. The terms "identification number" and "bicycle" are defined in D.C. Code § 50-1609. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be practically certainty that he or she would alter an identification number of a bicycle or bicycle part.

Paragraph (a)(2) further specifies that the accused must alter a BIN "with intent to" conceal or misrepresent the identity of the bicycle or bicycle part. "Intent" is a defined term in RCC § 22E-206, here meaning the accused was practically certain that he or she would conceal or misrepresent the identity of the bicycle or bicycle part. 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 accused actually concealed or misrepresented the identity of the bicycle or bicycle part, only that the accused was practically certain that he or she would do so.

Subsection (b) specifies the penalty for this offense. There is only one grade of ABIN, and the value of the bicycle or bicycle part is irrelevant.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC and the current D.C. Code.

Relation to Current District Law. *The revised ABIN statute changes current District law in one main way.*

The revised ABIN statute requires that the accused act with intent to conceal or misrepresent the identity of the bicycle or bicycle part. Under the current statute, it appears that a person commits an offense by merely knowingly altering a BIN, regardless of the purpose for doing so.[2] No case law exists as to whether a person would be guilty under the current statute for altering a BIN for some other purpose. In contrast, the revised statute eliminates liability for a person who alters[3] a BIN for purposes besides concealment or misrepresentation of identity. The change improves the proportionality of the revised offense.

[1] D.C. Code § 22-3234.
[2] D.C. Code § 22-3234.
[3] *E.g.* knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

In addition to this one main change, one other change is clarificatory in nature and is not intended to substantively change District law.

The current statute makes it a crime to "remove, obliterate, tamper with, or alter" a BIN.[4] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a BIN. The change is not intended to narrow the scope of the offense.

[4] D.C. Code § 22-3234.

RCC § 22E-2501. Arson.

Explanatory Note. *This section establishes the revised arson offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire, or causing an explosion, that damages or destroys a dwelling or building. The penalty gradations are based on the harm or risk of harm to human life. The revised arson offense, in conjunction with the RCC reckless burning offense, replaces the current arson offense,[1] and the closely-related offenses of burning one's own property with intent to injure or defraud another person[2] and placing explosives with intent to destroy or injure property.[3]*

Paragraph (a)(1) states the prohibited conduct for first degree arson—starting a fire, or causing an explosion, that damages or destroys a dwelling or building. "Dwelling" and "building" are defined terms in RCC § 22E-701. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) to be "knowingly," a term defined at RCC § 22E-206 which here requires the accused to be aware to a practical certainty that his or her conduct starts a fire or causes an explosion that damages or destroys a "dwelling" or "building."

Paragraph (a)(2) and paragraph (a)(3) specify two additional requirements for first degree arson. Paragraph (a)(2) requires that the accused is "reckless" as to the fact that a person who is not a participant in the crime is present in the dwelling or building. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that the dwelling or building is occupied by someone not a participant in the crime. Paragraph (a)(3) requires that the fire or explosion "in fact" cause death or serious bodily injury to another person who is not a participant in the crime. "Serious bodily injury" is a defined term in RCC § 22E-701. Subject to causation limitations, paragraph (a)(3) may also include harm to first responders. "In fact," a term defined in RCC § 22E-207, is used to indicate here that there is no culpable mental state requirement as to whether the fire or explosion caused death or serious bodily injury to another person who is not a participant in the crime.

Subsection (b) specifies the requirements for second degree arson. The requirements in paragraph (b)(1) and sub paragraph section (b)(2) are the same as the requirements in paragraph (a)(1) and paragraph (a)(2) for first degree arson. There are no additional requirements for second degree arson.

Subsection (c) specifies the requirements for third degree arson. The requirements in third degree arson are the same as the requirements in paragraph (a)(1) for first degree arson. There are no additional requirements for third degree arson.

Subsection (d) establishes an affirmative defense that applies only to third degree arson. It is an affirmative defense that the defendant, in fact, had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit. "In fact" is defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to

[1] D.C. Code § 22-301.
[2] D.C. Code § 22-302.
[3] D.C. Code § 22-3305.

any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. In subsection (c), "in fact" means that there is no culpable mental state requirement as to whether the defendant had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

Subsection (e) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

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

First, the revised arson statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current arson statute,[4] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The D.C. Court of Appeals (DCCA) has stated that the malice culpable mental state in the current arson requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy."[5] Beyond this, District case law holds that the meaning of malice in the current arson and current malicious destruction of property (MDP) offenses is the same.[6] And, in the context of MDP, the DCCA has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[7] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[8]

In contrast, the revised arson statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for each of the elements of the

[4] D.C. Code § 22-301.

[5] *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States*, 909 at 163-64. "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[6] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[7] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[8] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e., a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e., defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

revised offense—knowledge as to starting a fire, or causing an explosion, that damages or destroys a dwelling or building, recklessness as to occupancy, and strict liability as to causing death or serious bodily injury. The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[9] The "reckless" culpable mental state that the revised statute applies to whether the building or dwelling is occupied also approximates, but is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[10] and provides liability for reckless behavior that may result in serious property damage. Finally, the strict liability requirement reflects the fact that the accused has already engaged in serious criminal conduct and no further mental state appears necessary for liability as to the consequences based on his or her recklessness at placing a person risk. In fact, if the defendant had a culpable mental state as to such harm, it may also constitute assault or murder. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[11] Eliminating malice from the revised arson statute also eliminates the special mitigation defenses applicable to the current arson offense.[12] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the revised arson statute requires, in part, that the defendant "causes an explosion." The current arson statute merely requires that the defendant "burn or attempt to burn,"[13] and there is no case law on whether this would include all explosions. At common law, explosions were excluded from arson if they did not burn the property.[14] In contrast, the revised arson statute requires, in part, that the defendant "causes an

[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[10] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

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

[12] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").

[13] D.C. Code § 22-301.

[14] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").

explosion." Explosions can be as dangerous, if not more dangerous, than fire and raise similar concerns about occupancy of the location where the explosion takes place. This revision eliminates a possible gap in liability in current District law.[15]

Third, the revised arson statute applies only to railroad cars and watercraft that satisfy the RCC definition of "dwelling" in RCC § 22E-701. The current arson statute was enacted in 1901 and specifies a lengthy list of property,[16] including "any steamboat, vessel, canal boat, or other watercraft" and "any railroad car." The current arson statute also clearly applies to "dwellings" and "houses."[17] In contrast, the revised arson offense includes a railroad car or watercraft only when that railroad car or watercraft satisfies the definition of "dwelling" in § 22E-701.[18] Fires in railroad cars and watercraft that are not dwellings do not endanger human life the same as fires in buildings and dwellings. Damaging or destroying with fire or explosion railroad cars and watercraft that do not satisfy the definition of "dwelling" in RCC § 22E-701 is criminalized by the RCC criminal damage to property offense (RCC § 22E-2503). This revision clarifies and improves the proportionality of the revised statute.

Fourth, the revised arson statute eliminates the requirement that the dwelling or building be another person's property. The current arson statute requires that the property is "in whole or in part, of another person."[19] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person other than the defendant legally owns the property.[20] In contrast, the revised arson statute removes the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of arson to avoid liability because another person owned all or part of the property. Under the revised arson statute, ownership of the property is irrelevant. This change clarifies the revised arson statute and eliminates a gap in liability under current law.

Fifth, the revised arson statute provides a new affirmative defense, in subsection (d), to third degree arson where a government permit has been issued regarding the actor's conduct and the actor complied with all the rules and regulations governing the use of such a permit. No comparable statute or case law exists in current District law regarding such a defense. As there is less potential risk to human life in third degree

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[15] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."

[16] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").

[17] *Id*.

[18] Similarly, the revised arson statute includes a "motor vehicle," as that term is defined in RCC § 22E-701, only when it serves as a dwelling.

[19] D.C. Code § 22-301.

[20] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").

arson, it is appropriate to permit a defendant to avoid liability when acting with property authority. This revision improves the proportionality of the revised offense.

Sixth, the revised arson statute punishes attempted arson differently than a completed arson. The current arson statute includes both an "attempt to burn" and "burn"[21] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[22] In contrast, under the revised arson statute, the General Part's attempt provisions[23] establish liability for attempted arson consistent with other offenses. There is no clear rationale for such a special attempt provision in arson as compared to other offenses. This revision improves the proportionality of the revised offense.

Seventh, the revised arson statute creates three gradations of arson based primarily upon the actual harm or risk of harm to human life. The current arson statute does not have any gradations and makes no provision for instances where a person suffers serious injury or death as a result of the arson. Case law requires arson to endanger human life to some degree.[24] However, case law also suggests that liability for firefighters and first responders who are seriously injured or killed while responding to the fire or explosion is not covered in current District law.[25] In contrast, the revised arson statute has three gradations that differ on the seriousness of risk to human life. First degree arson provides liability when a defendant, in fact, caused serious bodily injury or death to any person that is not a participant in the crime. Subject to causation limitations, this would also include harm experienced by first responders.[26] No culpable mental state is required for this element because the defendant has already engaged in serious criminal conduct.[27] The revised arson statute excludes participants in the crime because their presence is unrelated to the risk the fire or explosion poses to the occupants or residents of the dwelling or building. In addition, the RCC provides liability under the RCC

[21] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").
[22] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).
[23] RCC § 22E-301.
[24] *See, e.g.*, *Phenis*, 909 A.2d at 164 ("With respect to arson, the government must prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy.) (internal citations omitted).
[25] In *Lewis v. United States*, the government argued that "by setting a fire which he knew would require the intervention of firefighters to extinguish, [the appellant] consciously disregarded a substantial risk to the lives of the firefighters." *Lewis v. United States*, 10 A.3d 646, 661 n.8 (D.C. 2010). The DCCA acknowledged that "there is some merit to this argument," but noted that in states in which "a risk to a firefighter safety satisfies an element of arson, this decision has been made by the legislature." *Id*. The court stated "[i]n light of these statutes applicable in other states, we refrain from extending the 'risk of harm to human life' element to include a risk to responding emergency personnel since we believe the legislature is more apt to make such a change in our arson law." *Id.*
[26] Where the harm to a first responder is by an unrelated or in no way a foreseeable event, for example an airplane crash landing at the location where the fire occurred, the causal connection between setting a fire to an occupied dwelling and the harm may be too tenuous to sustain liability. See commentary to RCC § 22E-204 Causation, for further explanation of causation requirements in the RCC.
[27] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence. *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

assault and homicide statutes if a defendant starts a fire or causes an explosion that injures or kills a participant in the crime. Second degree arson requires that the defendant is reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building. Third degree arson applies to dwellings or buildings with no additional requirements and recognizes the heightened risk to human life at these properties even if they happen to be unoccupied at the time of the offense.[28] This revision improves the proportionality of the revised offense by distinguishing more and less culpable conduct.

Eighth, the RCC arson statute replaces two statutes that are closely related to the current arson statute: burning one's own property with intent to defraud or injure another person,[29] and placing explosives with intent to destroy or injure property.[30] In the RCC, conduct currently prohibited by burning one's own property with intent to defraud or injure another person is criminalized under multiple revised statutes, including the revised arson statute which now applies to property belonging to anyone.[31] Similarly, in the RCC, conduct currently prohibited by placing explosives with intent to injure or destroy property is criminalized under multiple statutes, including arson which now explicitly includes use of explosives to cause damage.[32] This revision reduces unnecessary overlap with the revised arson offense, the revised reckless burning offense in RCC § 22E-2502, and other offenses.

Ninth, under the revised arson statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current arson statute is a

[28] All buildings, as enclosed spaces, pose greater risks of harm from a fire than open areas or business yards.

[29] D.C. Code § 22-302 ("Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[30] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[31] Burning one's own property with intent to defraud or injure another person would be subject to the revised arson statute if the property was one of the specific property types covered by arson (dwelling or building) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct may also satisfy the RCC reckless burning offense, although with a significantly lower penalty than under the revised arson statute. In addition to these property damage offenses, such conduct may well constitute an attempt (RCC § 22E-301) to commit fraud (RCC § 22E-2201), assault (RCC § 22E-1202), or murder (RCC § 22E-1101) depending on the facts of the case.

[32] Placing explosives with intent to injure or destroy property would constitute an attempt (RCC § 22E-301) to commit arson if the property was one of the specific property types covered by the revised arson statute (dwelling or building) or criminal damage to property if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct could also satisfy an attempt (RCC § 22E-301) to commit reckless burning, although with a significantly lower penalty than under the revised arson statute.

general intent crime,[33] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the culpable mental state requirements for the offense.[34] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[35]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for arson. By contrast, per the revised arson offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of arson. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in arson.[36] This change improves the clarity, consistency, and proportionality of the offense.

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

First, the revised arson statute requires a defendant, in relevant part, to "start[] a fire." The current arson statute requires that the defendant "burn" the specified property.[37] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[38] but no decision is directly on point. Instead of this ambiguity, the revised arson statute requires "start[] a fire." This revision clarifies the revised statute.

Second, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in

[33] *See Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) (citing *Barrett v. United States*, 377 A.2d 62 (D.C. 1977); *Charles v. United States*, 371 A.2d 404 (D.C. 1977)).

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

[35] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

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

[37] D.C. Code § 22-301.

[38] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[39] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

The revised arson statute requires that the fire or explosion "damage[] or destroy[]" the specified property. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[40] Insofar as burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

[39] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g. the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[40] D.C. Code § 22-301.

RCC § 22E-2502. Reckless Burning.

Explanatory Note. *This section establishes the reckless burning offense and penalty for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire or causing an explosion with recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building. Reckless burning is a lesser included offense of all the gradations of the revised arson offense (RCC § 22E-2401). It differs from the revised arson offense because it is limited to recklessly damaging or destroying the property at issue, whereas the revised arson statute requires knowingly damaging or destroying the property at issue. Along with the revised arson offense, the reckless burning offense replaces the current arson statute,*[1] *as well as the closely-related offenses of burning one's own property with intent to injure or defraud another person*[2] *and placing explosives with intent to destroy or injure property.*[3]

Paragraph (a)(1) states the prohibited conduct—starting a fire or causing an explosion. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) to be "knowingly," a term defined at RCC § 22E-206 which here requires the accused to be at least aware to a practical certainty that his or her conduct starts a fire or causes an explosion.

Paragraph (a)(2) states that the fire or explosion must damage or destroy a "dwelling" or a "building" as those terms are defined in RCC § 22E-701. Paragraph (a)(2) specifies a culpable mental state of "with recklessness," a defined term in RCC § 22E-206 that here means the accused must disregard a substantial risk that the fire or explosion will damage or destroy a "dwelling" or "building." It must be proven both that the fire or explosion damaged or destroyed the building and that the actor had a reckless culpable mental state as to that result.[4]

Subsection (b) establishes an affirmative defense to the reckless burning offense. It is an affirmative defense that the defendant, in fact, had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit. "In fact" is defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. In subsection (b), "in fact" means that there is no culpable mental state requirement as to whether the defendant had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

Subsection (c) specifies the penalty for the offense. [*See* Second Draft of Report #41.]

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

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[1] D.C. Code § 22-301.
[2] D.C. Code § 22-302.
[3] D.C. Code § 22-3305.
[4] If the actor knowingly starts a fire or causes an explosion with recklessness that the fire or explosion would damage or destroy a building or dwelling, but there is no such damage or destruction, then the defendant would be guilty of attempted reckless burning.

Relation to Current District Law. *The reckless burning statute changes current District law in seven main ways.*

First, the RCC reckless burning statute specifies culpable mental states of knowledge and recklessness with respect to various elements. "Maliciously" is the only culpable mental state specified in the current arson statute,[5] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The D.C. Court of Appeals (DCCA) has stated that the malice culpable mental state in the current arson statute requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy."[6] Beyond this, District case law holds that the meaning of malice in the current arson and current malicious destruction of property (MDP) offenses is the same.[7] And, in the context of MDP, has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[8] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[9]

In contrast, the RCC reckless burning statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for each of the elements of the revised offense—knowledge as to starting a fire or causing an explosion and recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building. The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[10] The "reckless" culpable mental state that applies to the fact that the fire or explosion damages or destroys and that the property is a dwelling or building approximates, but is somewhat lower than, existing

[5] D.C. Code § 22-301.

[6] *Phenis*, 909 A.2d at 164. (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States,* 909 A.2d 138, 163-64 (D.C. 2006). "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia,* 476 A.2d 1128,1132 (D.C. 1984).

[7] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[8] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[9] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e., a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e., defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[10] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[11] and provides liability for reckless behavior that may result in serious property damage. As a lesser included offense of arson, penalized at a lower level, the lower culpable mental state in the RCC reckless burning offense creates a wider range of conduct and punishments for arson-type behavior. Eliminating malice from the RCC reckless burning statute also eliminates the special mitigation defenses applicable to the current arson offense.[12] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the RCC reckless burning statute requires, in part, that the defendant "cause an explosion." The current arson statute merely requires that the defendant "burn or attempt to burn,"[13] and there is no case law on whether this would include all explosions. At common law, explosions were excluded from arson if they did not burn the property.[14] In contrast, the RCC reckless burning statute requires, in part, that the defendant "causes an explosion." Explosions can be as dangerous, if not more dangerous, than fire and raise similar concerns about occupancy of the location where the explosion takes place. This revision eliminates a possible gap in liability in current District law.[15]

Third, the revised arson statute applies only to railroad cars and watercraft that satisfy the RCC definition of "dwelling" in RCC § 22E-701. The current arson statute was enacted in 1901 and specifies a lengthy list of property,[16] including "any steamboat, vessel, canal boat, or other watercraft" and "any railroad car." The current arson statute also clearly applies to "dwellings" and "houses."[17] In contrast, the RCC reckless burning offense includes a railroad car or watercraft only when that railroad car or watercraft satisfies the definition of "dwelling" in § 22E-701.[18] Fires in railroad cars and watercraft that are not dwellings do not endanger human life the same as fires in buildings and

[11] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

[12] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").

[13] D.C. Code § 22-301.

[14] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").

[15] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."

[16] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").

[17] *Id*.

[18] Similarly, the revised arson statute includes a "motor vehicle," as that term is defined in RCC § 22E-701, only when it serves as a dwelling.

dwellings. Damaging or destroying with fire or explosion railroad cars and watercraft that do not satisfy the definition of "dwelling" in RCC § 22E-701 is criminalized by the RCC criminal damage to property offense (RCC § 22E-2503). This revision clarifies and improves the proportionality of the revised statute.

Fourth, the RCC reckless burning statute eliminates the requirement that the dwelling, or building be another person's property. The current arson statute requires that the property is "in whole or in part, of another person."[19] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person other than the defendant legally owns the property.[20] In contrast, the RCC reckless burning statute removes the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of reckless burning to avoid liability because another person owned all or part of the property. Under the RCC reckless burning statute, ownership of the property is irrelevant. This change clarifies the RCC reckless burning statute and eliminates a gap in liability under current law.

Fifth, the revised reckless burning statute provides a new affirmative defense in subsection (b) where a government permit has been issued regarding the actor's conduct and the actor complied with all the rules and regulations governing the use of such a permit. No comparable statute or case law exists in current District law regarding such a defense. As there is less risk to human life in reckless burning, in these circumstances it is appropriate to permit a defendant to avoid liability when acting with property authority. This change improves the proportionality of the RCC reckless burning offense.

Sixth, the revised reckless burning statute punishes attempted reckless burning differently than a completed reckless burning. The current arson statute includes both an "attempt to burn" and "burn"[21] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[22] In contrast, under the RCC reckless burning statute, the General Part's attempt provisions[23] will establish liability for attempted reckless burning consistent with other offenses. There is no clear rationale for such a special attempt provision in arson or reckless burning as compared to other offenses. This revision improves the proportionality of the revised offense.

Seventh, in codifying a reckless burning offense, the RCC replaces two statutes that are closely related to the current arson statute: burning one's own property with intent to injure or defraud another person,[24] and placing explosives with intent to destroy

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[19] D.C. Code § 22-301.

[20] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").

[21] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").

[22] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).

[23] RCC § 22E-301.

[24] D.C. Code § 22-302 ("Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure

or injure property.[25] In the RCC, conduct currently prohibited by burning one's own property with intent to defraud or injure another person is criminalized under multiple revised statutes, including the revised arson statute which now applies to property belonging to anyone.[26] Similarly, in the RCC, conduct currently prohibited by placing explosives with intent to injure or destroy property is criminalized under multiple statutes, including arson which now explicitly includes use of explosives to cause damage.[27] This revision reduces unnecessary overlap with the revised arson offense, the revised reckless burning offense in RCC § 22E-2502, and other offenses.

Beyond these seven main changes to current District law, two other aspects of the RCC reckless burning statute may constitute substantive changes of law.

First, the RCC reckless burning statute requires a defendant, in relevant part, to "start[]a fire." The current arson statute requires that the defendant "burn" the specified property.[28] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[29] but no decision is directly on point. Instead of this ambiguity, the revised arson statute requires "start[] a fire." This revision clarifies the revised statute.

Second, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities

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any other person, shall be imprisoned for not more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[25] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[26] Burning one's own property with intent to defraud or injure another person would be subject to the revised arson statute if the property was one of the specific property types covered by arson (dwelling or building) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct may also satisfy the RCC reckless burning offense, although with a significantly lower penalty than under the revised arson statute. In addition to these property damage offenses, such conduct may well constitute an attempt (RCC § 22E-301) to commit fraud (RCC § 22E-2201), assault (RCC § 22E-1202), or murder (RCC § 22E-1101) depending on the facts of the case.

[27] Placing explosives with intent to injure or destroy property would constitute an attempt (RCC § 22E-301) to commit arson if the property was one of the specific property types covered by the revised arson statute (dwelling or building) or criminal damage to property if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct could also satisfy an attempt (RCC § 22E-301) to commit reckless burning, although with a significantly lower penalty than under the revised arson statute.

[28] D.C. Code § 22-301.

[29] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[30] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

The revised reckless burning statute requires that the fire or explosion damage or destroy a dwelling or building. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[31] Insofar as burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

[30] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g. the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[31] D.C. Code § 22-301.

RCC § 22E-2503. Criminal Damage to Property.

Explanatory Note. *This section establishes the criminal damage to property (CDP) offense and penalty gradations for the Revised Criminal Code (RCC). The CDP offense proscribes damaging or destroying property without the effective consent of an owner. The penalty gradations are based on the amount of damage to the property, as well as the type of property and the defendant's culpable mental state in causing the damage or destruction. The CDP offense is closely related to the revised arson,[1] reckless burning,[2] and revised criminal graffiti offenses.[3] The CDP offense replaces the current malicious destruction of property (MPD) offense and multiple statutes[4] in the current D.C. Code that concern damage to particular types of property.*

Paragraph (a)(1) specifies the prohibited conduct for first degree CDP—damaging or destroying the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon without consent, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) applies to all of the elements in subsection (a)(1)—damages or destroys the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct damages or destroys the "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property with which the accused is not privileged to interfere. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Paragraph (a)(3) requires that the amount of damage to the property for first degree CDP "in fact" be $500,000 or more. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Paragraph (b)(1) and paragraph (b)(2) specify the prohibited conduct for second degree CDP. The requirements in paragraph (b)(1) and paragraph (b)(2) are the same as

[1] RCC § 22E-2501.
[2] RCC § 22E-2502.
[3] RCC § 22E-2404.
[4] D.C. Code §§ 22-3303, 22-3305, 22-3307, 22-3309, 22-3310, 22-3312.01, 22-3313, and 22-3314.

those in paragraph (a)(1) and paragraph (a)(2) for first degree CDP. Paragraph (b)(3) requires that the amount of damage to the property for second degree CDP "in fact" be $50,000 or more. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Paragraph (c)(1) and subparagraph (c)(1)(A) specify one type of prohibited conduct for third degree CDP. The requirements in paragraph (c)(1) and subparagraph (c)(1)(A) are the same as those in paragraph (a)(1) and paragraph (a)(2) for first degree CDP. Sub-subparagraph (c)(1)(B)(i), sub-subparagraph (c)(1)(B)(ii), and sub-subparagraph (c)(1)(B)(iii) specify the gradation requirements for this type of third degree CDP. Per the rules of interpretation in RCC § 22E-207, the term "in fact" in subparagraph (c)(1)(B) applies to each element that follows until a culpable mental state is specified. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Here, there is no culpable mental state as to the amount of damage ($5,000 or more in sub-subparagraph (c)(1)(B)(i)) or the type of property that is damaged or destroyed (cemetery, grave, other place for the internment of human remains, place of worship, or public monument in sub-subparagraphs (c)(1)(B)(ii) and (c)(1)(B)(iii)).[5]

Paragraph (c)(2) establishes an alternative set of requirements for third degree CDP that requires only recklessness as to the damage or destruction, but requires a higher amount of damage than the first alternative set of requirements in paragraph (c)(1) (which involves knowingly damaging or destroying property that causes $5,000 or more in damage). Paragraph (c)(2) specifies the prohibited conduct for this type of third degree CDP—damages or destroys property. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Recklessly" is a defined term in RCC § 22E-206 that here requires that the defendant disregard a substantial risk that his or her conduct damages or destroys "property."[6] Subparagraph (c)(2)(A) further requires that the property be "property of another." "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Subparagraph (c)(2)(A) specifies a culpable mental state of "knowing." "Knowing" is a defined term in RCC § 22E-206 that here requires that the defendant is practically certain that the property is "property of another." Subparagraph (c)(2)(B) requires that the prohibited conduct be "without the effective consent of an owner." The term "consent,"

[5] Harm to the specific types of property described gradations in third degree CDP—a "cemetery, grave, or other place for the internment of human remains" (sub-subparagraph (c)(1)(B)(ii)) and a "place of worship or a public monument" (sub-subparagraph (c)(1)(B)(iii))—may be charged at least as third degree CDP. However, depending on the amount of damage, damage or destruction of these types of property may also be charged as a higher gradation of CDP. Prosecutors are also able to charge conduct involving these types of property under a lower, lesser gradation than third degree CDP.

[6] Although paragraph (c)(2) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," subparagraph (c)(2)(A) requires a culpable mental state of "knowingly" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for this type of third degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property with which the accused is not privileged to interfere. Per the rules of interpretation in RCC § 22E-207, the "knowing" mental state in subparagraph (c)(2)(A) also applies to subparagraph (c)(2)(B). "Knowing" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner. Finally, subparagraph (c)(2)(C) requires that the amount of damage "in fact" be $50,000 or more for this type of third degree CDP. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Paragraph (d)(1), paragraph (d)(2), and paragraph (d)(3) specify the prohibited conduct for fourth degree CDP. These requirements are the same as the same requirements for third degree CDP in paragraph (c)(2), subparagraph (c)(2)(A), and subparagraph (c)(2)(C).[7] Paragraph (d)(4) requires that the amount of damage to the property for fourth degree CDP "in fact" be $500 or more. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Paragraph (e)(1), paragraph (e)(2), and paragraph (e)(3) specify the prohibited conduct for fifth degree CDP. These requirements are the same as the requirements for third degree CDP in paragraph (c)(2), subparagraph (c)(2)(A), and subparagraph (c)(2)(C).[8] Paragraph (e)(4) requires that the amount of damage to the property for fifth degree CDP is "any amount." "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Subsection (f) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The CDP statute changes current District law in eight main ways.*

[7] Although paragraph (d)(1) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," paragraph (d)(2) requires a culpable mental state of "knowing" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for fourth degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

[8] Although paragraph (e)(1) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," paragraph (e)(2) requires a culpable mental state of "knowing" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for fifth degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

First, the revised CDP statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current MDP statute,[9] and it is unclear whether all or just some of the current MDP statute elements are modified by the term. The D.C. Court of Appeals (DCCA) has defined malice to mean: "(1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result."[10] Per the first part of this holding, MDP is subject to various defenses more typically recognized in the context of murder.[11] Per the second part of this holding, the DCCA has further clarified that, as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice in MDP either requires the defendant act "purposely" (corresponding to an "actual intent to cause the particular harm") or with a blend of "knowingly" and "recklessly" culpable mental states (corresponding to a mental state of "wanton and willful…with awareness of a plain and strong likelihood").[12]

In contrast, the RCC provides standardized definitions for each culpable mental state and specifies the relevant culpable mental states for the revised CDP offense: knowledge or recklessness as to damaging or destroying property, knowledge for the fact that the item at issue is "property" and "property of another," as those terms are defined in RCC § 22E-701,[13] and knowledge for lacking the effective consent of an owner. In

[9] D.C. Code § 22-303.

[10] *Harris v. United States*, 125 A.3d 704, 708 (D.C. 2015) (quoting Guzman v. United States, 821 A.2d 895, 898 (D.C.2003)). The DCCA has further stated that the culpable mental state of the current MDP offense is one of "general intent." *Carter v. United States*, 531 A.2d 956, 962 (D.C. 1987). "General intent" is not used in or defined in the current MDP statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[11] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e., a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e., defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[12] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[13] The CDP statute consistently requires a culpable mental state of knowledge for the fact that the item at issue satisfies the RCC definitions of "property" and "property of another" in RCC § 22E-701, but the drafting varies. Paragraph (a)(1) of first degree CDP, paragraph (b)(1) of second degree CBP, and paragraph (c)(1) of third degree CDP each specify a "knowingly" culpable mental state for the element "property of another." Since the definition of "property of another" in RCC § 22E-701 incorporates the term "property," also defined in RCC § 22E-701, the "knowingly" culpable mental state also applies to the fact that the item is "property."

Paragraph (c)(2) of third degree CDP, paragraph (d)(1) of fourth degree CDP, and paragraph (e)(1) of fifth degree CDP require that the defendant "recklessly" damage or destroy "property." Although the "recklessly" culpable mental state applies to the element that the item at issue is "property," subparagraph (c)(2)(A) of third degree CDP, paragraph (d)(2) of fourth degree CDP, and paragraph (e)(2) of fifth degree CDP require that the defendant know that the item is "property of another," as that term is defined in RCC § 22E-701. Thus, given that the definition of "property of another" incorporates the definition of

addition, the RCC specifies strict liability as to the amount of damage required, as well as to the type of property specified in some of the alternative requirements for third degree CDP. The "knowingly" culpable mental state is consistent with, but somewhat narrower than, existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[14] The "reckless" culpable mental state that the revised CDP statute applies to lower grades of the statute is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, the recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[15] and provides liability for reckless behavior that may result in serious property damage. The strict liability requirement as to the amount of damage or type of property reflects the fact that the accused has already engaged in serious criminal conduct, and no further mental state appears necessary for liability as to the consequences based on his or her recklessly (or knowingly) damaging property. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[16] Finally, eliminating malice from the revised CDP statute also eliminates the special mitigation defenses applicable to MDP.[17] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the revised CDP statute grades the offense, in part, based upon the "amount of damage" done to the property, a defined term in RCC § 22E-701. The current MDP statute states that it is the "value" of the property that determines the gradation. DCCA case law has interpreted "value" for MDP to mean the fair market value of the object when the object is completely destroyed, or the "reasonable cost of the

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"property," these gradations ultimately require a "knowing" culpable mental state for the fact the item at issue is "property."

[14] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[15] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

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

[17] *Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("Thus, provocation is a proper defense to the charge of malicious destruction of property, and we look to the doctrine of provocation as it has developed in the context of homicide, and elsewhere, to guide us in deciding this case."); *see also* D.C. Crim. Jur. Instr. § 5.400 (requiring as an element of MDP that the defendant "acted without mitigation" and defining mitigation, in part, as "when a person acts in the heat of passion caused by adequate provocation" and "when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable.").

repairs necessitated" where an item is only partly damaged.[18] The DCCA further noted that where the cost of repair exceeds the fair market value of the item as a whole, the value would simply be the fair market value of the whole before the damage occurred.[19] In contrast, the revised CDP statute is graded simply on the "amount of damage"—not the value of the property as in the current MDP statute. The RCC definition of "amount of damage" is intended to be consistent with existing case law and is discussed in the commentary to RCC § 22E-701. This revision improves the proportionality of the revised statute.

Third, the revised CDP statute treats attempted CDP differently than a completed CDP. The current statute includes an "attempts to injure or break or destroy" as well as "injur[es] or break[s] or destroy[s]"[20] and there is no District case law construing this language. In contrast, under the revised CDP statute, the General Part's attempt provisions[21] establish liability for attempted CDP consistent with other offenses. There is no clear rationale for such a special attempt provision in CDP as compared to other offenses. This revision improves the proportionality of the revised offense.

Fourth, the CDP statute increases the number and type of gradations for the offense. The current MDP offense is limited to two gradations based solely on the value of the property.[22] First degree MDP is for property that has a "value" of $1,000 or more, and is punished as a serious felony. Second degree MDP involves property valued at less than $1,000 and is a misdemeanor. In contrast, the revised CDP offense has a total of five gradations, which span a much greater range of loss in value to the property, including distinctions for destruction of property that is of special significance and distinctions based upon the defendant's mental state as to the damage or destruction. The dollar value cutoffs in the revised CDP are consistent with other revised offenses and the increase in gradations, differentiated by offense seriousness, improves the proportionality of the revised offense.

Fifth, the revised CDP offense consolidates most prohibited conduct in the D.C. Code that involves damage or destruction of property, and deletes multiple statutes that are closely related to the current MDP statute.[23] The revised CDP and RCC criminal graffiti offense (RCC § 22E-2404) will cover the vast majority of conduct these deleted statutes prohibit pertaining to damaging property.[24] The only apparent exceptions are

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[18] *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).

[19] That is, in the instance that the value of the entire item or property is less than $200 (the then-current threshold for MDP) but the cost of repair is $200 or more, it would be "unjust to measure the value of the damaged portion by the cost of restoration." *Id.* at n.3.

[20] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy…").

[21] RCC § 22E-301.

[22] The DCCA has interpreted "value" in the MDP statute as meaning "fair market value." *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).

[23] D.C. Code §§ 22-3303, 22-3305, 22-3307, 22-3309, 22-3310, 22-3312.01, 22-3313, and 22-3314.

[24] D.C. Code §§ 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person defaces, mutilates, destroys . . . the whole or any part of" specified public records or papers); 22-3309 ("Whoever maliciously cuts down, destroys . . . any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever . . . ."); 22-3310 ("It shall be unlawful for any person willfully to top, cut down . . . girdle, break, wound, destroy, or in any manner injure" trees, specified vegetation, or any boxes or

causing damage to boundary markers that are on one's property[25] and placing excrement or filth on property in a manner that does not damage it.[26] Notably, attempted CDP, the revised arson offense,[27] and the reckless burning offense[28] cover the conduct prohibited in the current District offense pertaining to placing explosive substances near property.[29] Several of the statutes pertaining to removing or concealing property[30] are also addressed by the revised theft,[31] unauthorized use of property,[32] and fraud[33] offenses. This change removes unnecessary overlap among criminal statutes and improves the proportionality of the revised statutes.

Sixth, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," allows aggregation of value for the revised CDP offense based on a single scheme or systematic course of conduct. The current MDP offense is not part of the current aggregation of value provision for property offenses.[34]

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protection thereof of another person); 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to disfigure, cut, chip . . . to write, mark, or print obscene or indecent figures representing obscene or objects upon; to write, mark, draw, or paint, without the consent of the owner or proprietor thereof, or, in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon" property"); 22-3313 ("It shall not be lawful for any person or persons to destroy, break, cut, disfigure, deface, burn, or otherwise injure" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or "to cut, destroy, or injure any scaffolding, ladder, or other thing used in or about such building or improvement . . . ."; and 22-3314 ("If any person shall maliciously cut down, demolish, or otherwise injure any railing, fence, or inclosure around or upon any cemetery, or shall injure or deface any tomb or inscription thereon . . . .").

[25] D.C. Code § 22-3309 ("Whoever maliciously cuts down, destroys, or removes any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever, even though such boundary or bounded trees should stand within the person's own land so cutting down and destroying the same, shall be fined not more than the amount set forth in § 22-3571.01 and imprisoned not exceeding 180 days."). The statute appears to include boundary markers regardless of ownership, unlike the revised CDP offense requirement that the property be "property of another."

[26] D.C. Code § 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to … cover, rub with, or otherwise place filth or excrement of any kind…."). Other conduct in D.C. Code § 22-3312.01 appears to be covered by the revised CDP statute or revised criminal graffiti statute in 22E-2404.

[27] RCC § 22E-2401.

[28] RCC § 22E-2402.

[29] D.C. Code § 22-3305.

[30] D.C. Code § 22-3303 ("Whoever, without legal authority or without the consent of the nearest surviving relative, shall disturb or remove any dead body from a grave" for specified purposes); D.C. Code § 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person . . . abstracts, or conceals the whole or any part of" specified public records or papers); D.C. Code § 22-3309 ("Whoever maliciously . . . removes any boundary tree, stone, or other mark or monument . . . either of his or her own lands or of the lands of any other person whatsoever . . . ."); D.C. Code § 22-3310 ("It shall be unlawful for any person willfully to . . . remove" trees, specified vegetation, or any boxes or protection thereof of another person); D.C. Code § 22-3313 ("It shall not be lawful for any person or persons to . . . remove" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or any scaffolding, ladder, or other similar object).

[31] RCC § 22E-2101.

[32] RCC § 22E-2102.

[33] RCC § 22E-2201.

[34] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-

In contrast, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," applies to the revised CDP statute. This change improves the proportionality of the revised statute.

Seventh, under the revised CDP statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication.[35] The current MDP statute is silent as to the effect of intoxication. However, the DCCA has held that the current MDP statute is a general intent crime,[36] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the culpable mental state requirements for the offense.[37] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[38]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for MDP. By contrast, per the revised CDP offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of CDP. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in CDP.[39] This change improves the clarity, consistency, and proportionality of the offense.

Eighth, the revised CDP statute requires a result element of "damages or destroys." The current MDP statute refers to "injures or breaks,"[40] but does not define these terms. The DCCA has twice made rulings that depended on the definition of

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3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[35] With respect to those elements of CDP subject to a culpable mental state of recklessness, the Revised Criminal Code effectively precludes an intoxication defense where the intoxication is self-induced. *See* RCC § 209(c)("Imputation of Recklessness for Self-Induced Intoxication. When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if: (1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and (2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists.").

[36] *See Carter v. United States*, 531 A.2d 956, 962 (D.C. 1987).

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

[38] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

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

[40] D.C. Code § 22-303.

"injury," and in doing so referred to a dictionary definition of the term as meaning: "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing."[41] In one of these rulings the DCCA suggested that temporary disassembly of an object which does not involve loss or destruction of a part of the object constitutes injury so long as the immediate, ordinary purpose of the object is substantially affected.[42] In contrast, under the revised statute, damage does not include mere temporary disassembly of an object which does not involve loss or destruction of a part.[43] Instead, such a temporary disassembly would be a violation of the revised unauthorized use of property (UUP) offense in RCC § 22E-2102. This change clarifies and improves the proportionality of the revised offense.

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

First, the revised CDP statute requires the property be "property of another," defined in RCC § 22E-701, in part, as any property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The current MDP statute refers to the affected property as being "not his or her own," and does not further define the meaning of this phrase. The DCCA has stated that the phrase "not his or her own" is "ambiguous" because "it could either refer to property that is fully owned by an individual or property that is at least partially owned."[44] However, the DCCA has found that a co-owner of property can be found liable under the current MDP for destroying jointly-owned property.[45] The use of the RCC defined term "property of another" in the revised CDP offense is consistent with case law holding that a person may be liable for destroying jointly-owned property without consent of the other where the joint owner has an interest the other joint owner is not privileged to infringe upon.[46] However, the revised CDP offense, by use of "property of another," excludes liability for damaging or destroying property in which the only sense in which the

[41] *Baker v. United States*, 891 A.2d 208, 215 (D.C. 2006) ("Second, using black spray paint to inscribe obscenities on walls and on an automobile causes damage sufficient under the statute. "Injury" is defined as "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.1947). Applying this definition to the facts here demonstrates that the graffiti, although temporary, caused sufficient "injury." In order to repair Boggs' vehicle, the paint had to be removed and then replaced with a new layer of paint, otherwise, the vehicle would have been significantly devalued."); *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009).

[42] *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009) ("As with, for example, most broken human arms, the effect is temporary, but nevertheless substantial and sufficient to defeat the immediate purpose of its ordinary or intended use.").

[43] This meaning of "damage" may affect the rulings in *Baker v. United States*, 891 A.2d 208 (D.C. 2006) and *Thomas v. United States*, 985 A.2d 409 (D.C. 2009) which relied upon a dictionary definition of "injury" to decide the case.

[44] *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003).

[45] *Id.* at 964. Since the court determined the statutory language was ambiguous, it first looked to the legislative history. *Id.* at 965. The legislative history "provid[ed] no assistance," so the court then looked at case law from other jurisdictions, academic commentators, and the link between destruction of property and domestic violence. *Id.* at 965-67.

[46] Note that, under the revised definition of "property of another," joint owners are not categorically liable under CDP for destroying property of another.

property belongs to another is that another has a security interest in the property. This is because the revised definition of "property of another" specifically excludes "property in the possession of the accused that the other person has only a security interest in." No case law has interpreted whether the current MDP statute's reference to "not his or her own" would include property in the possession of, and owned by, the accused except for a security interest held by another. This change in the revised CDP statute clarifies the offense and applies a consistent definition across theft and theft-related offenses in Chapter 20 of Subtitle III of the RCC through the definition of "property of another."

Second, by use of the phrase "in fact," the revised CDP statute codifies that no culpable mental state is required as to the amount of damage in all gradations of the offense or as to the type of property required in some of the alternative variations of third degree CDP. The current MDP statute is silent as to what culpable mental state, if any, applies to the current MDP value gradations. There is no District case law on what mental state, if any, applies to the current MDP value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[47] Resolving this ambiguity, the revised CDP statute applies strict liability to the amount of damage in all gradations of the offense and to the type of property required in some of the alternative variations of third degree CDP. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[48] Clarifying that the amount of the loss in value is a matter of strict liability in the revised CDP gradations clarifies and potentially fills a gap in District law.

Third, the revised CDP statute requires that the defendant act without the "effective consent of an owner" and applies a culpable mental state of "knowingly" to this element. The current MDP statute does not reference the defendant's lack of consent, although it does require that the property be "not his or her own," which may suggest that the defendant lack consent. DCCA case law interpreting the phrase "not his or her own" is limited to determining issues of joint ownership.[49] More broadly, it seems as though consent would negate the malice requirement in the current MDP statute, given that malice generally requires the absence of "justification, excuse, or mitigation."[50] To resolve this ambiguity, the revised CDP statute requires that the defendant lack the "effective consent of an owner" and applies a "knowingly" culpable mental state to this element. This revision improves the clarity and proportionality of the revised statute and improves its consistency with other RCC property offenses that require that the defendant

[47] D.C. Crim. Jur. Instr. § 5.300.
[48] D.C. Crim. Jur. Instr. § 5.400.
[49] The DCCA has stated that the phrase "not his or her own" is "ambiguous" because "it could either refer to property that is fully owned by an individual or property that is at least partially owned." *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003). However, the DCCA has found that a co-owner of property can be found liable under the current MDP for destroying jointly-owned property. *Id.* at 964. Since the court determined the statutory language was ambiguous, it first looked to the legislative history. *Id.* at 965. The legislative history "provid[ed] no assistance," so the court then looked at case law from other jurisdictions, academic commentators, and the link between destruction of property and domestic violence. *Id.* at 965-67.
[50] *See, e.g.*, *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009).

know that he or she lack the consent or effective consent of an owner, such as the criminal graffiti statute (RCC § 22E-2504).

Fourth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[51] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

For example, the revised CDP statute deletes "by fire or otherwise" and "any public or private property, whether real or personal" that are in the current MDP statute.[52] The language is surplusage and deleting it will not change the scope of the offense.

[51] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g. the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[52] D.C. Code § 22-303.

RCC § 22E-2504. Criminal Graffiti.

Explanatory Note. *This section establishes the revised criminal graffiti offense and penalty for the Revised Criminal Code (RCC). The revised criminal graffiti offense prohibits placing any inscription, writing, drawing, marking, or design on the property of another without the effective consent of an owner. There is a single penalty gradation for the offense. The revised criminal graffiti offense is closely related to the criminal damage to property offense (CDP).*[1] *The two offenses share several elements, but the revised criminal graffiti offense addresses a specific type of damage to property. The revised criminal graffiti offense replaces the current graffiti offense,*[2] *the current possessing graffiti material offense,*[3] *and the current defacing public or private property offense.*[4]

Paragraph (a)(1) states the proscribed conduct—placing any inscription, writing, drawing, marking, or design on the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) applies to all of the elements in paragraph (a)(1)—placing any inscription, writing, drawing, marking, or design on the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct places any inscription, writing, drawing, marking or design on the "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an express or implied coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) specifies the penalty for the offense. [*See* Second Draft of Report #41.]

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

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[1] RCC § 22E-2403.
[2] D.C. Code § 22-3312.04(d).
[3] D.C. Code § 22-3312.04(e).
[4] D.C. Code § 22-3312.01. See commentary to criminal damage to property, RCC § 22E-2503.

Relation to Current District Law. *The revised criminal graffiti statute changes current District law in four main ways.*

First, the revised criminal graffiti punishes attempted criminal graffiti differently than a completed criminal graffiti offense. District law currently codifies a separate, attempt-type offense for graffiti that prohibits, in part, possessing graffiti material with the intent to place graffiti,[5] in addition to providing liability under the current general attempt statute.[6] In contrast, the revised criminal graffiti statute relies solely on the General Part's attempt provisions[7] to establish liability for attempts to place graffiti, consistent with other offenses. The General Part's attempt provisions differ from the current attempt-type offense for graffiti chiefly by requiring the person to be "dangerously close" to committing the offense for there to be liability. Such a requirement reflects longstanding District case law regarding criminal attempts generally.[8] There is no clear rationale for such a special attempt-type offense for graffiti as compared to other offenses. This revision improves the clarity and proportionality of the revised offense.

Second, the revised criminal graffiti offense specifies a culpable mental state of "knowingly" for all elements of the offense. The current graffiti offense[9] specifies a culpable mental state of "willfully." The current graffiti offense does not define the term "willfully" and there is no generally applicable definition in the District's current criminal code. No case law exists interpreting the culpable mental state of the graffiti statute. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[10] Requiring a knowing culpable mental state also makes the revised criminal graffiti offense consistent with the elements of higher gradations of the revised CDP statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[11] This revision improves the clarity and consistency of the revised statute.

Third, the revised criminal graffiti statute does not require that the graffiti be visible from a public right-of-way. The current D.C. Code statute defines "graffiti," in part, as requiring that the inscription, etc., be visible from a "public right-of-way."[12]

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[5] D.C. Code §§ 22-3312.05(5) (defining "graffiti material"), 22-3312.04(e) ("Any person who willfully possesses graffiti material with the intent to place graffiti on property without the consent of the owner shall be fined not less than $100 or more than $1,000.").
[6] D.C. Code §§ 22-1803.
[7] RCC § 22E-301.
[8] See commentary to RCC § 22E-301.
[9] D.C. Code § 22-3312.04(e).
[10] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[11] *See, e.g.*, RCC § 22E-2503.
[12] D.C. Code § 22-3312.05(4) ("'Graffiti' means an inscription, writing, drawing, marking, or design that is painted, sprayed, etched, scratched, or otherwise placed on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials that are on public or private property without the consent of the owner, manager, or agent in charge of the property, and the graffiti is visible from a public right-of-way.").

There is no DCCA case law interpreting this requirement and it appears to have been included for an abatement of graffiti provision that has since been repealed.[13] In contrast, the revised criminal graffiti offense does not require that the graffiti be visible from a public right-of-way. This requirement unnecessarily restricts the scope of the offense to places visible to the public, even though the harm to a property owner is the same whether or not the location is visible to the public. The requirement also is inconsistent with the revised criminal damage to property offense (RCC § 22E-2504), which applies to "property of another." This revision improves the proportionality and consistency of the revised statute.

Fourth, the revised criminal graffiti statute does not provide for mandatory restitution provision or have a specific parental liability provision. The current graffiti statute mandates restitution in addition to any fine or imprisonment,[14] and makes parents and guardians civilly liable for fines and abatement fees that their minor cannot pay.[15] However, there also is a substantially similar provision in D.C. Code § 16-2320.01 that states the court "may" enter a judgment of restitution in any case in which the court finds a child has committed a specified delinquent act and it also provides that the court may order the parent or guardian of a child, a child, or both to make such restitution.[16] With

[13] Subsection (c) of D.C. Code § 22-3312.04 establishes the current graffiti offense. Subsection (c) was added to D.C. Code § 22-3312.04 by the Anti-Graffiti Amendment Act of 2000 (Act 13-560). The Anti-Graffiti Amendment Act of 2000 also codified the definitions in D.C. Code § 22-3312.05, including the current definition of "graffiti," as well as an abatement of graffiti provision in former D.C. Code § 22-3312.03a. The abatement provisions in former D.C. Code § 22-3312.03a appear to depend, in part, on whether the graffiti is visible from a public right-of-way, as required in the definition of "graffiti" and as specified in the abatement provision. D.C. Code § 22-3312.03a(a), (b) ("(a) Any person applying graffiti on public or private property shall have the duty to abate the graffiti within 24 hours after notice by the Director, the Chief of Police, or the private owner of the property involved. Abatement shall be done in a manner prescribed by the Director. Any person applying the graffiti shall be responsible for the abatement or payment for the abatement. When graffiti is applied by a minor, the parents or legal guardian shall also be responsible for the abatement or payment for the abatement if the minor is unable to pay. (b) Subject to the availability of annual appropriations for that purpose, the Mayor shall provide graffiti removal services to abate graffiti on public property. The Mayor shall provide, subject to appropriations, graffiti removal services for the abatement of graffiti on private property that is visible from the public right-of-way without charge to the property owner if the property owner first executes a waiver of liability in the form prescribed by the Mayor."). (repl.).
The Anti-Graffiti Act of 2010 repealed the abatement provision in D.C. Code § 22-3312.03a and codified in Title 42 a new abatement provision and definition of "graffiti" that requires visibility from a public right-of-way. Anti-Graffiti Act of 2010 (Law 18-219). Despite the repeal of the abatement provision in D.C. Code § 22-3312.03a, the definition of "graffiti" in D.C. Code § 22-3312.05 was not repealed. The legislative history for the Anti-Graffiti Act of 2010 does not discuss whether the Council intentionally kept the visibility requirement in the definition of "graffiti" in D.C. Code § 22-3312.05.

[14] D.C. Code § 22-3312.04(f) ("In addition to any fine or sentence imposed under this section, the court shall order the person convicted to make restitution to the owner of the property, or to the party responsible for the property upon which the graffiti has been placed, for the damage or loss caused, directly or indirectly, by the graffiti, in a reasonable amount and manner as determined by the court.").

[15] D.C. Code § 22-3312.04(g) ("The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court.").

[16] D.C. Code § 16-2320.01(a) ("(a)(1) Upon request of the Corporation Counsel, the victim, or on its own motion, the Division may enter a judgment of restitution in any case in which the court finds a child has committed a delinquent act and during or as a result of the commission of that delinquent act has: (A)

respect to adults, D.C. Code § 16-711 provides judicial authority for (but does not require) ordering restitution. In contrast, the revised criminal graffiti statute deletes both the mandatory restitution provision and parental liability provision that apply to the current graffiti offense. Instead, matters of adult restitution are left to judicial discretion per D.C. Code § 16-711[17] and juvenile restitution and parental liability to judicial discretion per D.C. Code § 16-2320.01. This change improves the consistency and proportionality of the revised statute, and removes unnecessary overlap with other penalty provisions in the D.C. Code.

Beyond these four main changes to current District law, three other aspects of the revised criminal graffiti statute may constitute substantive changes of law.

First, the revised criminal damage to property statute requires that the "inscription, writing, drawing, marking, or design" be placed on the "property of another" and applies the definition of "property of another" in RCC § 22E-701. The current graffiti offense does not specify any ownership requirements for the property, although it does require the defendant to act "without consent of the owner." The definition of "property of another" in RCC § 22E-701 specifies that "property of another" is any property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The definition of "property of another" also excludes from the revised criminal graffiti offense property that is in the possession of the accused in which the other person has only a security interest. This narrow exclusion for security interests is the same exclusion that applies to the revised criminal damage to property offense (RCC § 22E-2504) and other property offenses in Chapter 20 of Subtitle III of the RCC. As with the other offenses, the exclusion is justified because civil remedies such as contract liability, rather than criminal liability, address the situation when a debtor damages property and the other party has only a security interest in that property. However, under RCC the definition of "property of another," a third party could be criminally liable for damaging property that is in the possession of the debtor because the debtor has a possessory interest in that property. Given the nature of the revised criminal graffiti offense, it is unlikely that the security interest exclusion will often apply. However, the consistency of the RCC improves if the criminal damage to property and the revised criminal graffiti offenses cover the same range of property interests.

Second, the revised criminal graffiti statute requires a person to act "without the effective consent of an owner." "Consent," "effective consent," and "owner" are defined terms in RCC § 22E-701 that together generally require a person to lack some indication of an owner's agreement to the placement of graffiti from a person holding an interest in the property. The current graffiti offense requires that the defendant act "without the consent of the owner," but there is no statutory definition of these terms, and no District case law addresses the meaning of "without the consent" or "owner" in the graffiti

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Stolen, damaged, destroyed, converted, unlawfully obtained, or substantially decreased the value of the property of another . . . (2) The Division may order the parent or guardian of a child, a child, or both to make restitution to: (A) The victim; (B) Any governmental entity; (C) A third-party payor, including an insurer, that has made payment to the victim to compensate the victim for a property loss under paragraph (1)(A) of this subsection or pecuniary loss under paragraph (1)(B) or (C) of this subsection.").

[17] RCC § 22E-602 generally authorizes courts to order restitution in accordance with D.C. Code § 16-711.

statute. Requiring a person to act "without the effective consent of an owner" and using the definitions in RCC § 22E-701 that apply to other property offenses in Chapter 20 of Subtitle III of the RCC improves the clarity and consistency of the revised offense.

Third, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[18] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, the revised criminal graffiti statute eliminates the "on public or private property" requirement that is in the current definition of "graffiti."[19] Similarly, the revised criminal graffiti offense deletes "on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials" that is in the current definition of "graffiti."[20] Such language is surplusage and deletion will not change District law.

Second, the revised criminal graffiti statute deletes the language in the current definition of "graffiti"[21] that refers to a "manager, or agent in charge of the property" because the RCC relies on civil law principles of agency to determine when an individual is authorized to give "consent" on behalf of another person. Deleting the language will not change District law.

Finally, the revised criminal graffiti offense deletes specific reference to the methods of making graffiti that are in the current definition of "graffiti:"[22] "is painted, sprayed, etched, scratched, or otherwise placed." Instead, the revised criminal graffiti statute requires the defendant to "place[]" "any inscription, writing, drawing, marking, or design." "Any inscription, writing, drawing, marking, or design" is taken from the

[18] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g. the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").
[19] D.C. Code § 22-3312.05(4).
[20] D.C. Code § 22-3312.05(4).
[21] D.C. Code § 22-3312.05(4).
[22] D.C. Code § 22-3312.05(4).

current definition of "graffiti" without change. "Places" and the types of graffiti specified in the revised statute render "is painted, sprayed, etched, scratched, or otherwise placed" are surplusage. Deletion will not change District law.

RCC § 22E-2601. Trespass.

Explanatory Note. *This section establishes the trespass offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly entering or remaining in certain locations without a privilege or license to do so under civil law. The offense is graded based on the location at issue. The revised trespass offense is closely related to burglary,[1] with the primary difference that trespass does not require that the defendant intend to commit a crime on the premises. The revised trespass offense replaces the unlawful entry on property[2] and unlawful entry of a motor vehicle[3] statutes in the current D.C. Code.[4]*

Paragraphs (a)(1), (b)(1), and (c)(1) require that the defendant "enters or remains in" a given place. The "enters" element does not require complete or full entry of the body, and evidence of partial entry is sufficient proof for a completed trespass.[5] The alternate phrase "remains in" creates liability for a person who remains on property with knowledge that he or she has no right or permission to be there.[6] A person who commits a trespass by remaining after being asked to leave must have a reasonable opportunity to do so.[7] Where a person is uncertain as to whether they can safely comply with a notice to quit, a justification defense may apply. Paragraphs (a)(1), (b)(1), and (c)(1) also specify the culpable mental state for these elements to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "enters or remains in" the prohibited space.

Paragraphs (a)(1), (b)(1), and (c)(1) also describe the places where a trespass can occur. Trespass into a dwelling is punished more severely per paragraph (a)(1) than

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[1] RCC § 22E-2701.

[2] D.C. Code § 22-3302.

[3] D.C. Code § 22-1341.

[4] To the extent that the District's current unlawful entry statute also protects "other property," besides dwellings, buildings, land, watercrafts, and motor vehicles, the RCC punishes exercising control over any property of another as unauthorized use of property in RCC § 22E-2102.

[5] Evidence of unlawful entry of a body part or a camera, microphone, or other instrument held by an actor is sufficient proof for a completed trespass.

[6] A person may be notified that his or her presence is unlawful by someone other than the titleholder. *See, e.g., Smith v. United States*, 445 A.2d 961, 964 (D.C. 1982) (a Secret Service officer can demand that protestors leave the grounds of the White House, even though the officer was not the highest ranking officer at the White House); *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966) (President need not personally order protestors to leave the White House grounds); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("The evidence in this case was sufficient to permit a finding that Joan Drummond was in charge of the office and that she exercised her authority through her agent, Carol Kiser."); *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (an embassy minister asked intruder to leave); and *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981) (a receptionist at an abortion clinic asked person to leave).

[7] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty); *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977); *Rahman v. United States*, 208 A.3d 734, 741 (D.C. 2019).

trespass into a building per paragraph (b)(1), which is punished more severely than trespass on land or into a watercraft or motor vehicle per paragraph (c)(1). The terms "dwelling," "building," and "motor vehicle" are defined in RCC § 22E-701. The phrase "or part thereof" makes clear that while a person may have a right to enter one part of a parcel, building, or vehicle, that person may not have a right to enter another area in the same location.[8] The "knowingly" mental state requires that the defendant at least be aware to a practical certainty that the identity of the location is a dwelling, building, land, watercraft, or motor vehicle.

Paragraphs (a)(2), (b)(2), and (c)(2) state that the proscribed conduct must be done "[w]ithout a privilege or license to do so under civil law."[9] Determining criminal liability for trespass depends on a wide array of non-criminal laws[10] to establish whether a person is "[w]ithout a privilege or license to do so under civil law."[11] In some instances, it may be obvious that a person has a right to be present.[12] However, particularly where there are competing rights,[13] or where there is public access[14] to a given parcel, building, or vehicle, it may be less clear whether an individual is legally

[8] For example, a retail store may give members of the general public effective consent to enter the floor room to shop and simultaneously withhold consent to enter a locked storage room in the rear of the store.

[9] A license may be specific or general and need not be communicated directly to the accused. For example, a private homeowner may be indifferent to children using her yard as a shortcut to and from school. A child who uses the yard for that purpose does not commit a trespass.

[10] The determination of whether a person is without a privilege or license under civil law to enter a location may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, a landlord who seeks to evict a tenant must follow the notice and hearing requirements that govern evictions and may not instead have the tenant arrested and removed pursuant to the revised trespass statute. *See generally* D.C. Code § 42-3505, et seq.

[11] *See Spriggs v. United States*, 52 A.3d 878, n. 2 (D.C. 2012) (explaining, "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants.").

[12] Consider, for example, a person who owns and inhabits a home or a person who is shopping a local store that is open to the public.

[13] Compare, for example, a roommate who bars another roommate's paramour from a shared apartment with a situation where a parent bars a teenage child's paramour from a shared apartment. *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

[14] When public property is involved, the court has previously explained, "[O]ne must be without legal right to trespass upon the property in question." *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976). The court construed the current unlawful entry statute to require "some additional specific factor establishing the party's lack of a legal right to remain," so as to protect a citizens First Amendment rights by ensuring that his "otherwise lawful presence is not conditioned upon the mere whim of a public official." Accepted "additional specific factors" include: a published WMATA free speech regulation (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982)), the issuance of a Capitol police order (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the existence of a chain that separated a tourist line from the White House lawn (*Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980)), a "pair of gates which WMATA personnel closed every night at the conclusion of the day's business," (*United States v. Powell*, 563 A.2d 1086 (D.C. 1989)), and a regulation prohibiting sitting or lying down combined with a police officer's warning that the defendant was in violation of the regulation (*Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993)). However, additional specific factors that the DCCA has rejected includes: closing early the public buildings early in response to the defendant-protestors themselves (*Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988)), and an invalid arrest under a different statute (*Hasty v. United States*, 669 A.2d 127, 135 (D.C. 1995)).

licensed to enter or remain. Even if a person apparently has obtained permission to enter or remain, the means by which the person obtained permission may render an entry unlawful.[15] Or, a person may commit a trespass by unlawfully exceeding the scope of a permission that is limited in time, place, or purpose.[16] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state also applies to paragraphs (a)(2), (b)(2), and (c)(2), requiring the defendant to be at least aware to a practical certainty or consciously desire that his or her presence at the location is unlawful.[17]

Paragraph (d)(1) codifies the proof requirements in cases alleging unlawful entry onto the grounds of public housing. Where the government seeks to prove unlawful entry premised on a violation of a District of Columbia Housing Authority ("DCHA") barring notice,[18] it must prove that the barring notice was issued for a reason described in DCHA regulations.[19] Additionally, the government must offer evidence that the DCHA official who issued the barring notice had an objectively reasonable basis for believing that the criteria identified in the relevant regulation were satisfied.[20] Even if sufficient cause for barring in fact exists, the issuance of a DCHA barring notice without objectively reasonable cause will render the notice invalid.[21]

Paragraph (d)(2) excludes from trespass liability the failure to pay an established transit fare to the Washington Metropolitan Area Transit Authority. Such conduct is punished exclusively under D.C. Code § 35-252.

Subsection (e) specifically provides that a factfinder may infer that a person lacks a privilege or license to enter or remain in an otherwise vacant[22] location when there are

[15] For example, a person who obtained permission by making a coercive threat may nevertheless commit a trespass.

[16] For example, a person who obtains permission to enter a home for the purpose of completing a repair may commit a trespass by instead (or additionally) entering another part of the home unrelated to the repair.

[17] For example, an investigative journalist who gains entry by going undercover does not commit a trespass unless she is practically certain that she does not have a privilege or license to do so under civil law. Consider also, a person who walks into the lobby of a residential building to leave menus, fliers, or business cards inside.

[18] This means any temporary, extended, or permanent notice barring a person from a location that is owned, operated, developed, administered, or financially assisted by the Department of Housing and Urban Development or District of Columbia Housing Authority. It includes notices issued by parties other than DCHA officials, including property managers and law enforcement officers.

[19] *See* 14 DCMR § 9600, et seq.

[20] *Winston v. United States*, 106 A.3d 1087, 1090 (D.C. 2015) (reversing a conviction where the defendant was barred from public housing for being an unauthorized person without first verifying whether the defendant was the guest of a resident); *Foster v. United States*, 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).

[21] Consider, for example, the facts in *Winston v. United States*, 106 A.3d 1087 (D.C. 2015). A security guard observed a non-resident on the grounds of a public housing complex unaccompanied by a resident and, based on this information alone, barred Mr. Winston as unauthorized, pursuant to 14 DCMR § 9600.4. The officer's actions were found to be objectively unreasonable because no steps were taken to verify that Mr. Winston was not a guest of a resident, permitted to enter pursuant to 14 DCMR § 9600.2. Accordingly, the barring notice was ruled invalid and the violation of the barring notice did not amount to an unlawful entry. It was deemed of no consequence whether Mr. Winston was, in fact, a guest or an unauthorized person.

[22] Here, "vacant" means that the property is uninhabited, not merely unoccupied at a particular moment in time.

at least two indicia of unlawful entry. The premises must show signs of forced entry[23] and either be secured in a manner that reasonably conveys that it is not to be entered[24] or display signage that is reasonably visible prior to or outside the location's points of entry that says "no trespassing" or similarly indicates that a person may not enter.

Subsection (f) provides the penalties for each grade of the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised trespass statute changes current District law in four main ways.*

First, the revised offense includes three penalty gradations. Current law separately criminalizes, with three different penalties, unlawful entry into a dwelling, building, or other property,[25] and unlawful entry of a motor vehicle.[26] In contrast, the revised trespass offense includes both real property and vehicles, but grades intrusions into dwellings more severely than intrusions into other buildings, which in turn are graded more severely than intrusions on land and vehicles. This change logically reorganizes the revised offenses and improves the consistency and proportionality of the revised offenses.

Second, the revised statute punishes an attempt to trespass differently from a completed trespass. Current D.C. Code § 22-3302 punishes an attempt to trespass the same as a completed trespass. In contrast, the revised offense punishes attempted trespass in a manner consistent with other revised offenses, relying on the general part's common definition of attempt[27] and penalty for an attempt.[28] This change improves the consistency and proportionality of the revised offenses.

Third, under the revised trespass statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current unlawful entry statutes are silent as to the availability of an intoxication defense, however, the DCCA has characterized the current statute is a general intent crime.[29] Under the RCC trespass statute, a defendant will be able to raise and present relevant and admissible evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a trespass. Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[30]

Fourth, the permissive inference in the revised offense requires that the affected property be vacant and shows signs of forced entry. Current D.C. Code § 22-3302

[23] Signs of forced entry are not limited to broken doors or windows.
[24] For example, boarding up the property or locking a gate or entryway to the property may be means of reasonably conveying that the public is not free to enter.
[25] D.C. Code § 22-3302 (providing a 180-day penalty for trespass of private buildings and a 6-month penalty for trespass of public buildings).
[26] D.C. Code § 22-1341 (providing a 90-day penalty).
[27] RCC § 22E-301(a).
[28] RCC § 22E-301(c)(1).
[29] *See Ortberg*, 81 A.3d at 305.
[30] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge and intent is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

provides, "The presence of a person in any private dwelling, building, or other property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign, shall be prima facie[31] evidence that any person found in such property has entered against the will of the person in legal possession of the property." This language is unclear as to whether the location must be vacant if it displays a no trespassing sign, and there is no case law on point. The current D.C. Code statute, however, clearly does not require evidence of forced entry as part of the permissive inherence. Legislative history indicates that the permissive inference was added to "make it easier to arrest unlawful occupants on vacant property."[32] In contrast, the inference in the revised offense requires signs of forced entry, to ensure that the inference meets the legal standard of being an indicator that it is "more likely than not" that the accused is acting without a privilege or license to do so.[33] A homeowner, real estate agent, or repair person who enters a vacant location that displays a "no trespassing" sign should not be able to be found guilty without further evidence of wrongdoing. This change improves the proportionality and may improve the constitutionality of the revised offense.

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

First, the revised trespass statute specifies knowledge as the culpable mental state required for all offense elements. The current District statutes do not specify a culpable mental state for any element of the unlawful entry on property or unlawful entry of a motor vehicle offenses. The District of Columbia Court of Appeals ("DCCA") has generally said that trespass is a general intent crime,[34] while also stating that it must be proven that the actor "knew or should have known" that entry was unwanted,[35] and also upholding a requirement that the actor "entered, or attempted to enter the property voluntarily, on purpose, and not by mistake or accident." [36] In addition, the court also has consistently recognized that a person who holds a bona fide belief that she has a right to

[31] The phrase "prima facie" is not defined by statute or in case law interpreting the current unlawful entry statutes. However, the same phrase, in the context of the bail reform act (D.C. Code § 22-1327), has been construed as "a permissive inference, not a presumption." *Trice v. United States*, 525 A.2d 176, 182 (D.C. 1987); see also *Raymond v. United States*, 396 A.2d 975, 976-77 ("although the wording…may be read to imply that the inference of willfulness is mandatory…the trier of fact has merely been permitted and not required to infer willfulness. We conclude that this instruction, incorporating a permissive inference, properly construes the statute."). As the phrase may be unnecessarily confusing to lawyers and lay people alike, the revised offense uses more straightforward language to convey that the inference is optional. This approach appears to be in line with current District practice. *See* D.C. Crim. Jur. Instr. § 5.401 ("You may, but you are not required to, presume that [name of defendant] entered the property against the will" of the lawful occupant.).

[32] *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 11.

[33] *See Leary v. United States*, 395 U.S. 6 (1969); *Reid v. United States*, 466 A.2d 433, 435-36 (D.C. 1983).

[34] *Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013); *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984) (requiring "general intent" and "the absence of an exculpatory state of mind").

[35] *See Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013); *see also Ronkin v. Vihn*, 71 F. Supp. 3d 124, 133 (D.D.C. 2014).

[36] *See Ortberg v. United States*, 81 A.3d 303, 309 (D.C. 2013).

remain does not commit a trespass.[37] To resolve these ambiguities, the revised statute requires a culpable mental state of knowingly, using the RCC standard definition. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[38] This change improves the consistency of the revised offense and the proportionality of penalties.

Second, under the revised trespass offense, criminal liability turns on whether the accused acted without privilege or license to do so under civil law. Current D.C. Code § 22-3302 prohibits entering property "against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit…" An array of DCCA cases have construed, in light of specific fact patterns, the meaning of, and exceptions to, the terms "against the will,"[39] "the lawful occupant,"[40] "the person lawfully in charge thereof,"[41] and "without lawful authority."[42] Current D.C. Code § 22-1341 prohibits entering or being inside a motor vehicle "without the permission of the owner or person lawfully in charge," and lists a few statutory exceptions where permission is not needed.[43] The revised statute more broadly refers to whether an actor has a "privilege or license"[44] for

[37] *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967); *Gaetano v. United States*, 406 A.2d 1291, 1294 (D.C. 1979); *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993).

[38] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[39] *Compare Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965) ("the entry must be against the expressed will, that is, after a warning to keep off") *with McGloin v. United States*, 232 A.2d 90, 90 (D.C. 1967) ("*Bowman* must be read in the light of the facts of that case. It concerned an unlawful entry into a restricted area of the Union Station, a semi-public building. In such a building the public generally is permitted to enter and if there are portions which are not obviously private or restricted, it is only reasonable that warning of some kind be given the public to stay out. Even in a semi-public or public building there are portions obviously not open to the public; and surely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.").

[40] *See Smith v. Unite States*, 445 A.2d 961, 964 (D.C. 1982) (finding a secret service agent is a lawful occupant of the White House); *Moore v. United States*, 136 A.2d 868, 869 (D.C. 1957) (explaining that whether the complainant is a lawful occupant is a question for the jury); *see also Bodrick v. United States*, 892 A.2d 1116, 1121 (D.C. 2006) (explaining that, in the case of a stay away order, a person's interest as leaseholder is subordinate to her occupancy and use).

[41] *See Whittlesey v. U. S.*, 221 A.2d 86, 91 (D.C. 1966) ("[A] person may be lawfully in charge even though there are other persons who could, if they chose to do so, countermand or override his authority."); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("[T]he person in charge may act through an agent in ordering someone to leave.") (citing *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C.1981)); *Woll v. United States*, 570 A.2d 819, 822 (D.C. 1990) (finding a lessee's right to the use of a corridor is sufficient to bring her within the meaning of "person lawfully in charge thereof.").

[42] *See, e.g., Dent v. United States*, 271 A.2d 699, 700 (D.C. 1970) (affirming a conviction where defendant was told "never to come back to the apartment, since he didn't know how to act.").

[43] D.C. Code § 22-1341(b) ("Subsection (a) of this section shall not apply to: (1) An employee of the District government in connection with his or her official duties; (2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or (3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle.").

[44] The phrasing "license or privilege" follows the Model Penal Code and many other jurisdictions' use. *See* § 21.2(a) Nature of the intrusion, 3 Subst. Crim. L. § 21.2(a) (3d ed.). The RCC does not intend to limit

entry (or remaining) under civil law.[45] This standard more plainly alludes to the many instances in which a person is entitled to occupy a particular space or vehicle over the express objection of an owner, occupant, manager, or security guard.[46] Unlike theft[47] (requiring unlawful taking) and burglary[48] (requiring intent to commit a crime), trespass criminalizes mere presence. Considerations of freedom of expression, assembly, movement, and association are, therefore, of paramount concern. Accordingly, criminality turns entirely on the entitlements of accused and not merely on the express objection of others. This change improves the clarity and consistency of the revised statute.

Third, the revised statute's permissive inference provision includes an explicit reasonableness requirement. The current trespass statute's evidentiary inference applies to a "property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign…" There is no case law on what manner of securing conveys a location is vacant or what standards may apply to the display of a no trespassing sign. To resolve these ambiguities, the revised permissive inference requires the manner in which the premises are secured to "reasonably convey" that it is not to be entered, or that the "no trespassing" signage be "reasonably visible" prior to or outside the property's points of entry. The reasonableness requirements provide courts with a degree of flexibility in assessing whether the manner of securing or signage is sufficient to infer that the defendant was on notice that the entry was unlawful.[49] The reasonableness requirements are an objective matter, to be determined from the perspective of an ordinary person entering or remaining in the location. Of course, even if the reasonableness requirements are not met, the

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construction of these terms to that of any other particular jurisdiction, but the basic distinction held by some jurisdictions seems appropriate that "licensed" refers to a consensual entry while "privileged" refers to a nonconsensual entry. *Id.*

[45] The term "civil law" is intended to refer broadly to non-criminal law. Black's Law Dictionary (10th ed. 2014).

[46] For example, current D.C. Code § 22-1341 includes several exclusions from liability for the government, tow truck operators, and re-possessors to enter a motor vehicle without the owner's permission. Similarly, there are many legitimate reasons for a person to occupy real property without permission from the titleholder. For example, a person may have rights in contract or landlord-tenant law (D.C. Code § 42-3505.01); under local or federal housing regulations (14 DCMR § 9600 et seq.; *Winston v. United States*, 106 A.3d 1087, 1090 (D.C. 2015)); by private necessity (*Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015)), or as protected by the First Amendment or the District's protections of traditional public forums (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982); D.C. Code § 5-331.01 et seq.; D.C. Code § 2-575). *See also Bodrick v. United States*, 892 A.2d 1116, 1121 (D.C. 2006) (explaining that, in the case of a stay away order, a person's interest as leaseholder is subordinate to her occupancy and use).

[47] *See* RCC § 22E-2101.

[48] *See* RCC § 22E-2701.

[49] Depending on the particular facts of the case, the reasonableness requirement may narrow the applicability of the permissive inference as compared to current law. *E.g.*, a single "No trespassing" sign that is obscured or at one entrance of a building with multiple entrances accessible to the public may not "reasonably" indicate that the building is not to be entered, but arguably may provide adequate notice under the current statute. On the other hand, the reasonableness requirement in the revised offense also may expand the applicability of the permissive inference, as compared to the current statute. For example, sign that read, "Employees Only," "Keep Out," or "Authorized Personnel Only" would all be included within the ambit of the RCC permissive inference, while they might not be included within the current statute.

government may prove the defendant's guilt without the benefit of the permissive inference.[50] This change clarifies the revised statute.

Fourth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[51] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, the revised offense replaces the reference to "other property" in the current unlawful entry on property statute with a specific list of locations where trespass may occur. The current statute[52] protects "any private dwelling, building, or other property" as well as "any public building, or other property," and parts thereof. The DCCA has not provided clear or comprehensive guidance, however, on how broadly "or other property" should be read.[53] The revised trespass offense clarifies that the protected locations are

[50] *See, e.g., Culp v. United States*, 486 A.2d 1174 (D.C. 1985) (Where police officers observed defendant inside a vacant building, and had reason to believe that defendant did not belong there, and the property itself revealed indications of a continued claim of possession by the owner or manager, police had probable cause to arrest defendant for unlawful entry); *Smith v. United States*, 281 A.2d 438 (D.C. 1971) (Where a construction company, the occupant of lot, had posted signs indicating its rightful control of the site, it had never authorized defendant to use the site at night when no one was present, and where site was protected at night by locked gates and a mesh chain link fence topped by barbed wire, there was no need that an explicit "keep out" sign be posted to establish that defendant was acting against the will of the construction company when he entered the site).

[51] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g. the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[52] D.C. Code § 22-3302.

[53] The DCCA has affirmed convictions for intrusions into places other than buildings or dwellings, including a Home Depot parking lot (*Gray v. United States*, 100 A.3d 129 (D.C. 2014)), the steps of the United States Capitol (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the area immediately surrounding the Farragut West Metro station *(United States v. Powell*, 536 A.2d 1086 (D.C. 1989)), and the White House grounds (*Leiss v. United States*, 364 A.2d 803 (D.C. 1976)).

dwellings, buildings, land, watercraft, and motor vehicles. Use of other property[54] without a privilege or license under civil law may be punishable in the RCC as unauthorized use of property.[55]

Second, the revised statute replaces the phrase "refuses to quit" with the more modern "remains in." This does not appear to be a substantive change, merely a stylistic one supported by modern usage.[56]

Third, the revised statute codifies an exclusionary rule for violations of DCHA barring notices. In *Winston v. United States*,[57] the DCCA required an objectively reasonable basis for believing that valid grounds exist to bar a person from public housing pursuant the regulations in 14 DCMR § 9600 et seq. Where a barring notice is issued incorrectly or arbitrarily—in that case, without first verifying that the person was not a guest[58]—violation of the notice does not amount to a criminal unlawful entry.

Fourth, the revised trespass offense clarifies that fare evasion may not be prosecuted as a trespass. The Fare Evasion Decriminalization Amendment Act of 2018 provides that fare evasion may be prosecuted as a civil infraction only, not as trespass or theft.[59]

Fifth, the statutory text of the revised offense does not list the exclusions from liability that are enumerated in current D.C. Code § 22-1341(b).[60] The revised offense's requirement that the accused know that they are acting without privilege or license under civil law renders this language superfluous.

[54] For example, a bicycle.
[55] RCC § 22E-2102.
[56] The DCCA has used the term "remaining" in construing the elements of the offense. *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976) (the offense prohibits "the act of entering or *remaining* upon any property when such conduct is both without legal authority and against the expressed will of the person lawfully in charge of the premises.") (emphasis added). *See also* § 21.2(a) Nature of the intrusion, 3 Subst. Crim. L. § 21.2(a) (3d ed.) ("The 'enters or remains' language of the Model Penal Code is used in the great majority of the state criminal trespass statutes…").
[57] 106 A.3d 1087 (D.C. 2015).
[58] *See also Foster v. United States*, 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).
[59] Prior to this legislation being enacted, fare evasion may have been prosecuted as a trespass. *See Bowman v. U.S., 212 A.2d 610* (D.C. 1965) (finding defendants were properly convicted under statute for unlawful entry where they, without a ticket and intent to board a train, had entered restricted area despite sign and public announcements whereby only persons having tickets were permitted through the gate to the restricted area.)
[60] "Subsection (a) of this section shall not apply to: (1) An employee of the District government in connection with his or her official duties; (2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or (3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle."

RCC § 22E-2701. Burglary.

Explanatory Note. *This section establishes the burglary offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly and fully entering or surreptitiously remaining in certain locations without a privilege or license to do so under civil law, with intent to commit a crime inside. The offense is graded based on location. The revised burglary offense is closely related to trespass,*[1] *with the primary difference that trespass does not require that the defendant intend to commit a crime on the premises. The revised burglary offense replaces the burglary statute in the current D.C. Code.*[2]

Paragraphs (a)(2), (b)(1), and (c)(1) require that the defendant "fully enters or surreptitiously remains in" a given place. The "fully enters" element requires complete entry of the body, and evidence of partial entry of the body is insufficient proof for a completed burglary.[3] The alternate phrase "surreptitiously remains in" creates liability for a person who hides[4] on property with knowledge that he or she has no permission to be there.[5] Paragraphs (a)(2), (b)(1), and (c)(1) also specify the culpable mental state for these elements to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "enters or remains in" the prohibited space.

Paragraphs (a)(2), (b)(1), and (c)(1) also describe the places where a burglary can occur. Burglary into an occupied dwelling is punished more severely than burglary into an unoccupied dwelling[6] or into an occupied building, which are punished more severely than burglary into an unoccupied building[7] or a business yard. The terms "dwelling," "building," and "business yard" are defined in RCC § 22E-701.[8] The phrase "or part thereof" makes clear that while a person may have a right to enter one part of a dwelling, building, or business yard, that person may not have a right to enter another area in the

[1] RCC § 22E-2601.
[2] D.C. Code § 22-801.
[3] Fact patterns involving a person's nonconsensual reaching—but not full body entry—into a dwelling, building, or business yard with intent to commit a crime inside may constitute attempted burglary (e.g., a person caught on top of a fence to a business yard) or an attempted or completed form of the predicate crime (e.g., theft, where a person reaches through a window to take an object from a building).
[4] A person who remains without hiding may commit a trespass, in violation of RCC § 22E-2601, but not a burglary. Consider, for example, a person who enters a store open to the public, makes a scene and is asked to leave by a manager, and who thereafter refuses and makes a criminal threat against the manager—such a person may be liable for trespass and criminal threats, but not burglary.
[5] A person may be notified that his or her presence is unlawful by someone other than the titleholder. *See, e.g., Smith v. United States*, 445 A.2d 961, 964 (D.C. 1982) (a Secret Service officer can demand that protestors leave the grounds of the White House, even though the officer was not the highest ranking officer at the White House); *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966) (President need not personally order protestors to leave the White House grounds); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("The evidence in this case was sufficient to permit a finding that Joan Drummond was in charge of the office and that she exercised her authority through her agent, Carol Kiser."); *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (an embassy minister asked intruder to leave); and *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981) (a receptionist at an abortion clinic asked person to leave).
[6] Or, an occupied dwelling, when the defendant is not reckless as to occupancy.
[7] Or, an occupied building, when the defendant is not reckless as to occupancy.
[8] The term "dwelling" may include houseboats and other structures that are not buildings.

same location.[9] The "knowingly" mental state requires that the defendant at least be aware to a practical certainty that the identity of the location is a dwelling, building, or business yard.

Paragraph (a)(3), subparagraphs (b)(1)(A) and (b)(1)(B), and paragraph (c)(2) state that the entering or remaining must be done "[w]ithout a privilege or license to do so under civil law."[10] Determining criminal liability for burglary depends on a wide array of non-criminal laws[11] to establish whether a person is "[w]ithout a privilege or license to do so under civil law."[12] In some instances, it may be obvious that a person has a right to be present.[13] However, particularly where there are competing rights,[14] or where there is public access[15] to a given building or business yard, it may be less clear whether an individual is legally licensed to enter or remain. Even if a person apparently has obtained permission to enter, the means by which the person obtained permission may render an entry unlawful.[16] Or, a person may commit a burglary by unlawfully exceeding the scope

[9] For example, a retail store may give members of the general public effective consent to enter the floor room to shop and simultaneously withhold consent to enter a locked storage room in the rear of the store.

[10] A license may be specific or general and need not be communicated directly to the accused.

[11] The determination of whether a person is without a privilege or license under civil law to enter a location may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, a landlord who seeks to evict a tenant must follow the notice and hearing requirements that govern evictions and may not instead have the tenant arrested and removed pursuant to the revised trespass statute. *See generally* D.C. Code § 42-3505, et seq.

[12] *See Spriggs v. United States*, 52 A.3d 878, n. 2 (D.C. 2012) (explaining, "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants.").

[13] Consider, for example, a person who owns and inhabits a home or a person who is shopping a local store that is open to the public.

[14] Compare, for example, a roommate who bars another roommate's paramour from a shared apartment with a situation where a parent bars a teenage child's paramour from a shared apartment. *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

[15] When public property is involved, the court has previously explained, "[O]ne must be without legal right to trespass upon the property in question." *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976). The court construed the current unlawful entry statute to require "some additional specific factor establishing the party's lack of a legal right to remain," so as to protect a citizens First Amendment rights by ensuring that his "otherwise lawful presence is not conditioned upon the mere whim of a public official." Accepted "additional specific factors" include: a published WMATA free speech regulation (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982)), the issuance of a Capitol police order (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the existence of a chain that separated a tourist line from the White House lawn (*Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980)), a "pair of gates which WMATA personnel closed every night at the conclusion of the day's business," (*United States v. Powell*, 563 A.2d 1086 (D.C. 1989)), and a regulation prohibiting sitting or lying down combined with a police officer's warning that the defendant was in violation of the regulation (*Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993)). However, additional specific factors that the DCCA has rejected includes: closing early the public buildings early in response to the defendant-protestors themselves (*Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988)), and an invalid arrest under a different statute (*Hasty v. United States*, 669 A.2d 127, 135 (D.C. 1995)).

[16] For example, a person who obtained permission by deceit may nevertheless commit a burglary. *See, e.g., McKinnon v. United States*, 644 A.2d 438, 440 (D.C. 1994).

of a permission that is limited in time, place, or purpose.[17] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraphs (a)(2), (b)(1) and (c)(1) also apply to the element "without a privilege or license," requiring the defendant to be at least aware to a practical certainty or consciously desire that his or her presence at the location is unlawful.

Paragraphs (a)(4), (b)(3), and (c)(3) require the defendant act "with intent to" commit one or more District crimes inside that is either an offense against persons under Subtitle II or a "predicate property offense," as defined in paragraph (e)(2). "Intent" is a defined term in RCC § 22E-206 that here means here means the accused was practically certainty that his or her conduct constitutes a criminal offense under District of Columbia law. The defendant must have the intent to commit the crime at the moment he or she enters or begins to surreptitiously hide inside.[18] And, the Defendant must intend to commit the crime in that location. 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 that the accused attempted or completed the predicate offense, only that the accused believed to a practical certainty that he or she would attempt or complete the predicate offense.

Sub-subparagraph (b)(1)(B)(i) and subparagraph (c)(1)(B) specify that buildings and business yards must not be open to the general public at the time of the offense.[19] "Open to the general public" is defined in RCC § 22E-701 to mean no payment, membership, affiliation, appointment, or special permission is required to enter. A person does not commit a burglary by entering a public space with intent to commit a crime.[20]

Paragraph (a)(1) and sub-subparagraph (b)(1)(B)(ii) provide heightened liability where a defendant is reckless as to a dwelling or building being occupied. "Recklessly" is defined in RCC § 22E-206 and here requires that the accused consciously disregard a substantial risk that the location is occupied by someone other than a participant in the burglary at the moment he or she enters or begins to surreptitiously hide inside.[21]

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[17] For example, a person who obtains permission to enter a home for the purpose of completing a repair may commit a burglary by instead (or additionally) entering another part of the home unrelated to the repair with intent to commit a crime.

[18] For example, a person who decides to steal an item after noticing it inside may commit a theft but not a burglary. *See* RCC § 22E-2101.

[19] There are instances in which a person is unauthorized to enter a space that is open to the general public. In those cases, other liability may attach but burglary liability will not. Consider, for example, a person is barred from a grocery store for shoplifting and returns to the same grocery store, in violation of the bar notice, with intent to commit theft, during business hours. That person may have committed a trespass, but not a burglary. Consider also, a person is ordered to stay 100 yards away from a former intimate partner, sees the former partner at the grocery store, approaches her, and assaults her. That person may have committed contempt, but not a burglary.

[20] For example, a person who enters a store during business hours with intent to steal and does steal may commit theft, but not burglary. *See* RCC § 22E-2101. A person who enters a tavern with intent to fight and does fight may commit an assault but not a burglary. *See* RCC § 22E-1202.

[21] Where an occupant returns home after the burglary commences and the burglary is immediately discovered, the offense is punished as second degree burglary only, not first degree. However, where an occupant returns home after the burglary commences and the burglar remains surreptitiously on the premises, the offense is punished as first degree burglary.

Paragraph (a)(1) and sub-subparagraph (b)(1)(B)(ii) further require that a non-participant directly perceive the actor, by sight or sound or touch.[22] Entering a building undetected is punished as third degree burglary but not as second degree.[23]

Subsection (d) provides the penalties for each grade of the offense. [*See* Second Draft of Report #41.] Paragraph (d)(4) authorizes a penalty enhancement where the actor carries a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location.

Subsection (e) cross-references applicable definitions in the RCC and defines the term "predicate property offense" to include specified offenses in Subtitle III of the RCC.

Relation to Current District Law. *The revised burglary statute changes current District law in seven main ways.*

First, the revised burglary statute prohibits surreptitiously remaining in a specified location. Current D.C. Code § 22-801 punishes unlawfully entering but not unlawfully remaining. In contrast, the revised statute provides liability in instances where a person lawfully enters a location and then hides to facilitate commission of a crime at a later time.[24] This change eliminates an unnecessary gap in liability.

Second, the revised burglary statute requires fully entering or remaining. Although current D.C. Code § 22-801 does not define the term "enter," District case law that previously has held that the term includes entering with "any part of a person's body."[25] In contrast, the RCC punishes partial entry of the body or a camera, microphone, or other instrument held by an actor as trespass[26] but reserves the revised burglary statute's more severe penalties for instances in which the potential for harm to another person or property is greater. This change improves the organization and proportionality of the revised offenses.

Third, the revised burglary offense requires proof that the defendant's presence in the location is "without a privilege or license…under civil law"—i.e. trespassory. The current burglary statute does not require that the defendant's presence is otherwise unlawful.[27] The lack of a trespassory element in burglary leads to some counterintuitive outcomes. 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

[22] Where a building occupant observes a burglar remotely, through a camera system, the burglar commits a third degree burglary only, not second degree.

[23] Consider, for example, a person who enters the lobby and mailroom of a large building, undetected by an employee on the fifth floor.

[24] Consider, for example, a person enters a store during business hours and hides away, intending to steal from the store once it is closed.

[25] *Edelen v. United States*, 560 A.2d 527, 529 (D.C. 1989); *Davis v. United States*, 712 A.2d 482, 485 (D.C. 1998).

[26] RCC § 22E-2601.

[27] *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("It is thus apparent that since the District of Columbia first degree burglary statute makes it an offense to enter an occupied dwelling with intent to commit a crime therein and that such offense can be committed without a violation of the unlawful entry statute, the entry need not necessarily be against the will of the occupants."); *see also Spriggs v. United States*, 52 A.3d 878 (D.C. 2012) (affirming a conviction for burglary of an apartment where the defendant was himself staying); *Bodrick v. United States*, 892 A.2d 1116, 1120 (D.C. 2006) (affirming a conviction for burglary of a marital home after a separation and court order to stay away).

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. In contrast, the revised burglary statute requires that the defendant's presence in the location amount to a trespass. This change improves the clarity and proportionality of the revised offenses.

Fourth, the revised burglary offense includes three penalty gradations. The current burglary statute contains two gradations: first degree burglary, which punishes those who burgle a dwelling where another person is present;[28] and second degree burglary which punishes other invasions such as dwellings where no one is present, all other buildings, and the miscellaneous watercraft and railroad cars discussed below.[29] The revised burglary offense includes an intermediate gradation that applies in two circumstances: burglary of an unoccupied dwelling[30] and burglary of an occupied building. This change improves the proportionality of the revised offense.

Fifth, the first and second degrees of the revised burglary statute require recklessness as to a location being occupied at the time of the burglary[31] while knowledge is the required culpable mental state for all other elements of the offense besides an intent to commit a crime. Current D.C. Code § 22-801 is silent as to applicable the culpable mental states required, other than "intent" (undefined) to commit another crime at the time of the entry.[32] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[33] A reckless culpable mental state is consistent with a wide range of penalty enhancements in the RCC related to the complainant's characteristics,[34] and has been recognized by some authorities as an appropriate minimal basis for liability.[35] This change improves the clarity and completeness of the revised offense.

Sixth, the revised burglary offense only protects a stable, watercraft, or railroad car if it is being used as a dwelling[36] or is affixed to land. The current second degree burglary statute expressly protects any "stable…steamboat, canalboat, vessel, or other watercraft, [or] railroad car."[37] In contrast, although the RCC punishes a trespass onto any land, watercraft, or motor vehicle,[38] it punishes only burglary of dwellings, buildings,

[28] D.C. Code § 22-801(a).
[29] D.C. Code § 22-801(b).
[30] Or, an occupied dwelling, when the defendant is not reckless as to occupancy.
[31] A person who is not at least reckless as to the presence of others in a location remains liable for burglary but is subject to a lower penalty. This change improves the consistency and proportionality of the revised offenses.
[32] *See also* D.C. Crim. Jur. Instr. § 5.101.
[33] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).
[34] *See, e.g.,* RCC § 22E-1202. Assault.
[35] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring in part and dissenting in part) ("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.").
[36] E.g., a berth in an Amtrak sleeping car.
[37] D.C. Code § 22-801(b).
[38] RCC § 22E-2601(c).

or business yards. "Building" is broadly defined to include any "structure affixed to land that is designed to contain one or more natural persons."[39] Unlike trespass, burglary is an inchoate offense that, in practice, provides a location enhancement for confined places where a person may be surprised by a burglar and where a person there is a special expectation of privacy. This change improves the organization and proportionality of the revised offenses.

Seventh, the revised burglary offense requires an intent to commit one of several specific offenses in the revised code. Current D.C. Code § 22-801 refers broadly to "intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit *any* criminal offense" (emphasis added). However, a least one District Court opinion has interpreted this statutory language to be narrower,[40] requiring that the nature of the intended criminal offense be reasonably related to the sanctity of the place entered—usually a crime of violence against persons or a crime involving the taking or destruction of property.[41] The same court has declined to state that the District's burglary statute reaches an intent to commit *any* misdemeanor[42] and specifically held that trespass may not itself be the basis for a burglary conviction.[43] In contrast, the revised statute limits burglary to specified crimes. The terms "bodily injury," "sexual act," "sexual contact," and "property" are defined in RCC § 22E-701, consistent with the use of these terms in other parts of the revised code. This change improves the clarity, consistency, and proportionality of the revised offense.

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

The definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current

[39] RCC § 22E-701.
[40] *United States v. Frank*, 225 F. Supp. 573 (D.D.C 1964) (dismissing a burglary charge premised on intent to operate a radio apparatus without a station license, in violation of the Federal Communications Act).
[41] *United States v. Frank*, 225 F. Supp. 573, 576 (D.D.C 1964) (rejecting a broader reading of "any criminal offense" that would criminalize as housebreaking entry of any room with an intent to violate the anti-trust laws or the regulations of the Securities & Exchange Commission, for instance).
[42] *See United States v. Fox*, 433 F.2d 1235, 1236-37 (D.C. Cir. 1970).
[43] *See United States v. Melton*, 491 F.2d 45, 47 (D.C. Cir. 1973) ("The element that distinguishes burglary from unlawful entry is the intent to commit a crime once unlawful entry has been accomplished. To allow proof of unlawful entry, ipso facto, to support a burglary charge is, in effect, to increase sixty-fold the statutory penalty for unlawful entry."); *Lee v. United States*, 37 App. D.C. 442, 445 (D.C. Cir. 1911) ("To constitute the crime of housebreaking, it is necessary to show an unlawful entry, with the intent to commit *some other* offense") (emphasis added).

Chapter 32 of Title 22 despite a similar scope of conduct.[44] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

First, by use of the word "inside," the revised burglary statute clarifies that the defendant must intend to commit the offense within the trespassed location. Although this requirement does not appear in the statutory text, the DCCA has included this requirement in some of its recitations of burglary's elements.[45] The purpose is to exclude from liability instances where a person passes through one property *en route* to the property where he or she intends to commit the crime.[46]

Second, the revised burglary statute specifies that participants in the crime cannot be the "other person" required in first degree and second degree burglary. The current statute is silent on this matter. The basis for treating burglaries of occupied places more seriously is the added danger and terror those occupants may experience. Such danger and terror are far less likely to occur if the other person present during the crime is an accomplice, co-conspirator, or aider and abettor.

Third, the revised burglary statute updates and modernizes the language of the offense in various other ways that do not change the scope of the offense. For instance, the revised offense simply eliminates a number of contradictory and redundant phrases.[47]

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[44] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g. the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[45] *Shelton v. United States*, 505 A.2d 767, 769 (D.C. 1986) ("A conviction for burglary requires a finding that the defendant entered the premises having already formed the intent to commit a criminal offense inside."); *Marshall v. United States*, 623 A.2d 551, 557 (D.C. 1992) ("In order to prove armed first degree burglary, the government must establish beyond a reasonable doubt, an armed entry (by appellant or by a principal aided and abetted by appellant) into an occupied dwelling with the intent to commit a crime therein. The intent to commit the crime inside the premises must have been formed by the time of the entry.") (internal citations omitted); *Lee v. United States*, 699 A.2d 373, 383 (D.C. 1997) ("To prove burglary, the government must establish that the defendant entered the premises having already formed an intent to commit a crime therein.") (internal quotations and citations omitted).

[46] For example, imagine adjacent houses A and B. A burglar plans to enter House B to steal property; but to do so, she knows she must cross over the backyard of House A to get to House B. She does so. Absent the requirement that the burglar must intend to commit an offense "therein," it appears that the burglar has actually committed burglary twice, once as to House A and once as to House B. Although counterintuitive, the burglar did trespass with intent to commit an offense when she entered the backyard of House A. Under the revised statute, the burglar would only be guilty of a trespass as to House A, and a burglary as to House B.

[47] The phrases are, "in the nighttime or in the daytime," which is pure surplusage; "break and enter, or enter without breaking," which is also surplusage; "room used as a sleeping apartment in any building," which is covered by the RCC's definition of dwelling; and "with intent to break and carry away any part thereof, or

any fixture or other thing attached to or connected thereto," which is surplusage to the phrase "with intent to commit any criminal offense therein." D.C. Code § 22-801. In the case of second-degree burglary, "bank, store, warehouse, shop, stable," are redundant because each is covered by the broader term "building."

RCC § 22E-2702. Possession of Tools to Commit Property Crime.

Explanatory Note. *This section establishes the possession of tools to commit property crime offense for the Revised Criminal Code (RCC). The offense criminalizes possession of a tool designed or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door, with intent to use the tool to commit a property offense. The revised possession of tools to commit property crime statute replaces the possession of implements of crime[1] statute and a sentencing provision related to the statute[2] in the current D.C. Code.*

Paragraph (a)(1) specifies that the defendant must "possess" the prohibited item, a term defined at RCC § 22E-701. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) of the offense to be knowledge, a term defined at RCC § 22E-206 to mean the defendant must be aware to a practical certainty that he possesses an item or items[3] that is a property crime tool. Paragraph (a)(1) specifies that the types of tools that are covered by the offense are limited to tools for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door.[4] The tools must be designed or specifically adapted for such use, and do not include unmodified, common, general use objects.[5]

Paragraph (a)(2) clarifies that the person must act "with intent to" use the tool to commit a District crime and that the crime must be Theft,[6] Unauthorized Use of Property,[7] Unauthorized Use of a Motor Vehicle,[8] Shoplifting,[9] Alteration of Motor Vehicle Identification Number,[10] Alteration of Bicycle Identification Number,[11] Arson,[12] Criminal Damage to Property,[13] Criminal Graffiti,[14] Trespass,[15] or Burglary.[16] "Intent" is a term defined at RCC § 22E-206 that here means the defendant was practically certain that he or she would use the tool to commit one of the specified crimes. 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 actually used the tool

[1] D.C. Code § 22-2501.
[2] D.C. Code § 24-403.01(f)(3).
[3] Possession of multiple tools at a given time amounts to only one count of the possession of tools to commit property crime offense.
[4] *E.g.*, lock picks, lock shims, bolt-cutters, computer software to deactivate security systems, and specialty tools to slide under locked doors to open them from the inside.
[5] *E.g.*, an unmodified small (jeweler's) screwdriver would not be designed or specifically adapted for picking locks.
[6] RCC § 22E-2101.
[7] RCC § 22E-2102.
[8] RCC § 22E-2103.
[9] RCC § 22E-2301.
[10] RCC § 22E-2403.
[11] RCC § 22E-2404.
[12] RCC § 22E-2501.
[13] RCC § 22E-2503.
[14] RCC § 22E-2504.
[15] RCC § 22E-2601.
[16] RCC § 22E-2701.

to commit a crime, only that the defendant was practically certain that he or she would do so.

Subsection (b) specifies that attempted possession of tools to commit property crime is not an offense.

Subsection (c) establishes the penalty for this offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised possession of tools to commit property crime statute changes current District law in five main ways.*

First, the revised statute changes the range of prohibited items by including tools that are designed or specifically adapted for "picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door" and by eliminating tools for picking pockets. The current statute only covers tools "for picking locks or pockets."[17] District case law has explicitly held that bolt-cutters, for example, are not tools covered by the current statute because they would destroy, not pick, a lock.[18] In contrast, the revised statute broadens the scope of the statute to include tools designed or specifically adapted for other purposes, including "cutting chains," which likely would include bolt-cutters. Such tools may commonly be used in gaining access to an object or location to commit a property crime. The revised statute reduces unnecessary gaps in the existing offense

Second, the revised offense limits the offense to tools "designed or specifically adapted for" the specified purposes. The current statute is silent as to whether the tool must be fashioned in a manner suited for the specified purposes of picking locks, etc. In contrast, the revised statute no longer covers objects that are not designed or specifically adapted for one of the stated purposes. This change eliminates liability for many common items carried by citizens that could be used for—but are not designed or specifically adapted for—picking locks or pockets.[19] This change clarifies and improves the proportionality of the revised offense.

Third, the revised statute eliminates the repeat offender penalty provision in the current statutes. In current law, the offense ordinarily is punishable by a maximum term of imprisonment of 180 days and a maximum fine of $1,000.[20] However, if the defendant has ever been previously convicted of the offense, or of any felony, the offense is punishable by a minimum term of imprisonment of one year, a maximum term of imprisonment of five years, and a maximum fine of $12,500.[21] By contrast, the revised offense is subject to a single, standard penalty classification, unless the RCC's general repeat offender penalty enhancement applies for having two or more prior convictions for a comparable offense.[22] This change improves the consistency and proportionality of revised statutes.

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[17] D.C. Code § 22-2501.

[18] *In re J.W.*, 100 A.3d 1091, 1092-94 (D.C. 2014) (holding that bolt-cutters do not constitute tools for "picking" locks or pockets).

[19] *E.g.*, nail files, nail clippers, or pocket knives.

[20] D.C. Code § 22-2501.

[21] D.C. Code §§ 22-2501; 24-403.01(f)(3).

[22] RCC §§ 22E-606(a) and (b).

Fourth, the revised offense bars any attempt liability. Under current law, possession of implements of crime is subject to the general attempt statute.[23] In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to revised possession of tools to commit property crime, that person has committed no offense under the revised code. Completed possession of tools to commit property crime is already an inchoate crime, closely related to an attempted form of theft or burglary, for which the RCC provides liability. This change improves the proportionality of the revised statute.

Fifth, the revised offense limits the target crimes within the scope of the revised statute to District crimes involving the trespass, misuse, taking, or damage of property. The District's current possession of implements of a crime statute refers broadly to "a crime."[24] In contrast, the revised offense requires an intent to commit a broad range of specified District property crimes. The revised statute consequently excludes the use of such tools to commit assault or drug crimes, or exclusively federal[25] crimes. By requiring intent to commit a property crime, the revised offense punishes only intended conduct that, by its nature, is logically related to the use of the tools that are within the scope of the statute. Possession[26] and use[27] of such tools as dangerous weapons to commit offenses against persons are addressed in other sections of the RCC. This change clarifies and improves the proportionality of the revised offense.

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

The definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[28] Resolving this ambiguity, the

[23] 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.").

[24] D.C. Code § 22-2501.

[25] *See, e.g., U.S. v. Frank*, 225 F. Supp. 573 (D.D.C. 1964) (Construing "intent…to commit any criminal offense" in the District's burglary statute to not include an intent to violate the Federal Communications Act insufficient to support burglary prosecution.).

[26] See offenses under Chapter 41 of Title 22E in the RCC.

[27] RCC § 22E-1202.

[28] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the

revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

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

The revised offense requires a culpable mental state of knowledge for paragraph (a)(1). The current statute does not specify a culpable mental state for these elements and no case law exists on point. However, given the current and revised offenses' requirements that the defendant have an intent to commit a crime with the tool,[29] a knowing culpable mental state as to the facts that the defendant possessed a relevant kind of tool appears appropriate. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[30] Requiring a knowing culpable mental state also makes the revised possession of tools to commit property crime offense consistent with the revised burglary statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[31] This change improves the clarity and consistency of the revised statute.

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reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g. the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[29] D.C. Code § 22-2501 ("No person shall have in his or her possession [an implement of crime] with the intent to use [the implement] to commit a crime.").

[30] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citations omitted.)).

[31] *See, e.g.*, RCC § 22E-2702.

COMMENTARY
SUBTITLE IV. OFFENSES AGAINST GOVERNMENT OPERATION

RCC § 22E-3401. Escape from a Correctional Facility or Officer.

Explanatory Note. *This section establishes the escape from a correctional facility or officer offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits knowingly absconding from the lawful custody of a government actor or agency. It replaces D.C. Code § 22-2601, Escape from institution or officer, and D.C. Code § 10-509.01a,[1] Escape from juvenile facilities.*

Subsection (a) establishes the first degree gradation of escape, which prohibits leaving confinement in a correctional facility, secure juvenile detention facility, or cellblock operated by the United States Marshals Service without effective consent. "Correctional facility" is defined in RCC § 22E-701 to mean any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense.[2] The word "secure" makes clear that placements in an unsecured inpatient drug treatment program or independent living program are excluded. "Secure juvenile detention facility" is defined in RCC § 22E-701 to mean any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.[3] The word "secure" makes clear that a placement at home or in a community-based residential facility is excluded.[4] These definitions do not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. Nor do they include buildings used by private businesses to detain suspected criminals.[5] The term "building" is also defined in RCC § 22E-701 and means "a structure affixed to land that is designed to contain one or more natural persons." "Building grounds" refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter.[6]

The phrase "in fact" in paragraph (a)(1) indicates that the accused is strictly liable[7] with respect to whether he or she was under a court order at the time the elements of the escape offense were completed.[8] The term "court order" includes any judicial directive, oral or written. The word "authorizing" makes clear that an order permitting a

[1] The penalty for this offense appears in D.C. Code § 10-509.03.

[2] E.g., Central Detention Facility ("D.C. Jail"), Central Treatment Facility ("CTF"). The term does not include locations operated by the Metropolitan Police Department or the United States Marshals Service. However, escaping from the lawful custody of such an agency may be punished as second degree escape.

[3] E.g., Youth Services Center (located inside the District of Columbia), New Beginnings Youth Development Center (located outside the District of Columbia).

[4] Community-based residential facilities include group homes, therapeutic foster care, extended family homes, and independent living programs.

[5] For example, a person who runs from the booking room of a retail store does not commit an escape under RCC § 22E-3401(a)(1)(A).

[6] *See, e.g.*, D.C. Code § 22-2603.01.

[7] RCC § 22E-207.

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

custodial agency[9] to choose either a secured or unsecured residential placement is sufficient.[10]

Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that they do not have the effective consent of the Mayor, the Director of the Department of Corrections, the Director of the Department of Youth Rehabilitation Services, or the United States Marshals Service to leave.[11] A person leaves a facility when they depart from the building grounds.[12] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an express or implied coercive threat, or deception.[13] "Consent" is also defined in RCC § 22E-701.

Subsection (b) establishes the second degree gradation of escape, which prohibits escaping the lawful custody of a law enforcement officer. "Custody" is defined in paragraph (f)(2) to mean full submission after an arrest or substantial physical restraint after an arrest.[14] For example, custody may include being detained by an officer on the street, being securely confined to a holding cell, or being securely transported to a court appearance or medical facility.[15]

The phrase "in fact" in paragraph (b)(1) indicates that the accused is strictly liable[16] with respect to whether they were in lawful custody at the time the elements of the escape offense were completed. For liability to attach, the custody must, in fact, be lawful. Where a law enforcement officer has detained a person without requisite cause or authority, in violation of any federal or District law, the person is not in lawful custody. The term "law enforcement officer" is defined in RCC § 22E-701 and includes persons with limited arrest powers, such as special police officers[17] and community supervision officers acting in their official capacity,[18] but excludes private actors who are performing a citizen's arrest.[19] The officer must be employed by the District or federal government.

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[9] E.g., Department of Corrections, Bureau of Prisons, United States Parole Commission, Department of Youth Rehabilitation Services.

[10] For example, if a person who was ordered to participate in a work release program violates the rules of the program and is administratively remanded to D.C. Jail, that person may not escape from D.C. Jail and defend on grounds that the court order did not explicitly "require" him to stay at the jail.

[11] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the warden or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[12] A person who leaves the building but is apprehended on building grounds does not commit a completed escape from a correctional facility but may have committed an attempted escape.

[13] RCC § 22E-701. Accordingly, a person who obtains permission to leave by impersonating another resident or an employee commits an escape.

[14] *Davis v. United States*, 166 A.3d 944, 948 (D.C. 2017). Efforts to forcibly evade arrest may create liability for resisting arrest, but not escape. *See* D.C. Code § 22-405.01.

[15] *See* D.C. Code §§ 22-3001(6)(A) and (B).

[16] RCC § 22E-207.

[17] D.C. Code § 23-582(a).

[18] 18 U.S.C. § 3606; *see also* 2017 H.R. 1039, the Probation Officer Protection Act of 2017 (a proposal to extend federal probation officers' arrest authority beyond supervisees to third parties who physically obstruct an officer or cause an officer physical harm).

[19] See D.C. Code § 23-582(b).

Paragraph (b)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that the person detaining him or her is a law enforcement officer[20] and that they do not have the effective consent of the law enforcement officer to leave custody.[21] A person leaves custody when they distance themselves from the officer in an effort to avoid apprehension.[22] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an express or implied coercive threat, or deception.

Subsection (c) establishes the third degree gradation of escape, which punishes unlawful absences from correctional facilities and halfway houses.

The phrase "in fact" in paragraph (c)(1) indicates that the actor is strictly liable[23] with respect to whether the actor was under a court order at the time the elements of the escape offense were completed.[24] The term "court order" includes any judicial directive, oral or written. The word "authorizing" makes clear that an order permitting a custodial agency[25] to choose either a secured or unsecured residential placement is sufficient.[26]

Paragraph (c)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that the person does not have the effective consent of the Mayor, the Director of the Department of Corrections, the Director of the Department of Youth Rehabilitation Services, or the United States Marshals Service to leave or remain away.[27] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an express or implied coercive threat, or deception.[28] "Consent" is also defined in RCC § 22E-701.

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[20] Consider, for example, a person who is tackled by an undercover officer and cannot understand the officer identifying himself as a policeman.

[21] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the facility or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[22] For example, a person who maneuvers her way out of handcuffs but stays seated in a police car has not committed a completed escape. On the other hand, a person who remains handcuffed and runs three blocks may have committed an escape.

[23] RCC § 22E-207.

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

[25] E.g., Department of Corrections, Bureau of Prisons, United States Parole Commission, Department of Youth Rehabilitation Services.

[26] For example, if a person who was ordered to participate in a work release program violates the rules of the program and is administratively remanded to D.C. Jail, that person may not escape from D.C. Jail and defend on grounds that the court order did not explicitly "require" him to stay at the jail.

[27] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the facility or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[28] RCC § 22E-701. Accordingly, a person who obtains permission to leave by impersonating another resident or an employee commits an escape.

Under subparagraphs (c)(2)(A) and (c)(2)(B), a person may commit a third degree escape by omission. Failing to return to custody after a lawful absence[29] or failing to report to custody as ordered[30] amounts to a third degree escape. Under subparagraph (c)(2)(C), leaving a halfway house without permission also amounts to third degree escape. A person leaves a facility when they depart from the building grounds.

Subsection (d) excludes prosecution for second degree escape for a person who is within a correctional facility (i.e. inside the building or on the building grounds). A person who is lawfully confined to a facility may be subject to first or third degree liability, depending on the facility, but not second degree liability.[31]

Subsection (e) specifies the penalties for each grade of the revised offense. [*See* Second Draft of Report #41.]

Paragraph (f)(1) cross-references applicable definitions in the RCC. Paragraph (f)(2) defines "custody," for RCC § 22E-3401(f) only, to mean full submission after an arrest or substantial physical restraint after an arrest.[32] For example, custody may include being detained by an officer on the street, being securely confined to a holding cell, or being securely transported to a court appearance or medical facility.[33]

Relation to Current District Law. *The revised escape from a correctional facility or officer statute changes current District law in five main ways.*

First, the revised escape offense has three gradations. The current statute provides only one penalty for all escape offenses.[34] Thus, under current law, a person who returns late to a work release program faces the same maximum penalty as a person who tunnels out of D.C. Jail.[35] Notably, a failure to return to a halfway house may, alternatively, be prosecuted as a misdemeanor by the Attorney General for the District of Columbia,[36] whereas there is no alternative charge in District law for a conventional prison break. In contrast, the revised offense distinguishes between escaping the confinement of an institution, escaping the lawful custody of a police officer, and failing to return or report to an institution.[37] This change improves the proportionality of the revised offense.

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[29] E.g., work release, unsupervised furlough.

[30] *See Williams v. United States*, 832 A.2d 158 (D.C. 2003) (where the defendant failed to serve all required consecutive weekends at D.C. Jail); *Mundine v. United States*, 431 A.2d 16 (D.C. 1981) (where the defendant failed to report to DC halfway house after being released in Virginia).

[31] For example, a person who is *confined* within a correctional facility does not commit an escape from the lawful *custody* of a law enforcement officer by wriggling out of an officer's grasp and returning to their designated cell.

[32] *Davis v. United States*, 166 A.3d 944, 948 (D.C. 2017). Efforts to forcibly evade arrest may create liability for resisting arrest, but not escape. *See* D.C. Code § 22-405.01.

[33] *See* D.C. Code §§ 22-3001(6)(A) and (B).

[34] D.C. Code § 22-2601.

[35] Although the verb "escape" is not defined in the statute, District case law has held that escape is "knowingly or deliberately leaving physical confinement, *or failing to return to it*, without permission." *Hines v. United States*, 890 A.2d 686 (D.C. 2006) (emphasis added); *see also Days v. United States*, 407 A.2d 702, 704 (D.C. 1979) (finding the extension of leave beyond that which is granted is the legal equivalent of an escape).

[36] D.C. Code § 24-241.05(b).

[37] Escaping the lawful custody of a police officer is graded more severely than failing to report or return because it is more likely to provoke a hot pursuit, which may endanger the arresting officers, the defendant, and bystanders.

Second, the revised statute punishes an attempt to escape as less serious than a completed escape. Current D.C. Code §§ 22-2601[38] and 10-509.01a[39] punish an attempt to escape the same as a completed escape. In contrast, the revised statute relies on the general part's common definition of attempt[40] and penalty for an attempt[41] to define and penalize attempts the same as for other revised offenses. This change improves the consistency and proportionality of the revised offense.

Third, the revised statute punishes accomplice liability consistently with other revised offenses. Current D.C. Code § 10-509.01a, Escape from juvenile facilities, prohibits aiding or abetting an escape from a juvenile facility. In contrast, the revised escape statute relies on the definition of accomplice liability in the revised code's general part,[42] as well as related provisions that establish a rule for crimes that exploit other persons as innocent instruments,[43] and carves out exceptions to accomplice liability.[44] This change improves the clarity, consistency, completeness, and the proportionality of the revised offense.

Fourth, the revised statute requires the person whose personal custody is escaped be a law enforcement officer and defines the term "law enforcement officer"[45] consistently with other revised offenses. Current D.C. Code § 22-2601(a)(2) prohibits escaping the lawful custody of "an officer or employee of the District of Columbia or of the United States." In contrast, the revised code clarifies that the person must be a law enforcement officer, as defined, who is acting within their lawful authority. While the revised definition of "law enforcement officer" is broad and includes individuals such as probation officers, the revised definition is narrower than the current statute's reference to any person employed by the District or federal government. This change improves the clarity and consistency of the revised offenses.

Fifth, the scope of the revised statute is more precisely defined so as to only include secure locations. Current D.C. Code § 22-2601(a)(1) prohibits escape from "any penal or correctional institution or facility" or from "[a]n institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed." DCCA case law has held that, in addition to the Central Detention Facility ("D.C. Jail"), the statute also includes the District's halfway houses.[46] Case law is silent as to which, if any, other locations qualify. The revised offense defines "correctional facility" to include any jails and prisons that are or may be erected in the District[47] and "secure juvenile detention facility" so as to include

[38] The statute begins: "No person shall escape or attempt to escape…".
[39] The statute begins: "No child who has been committed to a juvenile facility shall escape or attempt to escape from…"
[40] RCC § 22E-301(a).
[41] RCC § 22E-301(c)(1).
[42] RCC § 22E-210.
[43] RCC § 22E-211.
[44] RCC § 22E-212.
[45] RCC § 22E-701.
[46] *See Demus v. United States*, 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States*, 498 A.2d 1172, 1174 (D.C. 1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).
[47] E.g., Central Detention Facility ("D.C. Jail") and Central Treatment Facility ("CTF").

any physically secure juvenile placement.[48] The revised statute may broaden current law by including escapes from the Youth Services Center, pre-adjudication[49] or pre-commitment.[50] The revised statute may narrow current law by excluding escapes from unsecured congregate care placements such as group homes.[51] This change clarifies and may eliminate a gap in liability and improve the proportionality of the revised offense.

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

The revised statute specifies that whether a person is subject to a court order or in lawful custody of a law enforcement officer is a matter of strict liability. The current escape statute does not specify any culpable mental state for this offense element, nor has the DCCA directly addressed the matter. The revised statute resolves this ambiguity by not requiring any culpable mental state as to being subject to a court order or as to the lawfulness of the custody. For example, a person who mistakenly believes an arrest warrant is invalid, nevertheless commits an escape if all of the offense elements are satisfied, including the fact that the person knew they lacked effective consent of the institution or officer. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[52] This change clarifies 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 specifies that a "knowing" culpable mental state is required for leaving custody or failure to return or report to custody, and for lacking effective consent to do so. The current escape statute does not specify any culpable mental state. However, the DCCA has explained that escaping is "knowingly or deliberately leaving physical confinement, or failing to return to it, without permission."[53] The revised statute clarifies that the accused must be practically certain

[48] E.g., Youth Services Center (located inside the District of Columbia), New Beginnings Youth Development Center (located outside the District of Columbia).

[49] The DCCA has not considered or decided whether the Youth Services Center qualifies as a "penal or correctional institution or facility," under D.C. Code § 22-2601(a)(1). However, the Center is not described as penal or correctional in nature in Title 16. *See, e.g.*, D.C. Code § 16-2310 (authorizing shelter care placement if a child has no parent, guardian, custodian, or other person or agency able to provide supervision). Notably, all references to "penal" and "correctional" institutions in Title 16 are followed by the phrase "for adult offenders" or a reference to Title 22.

[50] Persons held at the Youth Services Center post-commitment currently are subject to escape liability, under D.C. Code § 22-2601(a)(3).

[51] The DCCA has not considered or decided whether any location other than New Beginnings Youth Development Center qualify as "[a]n institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed," under D.C. Code § 22-2601(a)(3).

[52] *See 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.'").

[53] *Hines v. United States*, 890 A.2d 686 (D.C. 2006). This is also consistent with federal escape case law. "Although § 751(a) does not define the term 'escape,' courts and commentators are in general agreement

that he or she is acting without permission. Consequently, a mistake of fact is an available defense in some, but not all, cases.[54] Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[55] This change clarifies the revised statute.

Second, the revised statute requires the accused to leave or fail to return without "effective consent." The current escape statute is silent as to whether lack of effective consent to the person's behavior, or a similar element, must be proven. District case law requires the accused escape without "permission," but does not specify whose permission is required or further define that term.[56] The revised statute requires a lack of "effective consent," of the person in charge of the facility, a defined term which means consent obtained by means other than the application of physical force, an express or implied coercive threat, or deception.[57] This change improves the revised offenses by describing all elements that must be proven and applying consistent definitions throughout the revised code.

Third, the revised statute codifies a clear consecutive sentencing provision. Current D.C. Code § 22-2601(b) states in pertinent part, that the "…sentence [is] to begin, if the person is an escaped prisoner, upon the expiration of the original sentence or disposition for the offense for which he or she was confined, committed, or in custody at the time of his or her escape." The DCCA has interpreted the phrase "original sentence" to mean the sentence being served at the time of the escape.[58] The revised statute more concisely states that the sentence for escape is to be served consecutive to the sentence being served during the escape. This change clarifies the revised statute.

[Fourth, the RCC provides for a general duress defense[59] that is consistent with other revised offenses. The current statute is silent as to whether any duress offense exists to escape. However, District case law has recognized a duress defense to escape in limited circumstances.[60] The revised statute does not separately codify a duress defense to escape, but instead relies on the duress defense in the general part of the RCC. This change clarifies and improves the consistency of the revised statutes.]

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that it means absenting oneself from custody without permission." *United States v. Bailey*, 444 U.S. 394, 407 (1980).

[54] For example, a person who mistakenly appears at the wrong halfway house is not liable for escape.

[55] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[56] *United States v. Bailey*, 444 U.S. 394, 407 (1980); *Hines v. United States*, 890 A.2d 686 (D.C. 2006).

[57] RCC § 22E-701.

[58] *Veney v. United States*, 738 A.2d 1185, 1199 (D.C. 1999) (requiring resentencing for a person who escaped during a street encounter).

[59] [A recommendation to codify this general defense is planned, but has not yet been completed, by the Commission.]

[60] [*Stewart v. United States*, 370 A.2d 1374 (D.C. 1977).]

RCC § 22E-3402. Tampering with a Detection Device.

Explanatory Note. *This section establishes the tampering with a detection device offense for the Revised Criminal Code (RCC). The offense prohibits purposely removing or interfering with a wearable monitoring device, such as a GPS ankle bracelet. It replaces D.C. Code § 22-1211, Tampering with a detection device.*

Paragraph (a)(1) specifies that for criminal liability to attach, the person must know that the person is legally required to wear a detection device at the time the elements of the tampering offense were completed. The term "detection device" is defined in RCC § 22E-701 and is any technology installed on a person's body or clothing that is capable of monitoring the person's whereabouts.[1] The term refers to the physical device itself and does not include the records or reports that it generates.[2] The term "knowingly" is defined in the general part of the revised code[3] and here means the person must be practically certain that compliance with electronic monitoring was required. The monitoring may be required as a condition of release or as a sanction for noncompliance with other release conditions.[4] The requirement must be valid at the time of the offense.[5]

Subparagraphs (a)(1)(A)-(E) establish five categories of people who are prohibited from tampering with a detection device. Namely, the revised statute applies to persons who must wear the device while subject to a protection order; while on pretrial release; while on presentence or predisposition release;[6] while committed to the Department of Youth Rehabilitation Services or incarcerated; or while on supervised release, probation, or parole. The revised statute does not apply to persons who are required to wear a monitoring device before a court proceeding is initiated or after a sentence is completed. Nor does it apply to people who are required to wear a monitoring device as a result of a judgment issued outside of the Superior Court of District of Columbia.

Paragraph (a)(2) specifies that the person must intentionally tamper with the detection device. The term "intentionally" is defined in the general part of the revised

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[1] Examples include mechanisms such as bracelets, anklets, tags, and microchips. It explicitly includes the global position systems ("GPS") that are currently used by the Pretrial Services Agency, Court Services and Offender Supervision Agency, and Court Social Services. It also explicitly includes the radio frequency identification technology ("RFID") that is currently used by the Department of Corrections.

[2] A person does not commit tampering with a detection device by destroying or manipulating the data generated by the device after it has been transmitted. Consider, for example, a person who hacks into his supervision officer's computer and deletes or alters the monitoring records. Such conduct may, however, constitute tampering with physical evidence, in violation of D.C. Code § 22-723.

[3] RCC § 22E-206.

[4] D.C. Code § 22-1211 was amended in 2016 to include sanctions, following the D.C. Court of Appeals decision in *Hunt v. United States*, 109 A.3d 620, 621 (D.C. 2014).

[5] Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). Accordingly, if a supervision officer employed by the Pretrial Services Agency, Court Services and Offender Supervision Agency, or Court Social Services were to require electronic monitoring without authorization from the court or USPC, the requirement would be invalid. Additionally, if the period of release specified by the court expires before the tampering occurs, criminal liability does not attach.

[6] "Predisposition" refers to minors who have been adjudicated delinquent and are awaiting the juvenile equivalent of sentencing.

code[7] and here means the person must be practically certain that their conduct will cause the device to be removed or the device's capability to be compromised.[8]

Subparagraph (a)(2)(A) prohibits purposely removing the wearable monitor or allowing another to remove it.[9] An unauthorized person refers to a person other than someone that the court or parole commission authorized to remove the device.[10]

Subparagraph (a)(2)(B) prohibits interfering with the operation of the device,[11] and allowing an unauthorized person to do so.[12] Interfering with the emission or detection of the device includes failing to charge the power for the device or allowing the device to lose the power required to operate,[13] when done intentionally, to interfere with its operation. An unauthorized person refers to a person other than someone that the court or parole commission authorized to interfere with the device.[14]

Subsection (b) authorizes an exception to the confidentiality provision in D.C. Code § 23-1303(d) for detection device information from the Pretrial Services Agency for the District of Columbia. Subject to other rules of evidence, pretrial detection device information may be divulged in a trial determining whether a person has committed tampering with a detection device. It may not be introduced on the issue of guilt for other charges, even if those charges are tried concurrently.[15]

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[7] RCC § 22E-206.

[8] Where a person is practically certain that their conduct will only minimally interfere with the operation of the device, a de minimis defense may be available under RCC § 22E-215. Consider, for example, a person who needs to wear construction boots to work and knows that the device's signal is marginally weaker inside the boots.

[9] A person may violate this statute by an act or by an omission, provided that the person behaves purposely. *See* RCC § 22E-202.

[10] Examples of persons authorized by the court or the parole commission to install and remove monitoring devices may include employees of the Pretrial Services Agency, Court Services and Offender Supervision Agency, Department of Youth Rehabilitation Services, or Court Social Services. Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). In extenuating circumstances unauthorized persons (e.g. a paramedic providing care) may have a justification defense for removing a bracelet. [The Commission has not yet issued recommendations for a general justification defense.]

[11] Unless one has a purpose to interfere with the operation of the device, and does so, a person does not violate the revised statute merely by decorating the device, applying a case to make it waterproof, or applying a substance to make it more comfortable to wear.

[12] A person may violate this statute by an act or by an omission, provided that the person behaves purposely. *See* RCC § 22E-202.

[13] *See* D.C. Code § 22-1211(a)(1)(C).

[14] Examples of persons authorized by the court or the parole commission to install and remove monitoring devices may include employees of the Pretrial Services Agency, Court Services and Offender Supervision Agency, Department of Youth Rehabilitation Services, or Court Social Services. Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). In extenuating circumstances unauthorized persons (e.g., a paramedic providing care) may have a justification defense for removing a bracelet. [The Commission has not yet issued recommendations for a general justification defense.]

[15] Consider, for example, a person who is charged with one count of tampering with a detection device and one count of possession of a controlled substance. Pretrial information about location tracking may be admissible as to the tampering count, however, it remains inadmissible for the controlled substances count. Other information such as drug testing results and interview statements are not excepted.

Subsection (c) specifies that the District may exercise long-arm jurisdiction over an offense that occurs outside the boundaries of the District of Columbia.

Subsection (d) provides the penalties for the revised offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised tampering with a detection device changes current District law in four main ways*

First, the revised statute punishes an attempt to tamper with a detection device as less serious than a completed tampering. Current D.C. Code § 22-1211 punishes an attempt to interfere with the operation of the device the same as a completed tampering.[16] In contrast, the revised statute relies on the general part's common definition of attempt[17] and penalty for an attempt[18] to define and penalize attempts the same as for other revised offenses. This change improves the consistency and proportionality of revised offense.

Second, the revised statute limits the offense to tampering with detection devices that are required in connection with a District of Columbia court case. The plain language of the current statute appears to provide liability for interference with detection devices worn by a person under any jurisdiction's court order. However, it is not clear that this was intended by the Council or that the statute has been applied in such circumstances. There is no case law on point. In contrast, the revised statute excludes violations of court orders imposed by other jurisdictions, where the District has no control over the underlying statutes and procedures that allowed for the placement of a detection device. This revision clarifies the revised statute.

Third, the revised statute includes an exception to the confidentiality provision in D.C. Code § 23-1303(d). Under current law, information from the Pretrial Services Agency for the District of Columbia is inadmissible on the issue of guilt in any judicial proceeding. The revised statute permits the introduction of detection device information in a trial determining a violation, subject to other rules of evidence. This change improves the consistency of the revised statute.

Fourth, the revised statute specifies that the District of Columbia may exercise jurisdiction over a tampering with a detection device offense that occurs across state lines. Current D.C. Code § 22-1211 does not specify whether a person who tampers with a device outside of the District commits an offense. In contrast, the revised statute includes a provision makes clear that a tampering committed out of state violates the statute. This change clarifies the revised statute and may eliminate a gap in liability.

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

The revised statute requires knowing and intentional conduct. The current tampering statute does not specify a culpable mental state for the circumstance of being under court-ordered detention or supervision that requires electronic monitoring, and there is no case law on point. Current D.C. Code § 22-1211 requires that the defendant

[16] D.C. Code § 22-1211(a)(1)(B).
[17] RCC § 22E-301(a).
[18] RCC § 22E-301(c)(1).

"intentionally" remove, alter, mask, or interfere with a device. However, the term "intentionally" is not defined in the statute or in case law. By contrast, the revised statute requires that the person know that they are required to wear a detection device and intend to remove it or interfere with its operation. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[19] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

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

First, the revised statute amends the word "committed" in paragraph (a)(1) of the current statute to the phrase "committed to the Department of Youth Rehabilitation Services." This clarifies that the statute refers to minors who have been adjudicated delinquent and not to adults who are civilly committed to the Department of Behavioral Health for psychiatric services. This change clarifies the revised statute.

Second, the revised statute strikes the terms "alter" and "mask" as superfluous. The word "interferes" broadly encompasses all interference with the emission and detection of the device's signal. The revised statute does not capture "altering" or "masking" a device in a way that does not affect its functionality, such as decorating a device or covering it with clothing, unless such conduct is also done with a purpose of interfering with the device's monitoring functions. This change clarifies the revised statute.

Third, the revised statute strikes language in D.C. Code § 22-1211(a)(1)(C)[20] as unnecessary and potentially confusing. This meaning of this provision is unclear in light of the possibility of changing technology, the lack of any standard for measuring a "failure to charge," and differing responsibilities of a person to maintain charges for different devices. Moreover, failing to adequately charge a device's battery may be one means of interfering with the operability of the device, in violation of RCC § 22E-3402(a)(2)(B). This change clarifies the revised statute.

Fourth, the revised statute clarifies that the term "protection order" refers to the civil protection orders that are issued after formal notice and hearing under Title 16 of the D.C. Code. This change clarifies the revised statute.

[19] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[20] "Intentionally fail to charge the power for the device or otherwise maintain the device's battery charge or power."

RCC § 22E-3403. Correctional Facility Contraband.

Explanatory Note. *This section establishes the correctional facility contraband offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes knowingly bringing certain prohibited items to a person confined in a secure facility. It also punishes a person confined to a facility who knowingly possesses certain prohibited items. The revised statute replaces D.C. Code § 22-2603.02, Unlawful possession of contraband; D.C. Code § 22-2603.03, Penalties; D.C. Code § 22-2603.01, Definitions; and D.C. Code § 22-2603.04, Detainment Power.*

Subparagraphs (a)(1)(A), (a)(2)(A), (b)(1)(A), and (b)(2)(A) specify that one way of committing correctional facility contraband is by bringing a prohibited item to a correctional facility[1] or secure juvenile detention facility[2] with intent that it reach someone who is confined there. It is not an element that the prohibited item actually was received by someone confined. "With intent" is a defined culpable mental state[3] that here requires the person believe their conduct is practically certain to cause the prohibited item to be received by someone who is confined to the facility.[4] 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 that the person intend that the item reach a particular resident of the facility.[5] The terms "correctional facility" and "secured juvenile detention facility" are defined in RCC § 22E-701 to include buildings and building grounds.

Subparagraphs (a)(1)(A), (a)(2)(A), (b)(1)(A), and (b)(2)(A) specify that the person must act knowingly, a culpable mental state that is defined in the general part of the revised code.[6] Applied here, it means the person must be practically certain that they have the item[7] and be practically certain that they brought the item to correctional facility grounds.[8] However, causing an innocent third party, such as a mail delivery person, to bring a prohibited item to a facility may be sufficient for liability if the other elements of the offense are satisfied.[9]

Subparagraphs (a)(1)(B), (a)(2)(B), (b)(1)(B), and (b)(2)(B) require that the person bring the item to the facility without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth

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[1] E.g., Central Detention Facility ("D.C. Jail"), Central Treatment Facility ("CTF").

[2] E.g., Youth Services Center, New Beginnings Youth Development Center.

[3] RCC § 22E-206.

[4] For example, an attorney who brings a cellular phone into D.C. Jail to take personal phone calls in the waiting room does not commit a contraband offense because she did not intent to give it to a resident.

[5] Consider, for example, a person who places a weapon on the outer wall of a correctional facility's recreation yard, hopeful that any resident might retrieve it. The government is not required to prove which resident was the intended recipient.

[6] RCC § 22E-206.

[7] Consider, for example, an attorney who brings his college backpack to D.C. Jail, without realizing there is a decades-old marijuana cigarette in the bottom of the bag. That attorney has not committed a correctional facility contraband offense.

[8] Consider, for example, a person who attempts to bring contraband into a halfway house, believing it is a temporary housing shelter or a rehabilitation center. That visitor has not committed a correctional facility contraband offense.

[9] See RCC § 22E-211, Liability for causing crime by an innocent or irresponsible person.

Rehabilitation Services. "Effective consent" is a defined term and means consent that was not obtained by the application of physical force, an express or implied coercive threat, or deception.[10] Where a person has the effective consent of the facility to bring the otherwise-prohibited item to the location, that item does not subject the person to correctional facility contraband liability.[11] Per the rules of interpretation in RCC § 22E-207(a), the culpable mental state of knowingly specified in subparagraphs (a)(1)(A) and (b)(2)(A) apply to this element of the offense. The person must be practically certain that they lack effective consent to bring the item to the facility.[12]

Subparagraphs (a)(1)(C) and (a)(2)(C) require that the item constitute Class A contraband.[13] Subparagraphs (b)(1)(C) and (b)(2)(C) require that the item constitute Class B contraband.[14] The term "in fact" is defined in the revised code to indicate that the actor is strictly liable with respect to this element of the revised offense.[15] Accordingly, it is of no consequence that the person does not know that the item is classified as Class A or Class B contraband.

Paragraphs (a)(2) and (b)(2) state that the second type of person subject to liability for correctional facility contraband is someone who is confined to a correctional facility or secure juvenile detention facility. The word "confined" refers to the person's legal custodial status and not to the physical strictures of the building. For instance, a corrections officer may, as a practical matter, be securely confined inside D.C. Jail during a shift in a physical sense, but the officer not legally "confined" to the custody of the correctional facility.

Subsection (c) establishes three exclusions from liability for the correctional facility contraband offense.

Paragraph (c)(1) excludes from liability the use of a portable electronic communication device by any person during a legal visit.[16] Paragraph (c)(2) excludes from liability a person's possession of their prescription medication when there is a medical necessity to access the item immediately or to be constantly accessible. Paragraph (c)(3) excludes from liability a person's possession of a syringe, needle, or other medical device when there is a medical necessity to access the item immediately or to be constantly accessible.[17]

Subsection (d) limits the correctional facility's authority to detain a person on suspicion of bringing contraband to a facility under paragraphs (a)(1) and (b)(1) to a period of two hours, pending surrender to the Metropolitan Police Department or, for

[10] RCC § 22E-701.
[11] For example, the department may allow a barber to bring a razor blade to use for cutting and shaving hair.
[12] Consider, for example, a person who gives papers fastened with a binder clip to a resident at D.C. Jail, without knowing that binder clips are disallowed. That person has not committed a contraband offense.
[13] The term "Class A contraband" is defined in RCC § 22E-701.
[14] The term "Class B contraband" is defined in RCC § 22E-701.
[15] RCC § 22E-207.
[16] Prohibiting contraband in this context may offend the right to effective assistance of counsel under the Sixth Amendment.
[17] These exceptions apply to medicines and medical devices necessary to treat chronic, persistent, or acute conditions that require constant or immediate medical response such as diabetes, severe allergies, or seizures. Depending on the facts of the case, criminalizing the possession of contraband in this context may offend the prohibition of cruel and unusual punishment in the Eighth Amendment.

facilities outside the District of Columbia, to a law enforcement agency designated by the Mayor. Probable cause is both sufficient and required.[18]

Subsection (e) specifies the penalties for each grade of the revised offense. [*See* Second Draft of Reprot #41.] The revised statute punishes contraband that may be used to cause an injury or facilitate an escape more severely than other contraband.

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

Relation to Current District Law. *The revised correctional facility contraband statute changes current District law in five main ways.*

First, the revised offense reclassifies contraband according to the danger presented. Current statutory law roughly classifies contraband as (A) any item prohibited by law, weapons, escape implements, and drugs;[19] (B) alcohol, drug paraphernalia, and cellular phones;[20] and (C) any item prohibited by rule.[21] The current statute penalizes possession of class C contraband as a criminal offense, even though only administrative sanctions are authorized.[22] In contrast, the revised statute classifies contraband into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. The revised statute does not otherwise criminalize violations of other facility rules regarding what items that can be possessed. In the RCC, such matters are subject to only administrative processing and sanctions. This reclassification of what constitutes contraband reorders and limits criminal sanctions to items posing significant dangers. This change improves the proportionality of the revised statutes.

Second, the revised statute narrows the list of Class A contraband in two ways. First, the current statute includes as Class A contraband the possession of any civilian clothing[23] and "[a]ny item, the mere possession of which is unlawful under District of Columbia or federal law."[24] There is no District case law interpreting this phrase, but the language would seem to include not only weapons and controlled substances listed separately as Class A contraband, but items that pose no apparent threat to the safety or order of a correctional facility.[25] In contrast, the revised statute criminalizes as Class A contraband only the possession of a uniform, and punishes possession of any weapon or drug that is prohibited by the District's criminal code, without including any (unspecified) item prohibited by federal or District law. Second, the current statute includes as Class A contraband, "Any object designed or intended to facilitate an escape."[26] In contrast, the revised statute refers more specifically to "A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door."[27] The revised language creates a more objective basis for identifying contraband—rather than intent to facilitate escape—

[18] *See* D.C. Code § 23-582.
[19] D.C. Code § 22-2603.01(2)(A).
[20] D.C. Code § 22-2603.01(3)(A).
[21] D.C. Code § 22-2603.01(4)(A).
[22] D.C. Code § 22-2603.03(e).
[23] D.C. Code § 22-2603.01(2)(A)(viii).
[24] D.C. Code § 22-2603.01(2)(A)(i).
[25] *See, e.g.*, 16 U.S.C. § 668 (criminalizing possession of a bald eagle feather).
[26] D.C. Code § 22-2603.01(2)(A)(iv).
[27] RCC § 22E-701.

and is consistent with language in the revised possession of tools to commit property crime offense.[28] These changes improve the clarity and consistency of the revised offense and improve the proportionality of penalties.

Third, the revised statute does not criminalize a failure to report contraband except to the extent such conduct meets the requirements for accomplice liability. The current contraband statute compels District employees to report contraband and criminally punishes a failure to do so.[29] In contrast, the revised contraband statute relies on the definition of accomplice liability in the revised code's general part,[30] as well as related provisions that establish a rule for crimes that exploit other persons as innocent instruments,[31] and carves out exceptions to accomplice liability.[32] Offenses relating to public corruption and obstructing justice may also punish employee accomplices in this context.[33] This change improves the consistency and the proportionality of the revised offenses.

Fourth, the revised statute leaves concurrent versus consecutive sentencing decisions to the discretion of the sentencing court. The current contraband statute requires that a sentence for unlawful possession of contraband run consecutive to any term of imprisonment imposed in the case in which the person was being detained at the time this offense was committed.[34] This provision has two notable features that distinguish it from any other sentencing provision in the D.C. Code. First, it applies to persons who are pre-sentence in any jurisdiction at the time of the contraband offense.[35] Second, it applies to persons who are pre-trial in any jurisdiction at the time of the contraband offense.[36] Legislative history does not clarify why such an infringement on the court's discretion is applied to contraband offenses and not to other correctional facility offenses such as escape. In contrast, the revised statute does not require consecutive sentencing, leaving such a decision to the sentencing court. This change improves the consistency and the proportionality of revised offenses.

Fifth, the revised statute adds an exception to liability for possession of a syringe, needle, or other medical device when that person has a medical necessity to have the substance immediately or constantly accessible. The current D.C. Code contraband statute only provides an exception for possession of a prescribed controlled substance that is medically necessary to carry. [37] In contrast, the revised statute excepts liability for syringes, needles, or other medical devices where there is a medical necessity or immediate access. The offense's exclusion of liability does not create an affirmative

[28] RCC § 22E-2702.
[29] D.C. Code § 22-2603.02(c).
[30] RCC § 22E-210.
[31] RCC § 22E-211.
[32] RCC § 22E-212.
[33] [The Commission has not yet issued recommendations for reformed public corruption and obstructing justice offenses.]
[34] D.C. Code § 22-2603.03(d).
[35] By contrast, the District's escape statute only requires the sentence be consecutive to an original sentence that is being served at the time of the. D.C. Code § 22-2601(b).
[36] The United States Supreme Court held that a federal judge did not violate the federal Sentencing Reform Act by running a federal sentence consecutive to an anticipated state sentence after a finding of guilt by the state court. *Setser v. United States*, 566 U.S. 231 (2012).
[37] D.C. Code § 22-2603.03(f).

right for a confined person to possess such items, and administrative sanctions may be imposed for such possession. There may also be criminal liability for misuse of a needle, syringe, or medical device under another statute,[38] and possession of a needle, etc. with intent to give the item to a confined person may be liable as an attempt or give rise to accomplice liability. However, a person's mere possession of such a medically necessary item is not grounds for a contraband conviction. This change improves the proportionality of the revised offense.

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

First, the revised statute specifies that a knowing culpable mental state is required for confined persons as to their possession of contraband, just as it is for persons who deliver it. Current D.C. Code § 22-2603.02(b) merely states, "It is unlawful for an inmate, or securely detained juvenile, to possess Class A, Class B, or Class C contraband, regardless of the intent with which he or she possesses it." This language is ambiguous as to whether a person is strictly liable as to whether the item possessed is contraband, or whether a person's intent to use contraband for a non-harmful purpose is irrelevant to liability but they must be aware that they possess contraband.[39] There is no case law on point. District practice appears to treat as a matter of strict liability the fact that an item possessed by a confined person is contraband, while the possession itself must be purposeful.[40] In contrast, the revised statute requires a confined person to knowingly possess an item, similar to the requirements for someone bringing contraband into a correctional facility. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[41] This change improves the proportionality of the revised statutes.

Second, the detainment authority provision in the revised offense authorizes and limits detention pending surrender to certain law enforcement authorities to investigate and arrest a person for commission correctional facility contraband. Current D.C. Code § 22-2603.04 refers only to the Metropolitan Police Department as an authorized authority. However, under a separate D.C. Code provision, other officials, may be granted specific authority by the Mayor to make arrests on the District's behalf for offenses occurring out

[38] For example, an inmate who uses a syringe or other device to assault another inmate may face more severe criminal liability for using a dangerous weapon in the assault. See RCC § 22E-1202.

[39] The current statutory definition of Class C contraband also states: "The rules shall be posted in the facility to give notice of the prohibited articles or things," but does not provide any relief to the accused if the notice is not posted. D.C. Code § 22-2603.01(4)(a).

[40] Criminal Jury Instructions for the District of Columbia Instruction 6.603 (2018) ("The elements of possessing contraband in [a penal institution] [a secure juvenile residential facility], each of which the government must prove beyond a reasonable doubt, are that: 1. [Name of defendant] was [an inmate] [a securely detained juvenile] in [name of penal institution or secure juvenile residential facility]; 2. S/he possessed [name of object]; [and] 3. S/he did so voluntarily and on purpose, and not by mistake or accident[.] [; and] [4. The [name of object] was [insert applicable definition of contraband from statute].] "voluntarily and on purpose, and not by mistake or accident.").

[41] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

of the District, including at New Beginnings Youth Development Center in Laurel, Maryland under D.C. Code § 10-509.01. There is no case law on whether or how to resolve the potential conflict between these provisions of law. To resolve this ambiguity, the revised statute includes in the detainment provision a reference to an agency designated per D.C. Code § 10-509.01. This change improves the clarity and consistency of the revised statute.

Third, the revised statute punishes accomplice liability consistently with other revised offenses. Current D.C. Code § 22-2603.02(a)(2) makes it unlawful to "cause another" to bring contraband to a secured facility. By contrast, the revised statute relies on the definitions of accomplice liability,[42] solicitation,[43] and criminal conspiracy[44] in the revised code's general part. This change improves the consistency and the proportionality of revised offenses.

Fourth, the revised statute requires a person to know that their possession or introduction of the contraband item is without the effective consent of the person in charge of the facility, and eliminates the exclusions from liability enumerated in D.C. Code § 22-2603.02(d) for items "issued" to a facility employee or law enforcement officer. The current D.C. Code excludes from liability for a contraband offense any item "issued" to a facility employee or a law enforcement officer that is being used in the performance of her official duties.[45] Case law has not addressed the scope or meaning of this provision. The RCC's requirement that the person knowingly act without the facility's effective consent renders this statutory exception to liability unnecessary.[46] It also ensures the revised offense does not reach possession of items that the facility authorized but did not "issue," such as personal medication. This change improves the proportionality of the revised offenses.

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

First, the phrase "brings…to a correctional facility or secured juvenile detention facility" replaces the phrases "bring…into or upon the grounds of"[47] and "place in such proximity to."[48] Current D.C. Code § 22-2603.02(a) is grammatically difficult to understand. Presumably, paragraph (a)(3) intends to say either, "place in close proximity with intent to give access" or "place in such proximity as to give access." Because the revised statute defines the terms "correctional facility" and "secured juvenile detention facility" to include the building grounds, the word "to" adequately captures all trafficking scenarios targeted by the current law.[49]

[42] RCC § 22E-210.
[43] RCC § 22E-302.
[44] RCC § 22E-303.
[45] D.C. Code § 22-2603.02(d).
[46] For example, where a facility has permitted an employee to carry a billy or a law enforcement officer to use tear gas, correctional facility contraband liability does not attach.
[47] D.C. Code § 22-2603.02(a)(1).
[48] D.C. Code § 22-2603.02(a)(3).
[49] For example, if a person places contraband on the outer wall of the correctional facility's secured yard, that person has brought contraband to the correctional facility.

Second, the revised code defines "possession" in RCC § 22E-701. The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[50] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Third, the revised offense simplifies the defined term "Cellular telephone or other portable communication device and accessories thereto."[51] Current law defines this term with references to specific technology, several of which are already rare or obsolete.[52] The revised statute uses a simpler reference to portable electronic communication devices and accessories thereto.[53]

Fourth, the revised statute clarifies the correctional facilities' detention authority. D.C. Code § 22-2603.04 states that a person who "introduces or attempts to introduce" contraband to a facility may be detained for no more than two hours until police arrive. The statute does not include a standard of proof and the District of Columbia Court of Appeals has not interpreted the statute. The revised statute clarifies that probable cause is required, just as it is for any other warrantless detention.[54]

[50] *See* D.C. Crim. Jur. Instr. 3.104.
[51] D.C. Code § 22-2603.01(a)(3)(c).
[52] "Cellular telephone or other portable communication device and accessories thereto" means any device carried, worn, or stored that is designed, intended, or readily converted to create, receive or transmit oral or written messages or visual images, access or store data, or connect electronically to the Internet, or any other electronic device that enables communication in any form. The term "cellular telephone or other portable communication device and accessories thereto" includes portable 2-way pagers, hand-held radios, cellular telephones, Blackberry-type devices, personal digital assistants or PDAs, computers, cameras, and any components of these devices. The term "cellular telephone or other portable communication device and accessories thereto" also includes any new technology that is developed for communication purposes and includes accessories that enable or facilitate the use of the cellular telephone or other portable communication device.
[53] RCC § 22E-701.
[54] *See* D.C. Code § 23-582.

COMMENTARY
SUBTITLE V. PUBLIC ORDER AND SAFETY OFFENSES

RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

Explanatory Note. *This section establishes the possession of a prohibited weapon or accessory offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes possession of particular weapons that are so highly suspect and devoid of lawful use that their mere possession is forbidden, without requiring any proof of intent to use the weapon for an unlawful purpose.*[1] *The revised offense replaces D.C. Code §§ 22-4514(a) (Possession of certain dangerous weapons prohibited)* [2] *and 22-4515a(a) and (c) (Manufacture, transfer, use, possession, or transportation of Molotov cocktails, or other explosives for unlawful purposes).*[3]

Subsection (a) specifies the elements of first degree possession of a prohibited weapon or accessory. Paragraph (a)(1) specifies that to commit first degree possession of a prohibited weapon or accessory, a person must act at least knowingly.[4] That is, the person must be practically certain that they possess an item[5] and must be practically certain that the item they possess is a firearm or an explosive.[6] "Firearm" is a defined term,[7] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[8] but excludes antiques.[9] "Possesses" is a defined term and includes both actual and constructive possession.[10] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[11] With respect to firearms, the person must know they possess a firearm[12] or that they possess component parts that could be arranged to make a whole firearm.[13] Evidence of

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[1] *See Worthy v. United States*, 420 A.2d 1216 (D.C. 1980).

[2] The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4514(c) – (d).

[3] The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4515a(d) – (e).

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

[5] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

[6] Consider, for example, a person who finds firearm silencer on the street and, without recognizing the object, carries it away out of curiosity. That person does not commit possession of a prohibited weapon or accessory.

[7] RCC § 22E-701.

[8] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

[9] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

[10] RCC § 22E-701.

[11] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[12] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

[13] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[14] No intent to use the firearm, accessory, or ammunition is required for this possessory offense.[15]

Paragraph (a)(2) specifies that a person must be at least reckless as to whether the weapon or accessory is of the prohibited variety.[16] "Reckless" is a defined term,[17] which, applied here, means the person must consciously disregard a substantial risk that the item is an assault weapon, machine gun, sawed-off shotgun, or restricted explosive. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.[18] The government is not required to prove that the person should have been aware that it is illegal to have the item. Subparagraphs (a)(2)(A) – (D) criminalize possession of four classes of prohibited objects.

Subparagraph (a)(2)(A) makes it unlawful to possess an assault weapon. "Assault weapon" is a defined term that includes an enumerated list of semiautomatic rifles, pistols, and shotguns. The term also includes semiautomatic firearms with specific features that make a firearm more readily capable of mass destruction, such as grenade launchers, flash suppressors, or vertical handgrips. Accordingly, an otherwise lawful firearm may be modified in a manner that converts it into contraband under the statute. It is not a defense that firearm was compliant at the time of manufacture or acquisition.

Subparagraph (a)(2)(B) makes it unlawful to possess a machine gun. "Machine gun" is a defined term and includes any firearm that is capable of automatically firing multiple shots with a single trigger pull. The term also includes a machine gun frame or receiver and parts that are designed and intended to convert a firearm into a machine gun.

Subparagraph (a)(2)(C) makes it unlawful to possess a sawed-off shotgun. "Sawed-off shotgun" is a defined term and means a shotgun having a barrel of less than 18 inches in length or a firearm made from a shotgun if such firearm as modified has an overall length of less than 26 inches or any barrel of less than 18 inches in length.

Subparagraph (a)(2)(D) makes it unlawful to possess a restricted explosive. The term "restricted explosive" is defined to include Molotov cocktails, bombs, grenades, and missiles. However, the term does not include explosive and combustible objects lawfully and commercially manufactured for a lawful purpose, which may exclude liability for items such as lanterns, fireworks, pest exterminators, or demolition dynamite.[19]

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[14] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys

[15] *Bsharah v. United States*, 646 A.2d 993 (D.C. 1994).

[16] RCC § 22E-207; *see Moore v. United States*, 927 A.2d 1040, 1054–55 (D.C. 2007); *In re D.S.*, 747 A.2d 1182 (D.C. 2000).

[17] RCC § 22E-206.

[18] RCC § 22E-206.

[19] A person who carries a lantern, fireworks, pest exterminators, or demolition dynamite with intent to injure another person may still commit Possession of a Dangerous Weapon to Commit Crime (RCC § 22E-4103) or third degree Carrying a Dangerous Weapon (RCC § 22E-4102). A person who uses fire or

Subsection (b) specifies the elements of second degree possession of a prohibited weapon or accessory. Paragraph (b)(1) specifies that to commit second degree possession of a prohibited weapon or accessory, a person must act at least knowingly.[20] That is, the person must be practically certain that they possess an item[21] and must be practically certain that the item they possess is a firearm accessory or ammunition.[22] "Ammunition" is a defined term, which means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device. "Possesses" is a defined term and includes both actual and constructive possession.[23] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[24] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[25]

Paragraph (b)(2) specifies that a person must be at least reckless as to whether the accessory or ammunition is of the prohibited variety.[26] "Reckless" is a defined term,[27] which, applied here, means the person must consciously disregard a substantial risk that the item is a firearm silencer, bump stock, or large capacity ammunition feeding device. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.[28] The government is not required to prove that the person should have been aware that it is illegal to have the item. Subparagraphs (b)(2)(A) – (C) categorically criminalize possession of three classes of prohibited objects.

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explosives to damage property or to injure another person may commit Arson (RCC § 22E-2501), Reckless Burning (RCC § 22E-2502), or Assault (RCC § 22E-1202).

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

[21] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

[22] Consider, for example, a person who finds firearm silencer on the street and, without recognizing the object, carries it away out of curiosity. That person does not commit possession of a prohibited weapon or accessory.

[23] RCC § 22E-701.

[24] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[25] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys

[26] RCC § 22E-207.

[27] RCC § 22E-206.

[28] RCC § 22E-206.

Subparagraph (b)(2)(A) makes it unlawful to possess a firearm silencer. A silencer is a device that is designed[29] to reduce the sound of gunfire.

Subparagraph (b)(2)(B) makes it unlawful to possess a bump stock. The term "bump stock" is defined in RCC § 22E-701. The term includes any rifle stock or other device that enables the shooter to fire repeatedly—though less accurately—without moving the trigger finger. These stocks use spring action to propel the stock forward using the kickback from each previous shot.

Subparagraph (b)(2)(C) makes it unlawful to possess a large capacity ammunition feeding device. The term "large capacity ammunition feeding device" is defined[30] to include extended clips or drums that hold more than 10 rounds at a time.

Subsection (c) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (d) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[31] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (e) provides the penalty for each gradation of the revised offense. [*See* Second Draft of Report #41.] Paragraph (e)(3) specifies that a conviction for possession of a prohibited weapon or accessory does not merge with any other offense arising from the same course of conduct.

Subsection (f) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised possession of a prohibited weapon or accessory offense changes current District law in three main ways.*

First, the RCC limits prohibited items to restricted explosives, firearms, and firearm accessories, grading possession of firearm accessories lower than possession of restricted explosives and firearms. D.C. Code § 22-4514(a) provides a single penalty gradation for possession of "any machine gun, sawed-off shotgun, bump stock, knuckles, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, sand club, sandbag, switchblade knife, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms…" In contrast, the revised offense punishes only possession of specified items that are likely to cause or facilitate multiple fatalities in a single event.

[29] Although everyday household items, such as soda bottles, may also be used to muffle noise, possession of such items which are not designed as silencers is not prohibited under this section, irrespective of unlawful intent.

[30] *See* RCC § 22E-701.

[31] *See, e.g.*, D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991). [The Commission's recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming.]

Possession of blackjacks and other dangerous weapons[32] is illegal if they are carried outside of the home,[33] possessed with intent to commit a crime,[34] or possessed during a crime.[35] Additionally, the RCC punishes some offenses more severely if a dangerous weapon is displayed or used, including robbery,[36] assault,[37] menacing,[38] sexual assault,[39] kidnapping,[40] and criminal restraint.[41] This change logically reorders and improves the proportionality of the revised offenses.

Second, the revised statute treats repeat offender penalty enhancements consistent with other revised offenses. Current D.C. Code § 22-4514(c) provides that a first possession of a prohibited weapon offense is punishable by a maximum of one year in jail and a second possession of a prohibited weapon offense (or a possession of a prohibited weapon offense committed by a person who has been previously convicted of a felony) is punishable by a maximum of 10 years in prison. Current D.C. Code § 22-4515a(d) provides that a first possession of a Molotov cocktail offense is punishable by 1-5 years in prison, a second is punishable by 3-15, and a third is punishable by 5-30. It further provides that a person convicted for a third time may not benefit from the Federal Youth Corrections Act. In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. Repeat violations of a prohibited weapon or accessory offense may be subject to a general repeat offender penalty enhancement just as other offenses.[42] The RCC also punishes possession of a firearm by a person who has previously convicted of a felony or weapons offense under RCC § 22E-4105. This change improves the consistency and proportionality of the revised statute.

Third, the revised statute requires that a person be at least reckless as to the weapon or accessory being of the variety that is prohibited. Current D.C. Code § 22-4514(a) does not specify a requisite mental state.[43] However, legislative history indicates that Congress intended to create a general intent crime,[44] such that the mere possession of certain enumerated weapons is prohibited, even if the person is unaware of the attributes

[32] The term "dangerous weapon" is defined in RCC § 22E-701 to include "[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."
[33] RCC § 22E-4102.
[34] RCC § 22E-4103.
[35] RCC § 22E-4104.
[36] RCC § 22E-1201.
[37] RCC § 22E-1202.
[38] RCC § 22E-1203.
[39] RCC § 22E-1301.
[40] RCC § 22E-1401.
[41] RCC § 22E-1402.
[42] RCC §§ 22E-606(a) and (b).
[43] District case law requires knowledge for the actual or constructive possession of any item. *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).
[44] "General intent" is not used in or defined in the current statute, but the DCCA has said that it is frequently defined as "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

that render the weapon unlawful.[45] In some instances, the unlawful attribute is not apparent on visual inspection. For example, a semiautomatic weapon may be converted, either by internal modification or simply by wear and tear, into a machine gun within the meaning of the statute.[46] The revised statute requires that a person consciously disregard a substantial risk that the item has the characteristics of a prohibited weapon or accessory. 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.[47] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[48] This change improves the proportionality of the revised offense.

Beyond these three changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute does not include an explicit reference to manufacturing, transferring, using, transporting, or selling a prohibited weapon. D.C. Code § 7-2506.01(b) makes it unlawful to possess, sell, or transfer any large capacity ammunition feeding device. This conduct is also prohibited by D.C. Code § 7-2504.01(b).[49] D.C. Code § 22-4515a makes it unlawful to manufacture, transfer, use, possess, or transport a Molotov cocktail. This conduct is also prohibited by D.C. Code §§ 7-2502.01[50] and 7-2505.01.[51] In contrast, the RCC's definition of possess[52] includes actual possession and constructive possession. A person who knowingly manufactures, transfers, uses, transports, or sells a prohibited weapon appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.[53] This

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[45] *See McBride v. United States*, 441 A.2d 644, 660 n. 7 (D.C.1982); *Worthy v. United States*, 420 A.2d 1216, 1218 (1980); *United States v. Brooks*, 330 A.2d 245, 247 (D.C.1974); *In re D.S.*, 747 A.2d 1182, 1186 (D.C. 2000).

[46] *See Staples v. United States*, 511 U.S. 600, 614-15 (1994).

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

[48] *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.").

[49] "No person or organization shall engage in the business of selling…any firearm…[or] parts therefor…without first obtaining a dealer's license."

[50] "[N]o person or organization…shall…transfer, offer for sale, sell, give, or deliver any destructive device." *See also* D.C. Code § 7-2501.01 (defining the term "destructive device" to include "[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device," such as a Molotov cocktail).

[51] "No person or organization shall sell, transfer or otherwise dispose of any…destructive device…except as provided in § 7-2502.10(c), § 7-2505.02, or § 7-2507.05." *See also* D.C. Code § 7-2501.01 (defining the term "destructive device" to include "[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device," such as a Molotov cocktail).

[52] RCC § 22E-701.

[53] *See* D.C. Code § 22-1511 (Fraudulent advertising).

change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

Second, the revised statute does not include an explicit exception for possession of a Molotov cocktail during a state of emergency. D.C. Code § 22-4515a(c) provides that a person may not manufacture, transfer, use, possess, or transport an explosive during a state of emergency "except at his or her residence or place of business." There is no clear rationale for why, at present, person can make and transfer explosives during a state of emergency. This conduct is prohibited by D.C. Code §§ 7-2502.01, 7-2504.01(b), and 7-2505.01, none of which contain a similar state-of-emergency exception. Where a state of emergency is occasioned by mass disorder such as rioting, the sale of Molotov cocktails may be even more dangerous than during a time of peace. This change improves the consistency of the revised statutes and reduces an unnecessary gap in liability.

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

First, the revised statute uses the undefined term "firearm silencer." Current D.C. Code § 22-4514(a) makes it unlawful to possess "any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms." It is unclear from the statute whether it is intended to include only items that are designed to silence firearms or to also include any object[54] that is actually used or could be used to muffle the sound of gunfire. Case law has not addressed the issue. In contrast, the phrase "firearm silencer," which appears twice in D.C. Code § 7-2501.01,[55] more directly refers to items that are designed to silence a firearm.

[54] For example, a plastic bottle may muffle the sound of a firearm discharging.

[55] "Firearm muffler or silencer" appears in the current definition of "firearm." "Silencer" appears in the definition of "assault weapon."

RCC § 22E-4102. Carrying a Dangerous Weapon.

Explanatory Note. *This section establishes the carrying a dangerous weapon offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes carrying a firearm without a license. It also proscribes carrying another dangerous weapon with intent to use it in a manner likely to cause death or a serious bodily injury. The revised offense replaces D.C. Code §§ 22-4502.01 (Gun free zones; enhanced penalty) and 22-4504(a) and (a-1).*

Subsection (a) punishes carrying a firearm, unlicensed pistol, or restricted explosive in a prohibited location[1] as first degree carrying a dangerous weapon.[2]

Paragraph (a)(1) specifies that a person must knowingly possess a weapon.[3] "Knowingly" is a defined term[4] and applied here means that the person must be practically certain that they possess the weapon. "Possesses" is a defined term and includes both actual and constructive possession.[5] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[6] The person must know they possess a weapon[7] or that they possess component parts that could be arranged to make a whole firearm.[8] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[9]

Subparagraphs (a)(1)(A) – (C) specify that a person commits the offense by having a firearm other than a pistol, a pistol without a license, or a restricted explosive. "Firearm," and "pistol" are defined terms,[10] which include inoperable weapons that may

[1] *See Wrenn v. Dist. of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017) (stating, "'[W]hen a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places…' By contrast, a ban on owning or storing guns at home leaves no alternative channels for *keeping* arms." (Emphasis in original.) (Internal citations omitted.)).

[2] The revised first degree carrying a dangerous weapon offense replaces D.C. Code § 22-4502.01, which provides an enhanced penalty for illegally carrying a firearm in a gun free zone.

[3] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

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

[5] RCC § 22E-701.

[6] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[7] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

[8] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

[9] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys

[10] RCC § 22E-701.

be redesigned, remade or readily converted or restored to operability[11] but exclude antiques.[12] Pistols are a subset of firearms that are either designed to be fired by a single hand or have a barrel shorter than 12 inches.[13] District law allows civilians to apply for a license to carry a pistol,[14] however, carrying a larger firearm is categorically prohibited. The term "restricted explosive" is defined[15] to include Molotov cocktails, bombs, grenades, and missiles. However, the term does not include explosive and combustible objects lawfully and commercially manufactured for a lawful purpose, which may exclude liability for items such as lanterns, fireworks, pest exterminators, or demolition dynamite.[16]

Paragraph (a)(2) and subparagraph (a)(3)(A) explain that two elements must be proven to establish that a person "carried" a firearm or explosive. Paragraph (a)(2) specifies that a person must carry the weapon in a manner that it is both conveniently accessible and within reach.[17] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the weapon is conveniently accessible and within reach. Subparagraph (a)(3)(A) requires that the person possess the weapon in a location other than their own home,[18] place of business, or land. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not their own home, business place, or land.

Subparagraph (a)(3)(B) provides elevated liability for illegally carrying a firearm or explosive within 300 feet of a location that operates as a school, college, university, public swimming pool, public playground, public youth center, or public library, or children's day care center.[19] The 300-foot distance is calculated from the property line, not from the edge of a building.[20] Sub-subparagraph (a)(3)(B)(ii) requires that the location displays clear and conspicuous signage that indicates firearms or explosives are

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[11] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

[12] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

[13] RCC § 22E-701.

[14] D.C. Code § 22-4506; 24 DCMR §§ 2332 – 2342; *see also Wrenn v. Dist. of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

[15] RCC § 22E-701.

[16] A person who carries a lantern, fireworks, pest exterminators, or demolition dynamite with intent to injure another person may still commit Possession of a Dangerous Weapon to Commit Crime (RCC § 22E-4103) or third degree Carrying a Dangerous Weapon (RCC § 22E-4102). A person who uses fire or explosives to damage property or to injure another person may commit Arson (RCC § 22E-2501), Reckless Burning (RCC § 22E-2502), or Assault (RCC § 22E-1202).

[17] *See White v. United States*, 714 A.2d 115, 119 (D.C.1998); *Johnson v. United States*, 840 A.2d 1277, 1280 (D.C. 2004). For example, where there is an obstacle to a person's access to a weapon, such as a locked trunk, the person has not carried a weapon under the revised statute. *See, e.g., Henderson v. United States*, 687 A.2d 918, 922 (D.C. 1996); *Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952).

[18] Unlike the term "dwelling," which is defined in RCC § 22E-701, the word "home" refers to the person's own place of abode. It is not necessary to prove that the location is the person's *bona fide* residence or domicile. However, "home" does not include momentary sleeping quarters such as a guest room or hotel room. *See, e.g., Osterweil v. Bartlett*, 21 N.Y.3d 580 (2013).

[19] These locations include buildings or building grounds that are being used for the specified purpose. They do not include, for example, an address that is used only to receive mail for an online education program or a Free Little Library book exchange box.

[20] *See Jeffrey v. United States*, 892 A.2d 1122 (D.C. 2006).

prohibited.[21] Whether a sign is clear and conspicuous may depend on facts including its placement, legibility, and word choice.[22] Subparagraph (a)(3)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person is in an appropriately identified school, college building, university building, public swimming pool, public playground, public youth center, or public library, or children's day care center.

Subsection (b) punishes carrying a firearm, unlicensed pistol, or restricted explosive in any location anywhere outside the person's home, place of business, or land as second degree carrying a dangerous weapon.[23] This gradation of the offense does not require proof of a prohibited location (a "school zone") but otherwise has elements identical to first degree carrying a dangerous weapon.

Subsection (c) punishes carrying a dangerous weapon with intent to use the weapon in a manner likely to seriously injure or kill another person[24] as third degree carrying a dangerous weapon.[25] Paragraph (c)(1) specifies that a person must knowingly[26] possess a dangerous weapon.[27] "Possesses" is a defined term and includes both actual and constructive possession.[28] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[29] The person must be practically certain that the item is one of the objects that qualifies as a dangerous weapon.[30] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[31]

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[21] E.g., a sign reading, "Gun Free Zone."

[22] This is a more flexible standard than provided in the District's current municipal regulation of signage preventing entry onto private property with a concealed firearm. 24 DCMR § 2346 (requiring a sign at the that is at least eight (8) inches by ten (10) inches in size and contains writing in contrasting ink using not less than thirty-six (36) point type).

[23] The revised second and third degree carrying a dangerous weapon offenses replace D.C. Code §§ 22-4504(a) and (a-1), which criminalize carrying a pistol without a license, a deadly or dangerous weapon, or a rifle or shotgun.

[24] The revised third degree carrying a dangerous weapon offense differs from the revised third degree possession of a dangerous weapon during a crime offense RCC § 22E-4104(c) insofar as: (1) it does not include stun guns, (2) it requires carrying in a manner that is conveniently accessible and within reach, and (3) it criminalizes possession for purposes of non-immediate, conditional self-defense.

[25] The revised second and third degree carrying a dangerous weapon offenses replace D.C. Code §§ 22-4504(a) and (a-1), which criminalize carrying a pistol without a license, a deadly or dangerous weapon, or a rifle or shotgun.

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

[27] *See, e.g., United States v. Matthews*, 480 F.2d 1191, 1192 (D.C. Cir. 1973).

[28] RCC § 22E-701.

[29] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[30] "Dangerous weapon" is defined in RCC § 22E-701 to include firearms, explosives, daggers, blackjacks, false knuckles and other items. It also includes any object, if the actual, attempted, or threatened use is likely to inflict a serious bodily injury. Consider, for example, a person who picks up a brick with intent to strike another person. The person commits carrying a dangerous weapon only if they intend to strike the person in a manner that will likely cause a serious bodily injury (e.g., a blow to the head).

[31] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even

Paragraphs (c)(2) and (c)(3) explain that two elements must be proven to establish that a person "carried" a dangerous weapon. Paragraph (c)(2) specifies that a person must carry the weapon in a manner that it is both conveniently accessible and within reach. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the weapon is conveniently accessible and within reach. Subparagraph (c)(3) requires that the person possess the weapon in a location other than their own home, place of business, or land. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not their own home, business place, or land.

Paragraph (c)(4) specifies that the person must possess the dangerous weapon with intent to use the weapon in a manner that is likely to cause death or serious bodily injury to another person. "Intent" is a defined term,[32] which, applied here, means the accused must be practically certain that the intended use would cause a serious bodily injury or death. The government is not required to prove intent to use the weapon unlawfully,[33] but is required to prove intent to use the item as a dangerous weapon.[34] "Serious bodily injury" is defined in the RCC to require a substantial risk of death, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ.[35] The word "likely" clarifies that the danger of harm must be objectively more probable than not. Some dangerous weapons are of such limited lethality and dangerousness that they typically will not meet this standard.[36] Paragraph (c)(4) specifies that the intent to use the weapon may be conditional.[37] Although general

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without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys

[32] RCC § 22E-206.

[33] *See In re S.P.*, 465 A.2d 823, 824 (D.C. 1983) (affirming a conviction for carrying a dangerous weapon where the defendant was swinging and twirling nunchaku in a crowd of onlookers); *see also Cooke v. United States*, 275 F.2d 887, 888 (D.C. Cir. 1960) (upholding a conviction for carrying a pistol in self-defense).

[34] *Strong v. United States*, 581 A.2d 383 (D.C. 1990); *see also Tuckson v. United States*, 77 A.3d 357, 361 (D.C. 2013) (finding no probable cause for possession of a prohibited weapon where a defendant possessed a collapsible police baton in his car, as the design and purpose of the instrument was not for use as a weapon, and defendant did not display, wield, or hold the baton in the presence of police officers).

[35] RCC § 22E-701.

[36] In most instances, use of a stun gun is unlikely to cause "serious bodily injury," which is defined in RCC § 22E-701 to require "protracted loss or impairment of the function of a bodily member or organ."

[37] Proof of an intent to use the weapon for an unlawful purpose is not an element of the offense. *Scott v. United States*, 243 A.2d 54, 56 (D.C. 1968) (citing *United States v. Shannon*, D.C.Mun.App., 144 A.2d 267 (1958)). Proof of intent to use the weapon for a dangerous purpose is sufficient. *See In re M.L.*, 24 A.3d 63, 68 (D.C. 2011) (citing *Lewis v. United States*, 767 A.2d 219, 222-23 (D.C. 2001); *Monroe v. United States*, 598 A.2d 439, 441 (D.C.1991)).

defenses[38] such as self-defense[39] and defense of property[40] apply to this offense, carrying a dangerous weapon for purposes of non-immediate self-defense is prohibited.[41]

Subsection (d) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (e) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[42] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (f) provides the penalty for each gradation of the revised offense. [*See* Second Draft of Report #41.]

Subsection (g) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised carrying a dangerous weapon offense changes current District law in five main ways.*

First, the revised offense applies only to people who are outside of their own home, place of business, or land. D.C. Code § 22-4504 distinguishes a higher penalty gradation for possession of a firearm outside of "the person's dwelling place, place of business, or on other land possessed by the person."[43] In *Heller I*, the United States Supreme Court explained that it violates the Second Amendment to inhibit the operability of a lawful firearm in the home for the purpose of immediate self-defense.[44] The Court required the District to permit the plaintiff to register his handgun and to issue him a license to carry it in the home, fully assembled, loaded, and without a trigger lock. The RCC does not separately punish carrying a lawfully registered firearm at home.[45] This change reduces unnecessary overlap between the possession and carrying offenses and may improve the constitutionality of the revised offense.

Second, the revised offense punishes carrying a firearm or a restricted explosive in a school zone. Current D.C. Code § 22-4502.01 establishes a penalty enhancement for any person who carries a gun within 1000 feet of a school, playground, or public housing.

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[38] [The Commission's recommendations for general defenses are forthcoming.]

[39] *See Williams v. United States*, 90 A.3d 1124, 1127 (D.C. 2014); *Reid v. United States*, 581 A.2d 359, 367 (D.C. 1990); *Potter v. United States*, 534 A.2d 943, 946 (D.C. 1987); *McBride v. United States*, 441 A.2d 644, 649 (D.C. 1982); *Cooke v. United States*, 213 A.2d 508, 510 (D.C. 1965); *United States v. Christian*, 187 F.3d 663, 666 (D.C. Cir. 1999).

[40] *See, e.g., Doby v. United States*, 550 A.2d 919 (D.C. 1988).

[41] For example, a person who carries a dagger in their purse to protect against any potential attackers commits third degree carrying a dangerous weapon. This is true even if the perceived threat is objectively reasonable under the circumstances.

[42] *See, e.g.*, D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991). [The Commission's recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming.]

[43] D.C. Code § 22-4502.01 establishes a penalty enhancement for any person carries a gun within 1000 feet of a school, playground, or public housing, without any exception for a person whose dwelling, business or land is located inside a gun free zone.

[44] 554 U.S. 570 (2008).

[45] Mere possession of an unregistered firearm is punished under RCC § 7-2502.01.

The term "gun" is not defined in the statute and case law does not clarify whether it is intended to include air guns, spring guns, stun guns, imitation firearms, toys, or antiques. There is no clear rationale for excluding explosives—which may be as lethal or more lethal than firearms—from the reach of the enhancement. In contrast, the revised code defines the terms "firearm" and "restricted explosive"[46] and specifies that a person who unlawfully carries either class of weapon near a school, playground, or day care center is subject to a more severe penalty than a person who carries such a weapon in another location. This change clarifies the revised offense, eliminates an unnecessary gap in liability, and improves the proportionality of the revised offenses.

Third, the first degree of the revised offense requires that the person know that they are proximate to a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center. D.C. Code § 22-4502.01 does not specify a culpable mental state as to the location. It does, however, require that the location be "appropriately identified," that is, bearing "a sign that identifies the building or area as a gun free zone." In contrast, the revised offense applies the standard culpable mental state definition of "knowingly" used throughout the RCC.[47] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[48] This change improves the clarity and consistency of the revised offense.

Fourth, the revised statute narrows the list of locations that elevate a carrying a dangerous weapon offense from second degree to first degree. Current D.C. Code § 22-4502.01 establishes a 1000-foot radius for gun free zones and describes them to include any "video arcade" and "in and around public housing as defined in section 3(1) of the United States Housing Act of 1937, approved August 22, 1974 (88 Stat. 654; 42 U.S.C. § 1437a(b)), the development or administration of which is assisted by the United States Department of Housing and Urban Development, or in or around housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority." Video arcades are considerably less common in modern times than when the statute became law in 1981. In fact, the District does not appear to have any arcades that are open to minor children presently advertised online. On the other hand, large sections of the District fall within a 1000-foot radius of public housing.[49] In contrast, the revised offense protects a

[46] RCC § 22E-701.
[47] RCC § 22E-206.
[48] 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)).
[49] At least one court has held that public housing tenants have a right to bear arms in common areas. *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014); *see also* Mo. Ann. Stat. § 571.107(1)(6) (explicitly exempting any building used for public housing by private persons from any restriction on the carrying or

300-foot radius around every "school, college building, university building, public swimming pool, public playground, public youth center, or public library, or children's day care center." These locations are similarly protected from stun guns[50] and drug activity[51] under the revised code. This change improves the consistency of the revised offenses and eliminates an unnecessary gap in liability.

Fifth, the revised statute treats repeat offender penalty enhancements consistent with other revised offenses. Current D.C. Code § 22-4504 provides that a first carrying a dangerous weapon offense is punishable by a maximum of one year in jail and a second carrying a dangerous weapon offense (or a carrying a dangerous weapon offense committed by a person who has been previously convicted of a felony) is punishable by a maximum of 10 years in prison. In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. Repeat violations of a prohibited weapon or accessory offense may be subject to a general repeat offender penalty enhancement just as other offenses.[52] The RCC also punishes possession of a firearm by a person who has previously convicted of a felony or weapons offense under RCC § 22E-4105. This change improves the consistency and proportionality of the revised statute.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised offense applies a heightened penalty for carrying a pistol in a school zone only if the pistol is carried without a license. Current D.C. Code § 22-4502.01 establishes a penalty enhancement for any person carrying a gun illegally in a prohibited location. The term "illegally" is not defined in the statute and District case law has not addressed its meaning.[53] The revised code attaches a location enhancement to the offense of carrying a firearm or explosive without permission only when a person carries a pistol without a license.[54] This change improves the clarity of the revised offenses.

Second, the RCC separately codifies a list of exclusions from liability for possessory weapons offenses that are incorporated into the revised carrying a dangerous weapon offense by reference.[55] Current D.C. Code § 22-4504 does not include any exceptions for law enforcement officers, weapons dealers, government employees, and

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possession of a firearm); *but see People v. Cunningham*, 1-16-0709, 2019 WL 1429072 (Ill. App. Ct. Mar. 29, 2019) (holding that a ban in public housing is constitutional). The D.C. Department of Housing and Community Development, along with Urban Institute, the Coalition for Non Profit Housing and Economic Development, and Code for D.C., produced an interactive tool at HousingInsights.org. The map illustrates that large portions of some neighborhoods—and much of an entire city ward—are subject to the current enhancement penalty.

[50] RCC § 7-2502.15.

[51] *See* RCC § 48-904.01b(g)(7)(C)(i).

[52] RCC §§ 22E-606(a) and (b).

[53] D.C. Code § 22-4502.01(c) provides an exception for licensees who live or work within 1000 feet of a gun free zone. This may indicate that licensees are otherwise included within the statute's intended reach.

[54] A person who has a license to carry but does so in an illegal manner per RCC § 7-2509.06, carrying a pistol in an unlawful manner, is not liable for carrying a firearm or explosive without permission or its first degree gradation containing a location enhancement.

[55] RCC § 22E-4118.

nonresidents who carry a dangerous weapon. In contrast, RCC § 22E-4118 provides a comprehensive list of exclusions from liability, accounting for these and other legitimate circumstances. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for law enforcement authorities.[56] This change improves the clarity, consistency, and completeness of the revised code.

[56] [The Commission's recommendations for general defenses are forthcoming.]

RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

Explanatory Note. *This section establishes the possession of a dangerous weapon with intent to commit crime offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes having an explosive, imitation firearm or other dangerous weapon with intent to commit an offense against persons or specified property crimes. The revised offense replaces D.C. Code §§ 22-4514(b) (Possession of a dangerous weapon with intent to use unlawfully against another)*[1] *and 22-4515a(b) (Manufacture, transfer, use, possession, or transportation of Molotov cocktails, or other explosives for unlawful purposes, prohibited; definitions; penalties).*[2]

Subsection (a) specifies the elements of first degree possession of a dangerous with intent to commit crime.

Paragraph (a)(1) specifies that a person must at least knowingly[3] possess an object designed to explode or produce uncontained combustion. "Possesses" is a defined term and includes both actual and constructive possession.[4] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[5] The person must be practically certain that the item is explosive. Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[6]

Paragraph (a)(2) specifies that the person must possess the explosive with intent to commit a crime. "Intent" is a defined term[7] which, applied here, means the accused must be practically certain that they are engaging in the conduct that constitutes an offense against persons or an offense against property. The intended conduct must be criminal.[8] The burden of proof rests with the government and does not shift to the defense to prove innocent possession.[9] Evidence of an actual attempt to do harm is not required.[10]

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[1] The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4514(c) – (d).

[2] The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4515a(d) – (e).

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

[4] RCC § 22E-701.

[5] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[6] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys

[7] RCC § 22E-206.

[8] General defenses such as self-defense are applicable to the offense. [The Commission's recommendations for general defenses are forthcoming.]

[9] *United States v. Brooks*, 330 A.2d 245, 246 (D.C. 1974).

[10] *Jones v. United States*, 401 A.2d 473 (D.C. 1979).

Subparagraphs (a)(2)(A) and (a)(2)(B) specify that the person must intend to commit a criminal harm that is either an offense against persons[11] or an offense against property.[12] Subparagraphs (a)(2)(A) and (a)(2)(B) use the term "in fact" to specify that there is no culpable mental state required as to whether the intended harm meets the definition of an offense against persons or offense against property.[13] A person is strictly liable as to the intended conduct being of the variety described in paragraph subparagraphs (a)(2)(A) and (a)(2)(B).[14]

Subsection (b) specifies the elements of second degree possession of a dangerous with intent to commit crime.

Subparagraphs (b)(1)(A) and (b)(1)(B) specify that a person must at least knowingly[15] possess an imitation firearm or a dangerous weapon. The terms "imitation firearm" and "dangerous weapon" are defined in the RCC. An imitation firearm is "any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real."[16] A dangerous weapon includes restricted explosives,[17] other enumerated weapons, and "any object, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."[18] It does not include attached fixtures.[19]

Paragraph (b)(2) specifies that the person must possess the imitation firearm or dangerous weapon with intent to commit a crime. "Intent" is a defined term[20] which, applied here, means the accused must be practically certain that they are engaging in the conduct that constitutes an offense against persons or burglary.[21] The intended conduct must be criminal.[22] The burden of proof rests with the government and does not shift to the defense to prove innocent possession.[23] There is no requirement of evidence of an attempt to do harm.[24]

Subparagraphs (b)(2)(A) and (b)(2)(B) specify that the person must intend to commit either an offense against persons[25] or a burglary.[26] Subparagraphs (b)(2)(A) and

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[11] Subtitle II of Title 22E.
[12] Subtitle III of Title 22E.
[13] RCC § 22E-207.
[14] Although a person is strictly liable, justification defenses may apply. *See Blades v. United States*, 2019, 2019 WL 291888. [The Commission's recommendations for general defenses are forthcoming.]
[15] "Knowingly" is defined in RCC § 22E-206.
[16] RCC § 22E-701.
[17] Second degree possession of a dangerous weapon with intent to commit crime is a lesser-included offense of first degree possession of a dangerous weapon with intent to commit crime. The term "dangerous weapon" broadly includes objects designed to explode or produce uncontained combustion. RCC § 22E-701.
[18] RCC § 22E-701.
[19] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).
[20] RCC § 22E-206.
[21] The person must intend to use the object unlawfully against another person. *See* D.C. Code § 22-4514(b); *In re M.L.*, 24 A.3d 63 (D.C. 2011); *Mihas v. United States*, 618 A.2d 197 (D.C. 1992); *Reid v. United States*, 581 A.2d 359 (D.C. 1990).
[22] General defenses such as self-defense are applicable to the offense. [The Commission's recommendations for general defenses are forthcoming.]
[23] *United States v. Brooks*, 330 A.2d 245, 246 (D.C. 1974).
[24] *Jones v. United States*, 401 A.2d 473 (D.C. 1979).
[25] Subtitle II of Title 22E.

(b)(2)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the intended harm meets the definition of an offense against persons or burglary.[27] A person is strictly liable as to the intended conduct being of the variety described in paragraph subparagraphs (b)(2)(A) and (b)(2)(B).[28]

Subsection (c) provides the penalty for each gradation of the revised offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised possession of a dangerous weapon with intent to commit crime offense changes current District law in one main way.*

The revised statute specifies the intended harm required for the offense must be a particular type of District crime. D.C. Code § 22-4514(b) disallows possession of a weapon "with intent to use [it] unlawfully against another."[29] D.C. Code § 22-4515a(b) disallows possession of a weapon "with the intent that the same may be used unlawfully against any person or property." District case law has explained that the phrase "unlawfully against another" requires the accused carry the object with the purpose of using it "as a weapon."[30] However, case law has not specifically ruled whether "as a weapon" is limited to criminal infliction of bodily injury or also property damage or threatening conduct. In contrast, the revised offense cross-references all RCC offenses against persons and either offenses against property (for first degree) or burglary (for second degree). This change clarifies the revised offense and may eliminate an unnecessary gap in liability.

Beyond this change, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires the accused know that they possess the weapon. The current statutes[31] do not specify a culpable mental state, however, District case law requires knowledge for the actual or constructive possession of any item.[32] The revised statute requires that the person know that they possess the item and that the person know that the item is a weapon. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in

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[26] RCC § 22E-2701.
[27] RCC § 22E-207.
[28] Although a person is strictly liable, justification defenses may apply. *See Blades v. United States*, 2019, 2019 WL 291888. [The Commission's recommendations for general defenses are forthcoming.]
[29] Similarly, D.C. Code § 22-4515a(b) disallows possession of an explosive "with the intent that the same may be used unlawfully against any person or property."
[30] *See Peay v. United States*, 597 A.2d 1318, 1321 (D.C. 1991) (explaining the test to be applied in determining whether an item is a "deadly or dangerous weapon" is whether, under the circumstances, the purpose of carrying the item was its use as a weapon) (citing *Nelson v. United States*, 280 A.2d 531, 533 (D.C.1971) (per curiam); *Clarke v. United States*, 256 A.2d 782, 786 (D.C.1969)).
[31] D.C. Code §§ 22-4514(b); 22-4515a(b).
[32] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

American jurisprudence.[33] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Second, the revised statute does not include an explicit reference to manufacturing, transferring, using, or transporting an explosive. D.C. Code § 22-4515a(b) makes it unlawful to manufacture, transfer, use, possess, or transport any device, instrument, or object designed to explode or produce uncontained combustion. This conduct is also prohibited by D.C. Code §§ 7-2502.01[34] and 7-2505.01.[35] In contrast, the RCC's definition of possess[36] includes actual possession and constructive possession. A person who knowingly manufactures, transfers, uses, or transports an explosive appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.[37] This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

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

First, the revised code defines "possession" in its general part.[38] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[39] The RCC definition of "possession,"[40] with the requirement in the offense that the possession be "knowing,"[41] matches the meaning of possession in current DCCA case law.[42] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[33] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[34] "[N]o person or organization…shall…transfer, offer for sale, sell, give, or deliver any destructive device." *See also* D.C. Code § 7-2501.01 (defining the term "destructive device" to include "[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device," such as a Molotov cocktail).

[35] "No person or organization shall sell, transfer or otherwise dispose of any…destructive device…except as provided in § 7-2502.10(c), § 7-2505.02, or § 7-2507.05." *See also* D.C. Code § 7-2501.01 (defining the term "destructive device" to include "[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device," such as a Molotov cocktail).

[36] RCC § 22E-701.

[37] *See* D.C. Code § 22-1511 (Fraudulent advertising).

[38] RCC § 22E-202.

[39] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

[40] RCC § 22E-701.

[41] RCC § 22E-206.

[42] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander."

Second, the revised statute applies the RCC's standardized definition of "with intent." D.C. Code § 22-4514(b) disallows possession of a weapon "with intent to use [it] unlawfully against another."[43] D.C. Code § 22-4515a(b) disallows possession of a weapon "with the intent that the same may be used unlawfully against any person or property." The current statutes do not define "with intent." In contrast, the RCC defines all culpable mental states in its general part.[44] This change improves the clarity and consistency of the revised statutes.

Third, the revised offense applies a standardized definition of "dangerous weapon" used throughout the RCC. D.C. Code § 22-4514(b) prohibits possession of "an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon." The term "dangerous weapon" is not defined in Chapter 45.[45] However, District case law has held that an object is a dangerous weapon if it is detached[46] and "known to be 'likely to produce death or great bodily injury' in the manner it is used, intended to be used, or threatened to be used."[47] The RCC codifies a common definition to be applied to all revised offenses. This change improves the clarity and consistency of the revised offenses.

(Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

[43] Similarly, D.C. Code § 22-4515a(b) disallows possession of an explosive "with the intent that the same may be used unlawfully against any person or property."

[44] RCC § 22E-206.

[45] *See* D.C. Code § 22-4501 (Definitions).

[46] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).

[47] *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (citing *Harper v. United States*, 811 A.2d 808, 810 (D.C.2002)); *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005);

RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

Explanatory Note. *This section establishes the possession of a dangerous weapon during a crime offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes having a firearm or other dangerous weapon in furtherance of an offense against persons or a burglary. In conjunction with the revised Trafficking of a Controlled Substance statute,[1] the revised offense replaces D.C. Code § 22-4502 (Additional penalty for committing crime when armed). The revised offense also replaces D.C. Code §§ 22-4504(b) (Possession of a firearm during a crime of violence or dangerous crime).*

Subsection (a) specifies the elements of first degree possession of a dangerous weapon during a crime. Paragraph (a)(1) specifies that a person must knowingly possess a firearm.[2] "Knowingly" is a defined term[3] and applied here means that the person must be practically certain that they possess the firearm. "Possesses" is a defined term and includes both actual and constructive possession.[4] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[5] The person must know they possess a firearm[6] or that they possess component parts that could be arranged to make a whole firearm.[7] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[8] "Firearm" is a defined term,[9] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[10] but excludes antiques.[11]

Paragraph (a)(2) requires that the person possess the firearm in furtherance of and while committing a crime. The phrase "in furtherance of" has the same meaning as in 18

[1] RCC § 48-904.01b.

[2] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

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

[4] RCC § 22E-701.

[5] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[6] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

[7] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

[8] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys

[9] RCC § 22E-701.

[10] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

[11] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

U.S.C. § 924(c)(1).[12] This requires specific evidence of a nexus between the weapon and the defendant's intent to advance or facilitate the underlying criminal activity.[13] The mere presence of a firearm near a criminal act, criminal proceeds, or contraband is insufficient.[14] The phrase "while committing" requires that the person must engage in the conduct constituting the underlying offense at the same time as they possess the firearm. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is acting in furtherance of the predicate crime.

Subparagraphs (a)(2)(A) and (a)(2)(B) specify that the person must commit[15] either an offense against persons,[16] arson,[17] or reckless burning.[18] Some offenses against persons also provide for a heightened penalty gradation if a firearm or other dangerous weapon is displayed or used.[19] Possession of a firearm in furtherance of a drug crime is punished under RCC § 48-904.01b.

Subsection (b) punishes possession of an imitation firearm or a dangerous weapon in furtherance of a crime as second degree possession of a dangerous weapon during a crime. The terms "imitation firearm" and "dangerous weapon" are defined in the RCC. An imitation firearm is "any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real."[20] A dangerous weapon includes firearms, other enumerated weapons, and "any object, other than a body part,

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[12] Another aspect of this statute was recently held to be unconstitutionally vague. *United States v. Davis*, 18-431, 2019 WL 2570623 (U.S. June 24, 2019).

[13] *See* H.R. Rep. No. 105-344, 1997 WL 668339 (reporting that the "fact that drug dealers in general often carry guns for protection is insufficient to show possession in furtherance of drug activity"; rather, the government must clearly show through "specific facts that tie the defendant to the firearm," that a weapon was possessed to advance or promote the commission of the underlying offense, and the "mere presence of a firearm in an area where a criminal act occurs" is not a sufficient basis for imposing a sentence under this provision).

[14] Most circuits have identified specific factors that allow a court to distinguish guilty possession from innocent "possession at the scene," including: the accessibility of the firearm, the type of weapon, whether the possession is illegal, whether the gun is loaded, and the time and circumstances under which the gun is found. *United States v. Renteria*, 720 F.3d 1245, 1255 (10th Cir. 2013); *see also United States v. Brown*, 715 F.3d 985, 993-94 (6th Cir. 2013); *United States v. Gill*, 685 F.3d 606, 611 (6th Cir. 2012); *United States v. Johnson*, 677 F.3d 138, 143 (3d Cir. 2012); *United States v. Eller*, 670 F.3d 762, 766 (7th Cir. 2012); *United States v. London*, 568 F.3d 553, 559 (5th Cir. 2009); *United States v. Lopez-Garcia*, 565 F.3d 1306, 1322 (11th Cir. 2009); *United States v. Perry*, 560 F.3d 246, 254 (4th Cir. 2009); *see also United States v. Chavez*, 549 F.3d 119, 130 (2d Cir. 2008); *but see United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007)(internal citations omitted)("Although the Fifth Circuit has developed a non-exclusive list of factors…we have concluded that this approach is not particularly helpful in close cases…In our most recent case addressing the 'in furtherance question,' we reiterated the importance of the factual inquiry. We declined once again to adopt a checklist approach to deciding this issue and held that it is the totality of the circumstances, coupled with a healthy dose of a jury's common sense when evaluating the facts in evidence, which will determine whether the evidence suffices to support a conviction").

[15] Here, the word "commit" includes an attempt to commit and a conspiracy to commit. *See, e.g., Morris v. United States*, 622 A.2d 1116 (D.C. 1993) (sustaining a conviction for possession of a firearm during an attempted armed robbery).

[16] Subtitle II of Title 22E.

[17] RCC § 22E-2501.

[18] RCC § 22E-2502.

[19] RCC §§ 22E-1201 (robbery); 22E-1202 (assault); 22E-1203 (menacing); 22E-1301 (sexual assault); 22E-1401 (kidnapping).

[20] RCC § 22E-701.

that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."[21] It does not include attached fixtures.[22] This gradation of the offense does not require proof of an actual firearm but otherwise has elements identical to first degree possession of a dangerous weapon during a crime.

Subsection (c) provides the penalty for each gradation of the revised offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised possession of a dangerous weapon during a crime offense changes current District law in two main ways.*

First, the revised offense generally expands the number of crimes that are a predicate for possession of a dangerous weapon during a crime liability. Current D.C. Code §§ 22-4502 and 22-4504 prohibit possession of a weapon only during a "crime of violence" which is defined in D.C. Code § 22-4501 to include felony offenses enumerated in D.C. Code § 23-1331(4).[23] In contrast, the revised offense punishes possession of a weapon during any offense against persons—including misdemeanor assault or misdemeanor sex offenses—or during the commission of arson (first degree), reckless burning (first degree) or burglary (second degree). It is not clear that the *potential* risk in possessing (but not displaying or using) a dangerous weapon when engaged in an offense against persons varies significantly between misdemeanor and felony level conduct. In a few instances, changes to offenses against persons in the RCC may narrow liability for possession of a dangerous weapon during a crime.[24] This change improves the proportionality of the revised statute and eliminates an unnecessary gap in liability.

Second, the revised offense does not require proof that the weapon is readily available. Current D.C. Code § 22-4502 requires evidence that a firearm was "in close proximity or easily accessible" during the commission of the underlying offense.[25]

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[21] RCC § 22E-701.

[22] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).

[23]

> The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

[24] For example, the RCC robbery statute, RCC § 22E-1201, is narrower than the current D.C. Code robbery statute, D.C. Code § 22-2801, insofar as some of the current statute's conduct (sudden and stealthy snatching) is criminalized as third degree theft, RCC § 22E-2101(c), which is not within the scope of the revised offense of possession of a dangerous weapon during a crime.

[25] *Clyburn v. United States*, 48 A.3d 147, 153-54 (D.C. 2012).

However, D.C. Code § 22-4504(b) does not include a similar proximity requirement. In contrast, liability under the revised statute turns only on the relationship between the weapon and the unlawful activity instead of ease of access.[26] That is, the revised offense requires that the weapon—wherever it is located—be possessed "in furtherance of" the underlying crime. This change improves the consistency and proportionality of the revised offenses.

Beyond these two changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires the accused know that they possess the weapon. The current statutes[27] do not specify a culpable mental state, however, District case law requires knowledge for the actual or constructive possession of any item.[28] The revised statute requires that the person know that they possess the item and that the person know that the item is a weapon or imitation firearm. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[29] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Second, the revised offense does not include possession of a firearm in furtherance of a drug crime. Current D.C. Code §§ 22-4502(a) and 22-4504(b) punish possession of a firearm during a dangerous crime. The term "dangerous crime" is defined in D.C. Code § 22-4501 to mean "distribution of or possession with intent to distribute a controlled substance." In contrast, the RCC reorganizes the controlled substances statutes to include an enhancement for drug trafficking while armed.[30] The enhancement requires that the firearm is "readily available," which is consistent with D.C. Code § 22-4502(a)[31] but possibly narrower than § 22-4504(b).[32] This change logically reorders and improves the consistency of the revised offenses.

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[26] Compare for example, Person A who carries a pocketknife for self-defense but does not use it during a simple assault and Person B who threatens to retrieve a firearm from the trunk of his car while committing a robbery. *See Strong v. United States*, 581 A.2d 383, 387 (D.C. 1990) (explaining "The prevention of coercion is at the heart of enhancement provisions which include imitation weapons within their scope" and holding "Convictions under the 'while armed' statute will stand only if a defendant (1) has committed some violent crime, and (2) has used the threat of injury by a dangerous weapon to force his victims to comply with his illegal requests") (citing *Paris v. United States*, 515 A.2d 199 (D.C.1986)).

[27] D.C. Code §§ 22-4502; 22-4504(b).

[28] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

[29] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[30] RCC § 48-904.01b(g)(7)(B).

[31] "Armed with" means "actual physical possession of the pistol or other firearm." *Cox v. United States*, 999 A.2d 63, 69 (D.C. 2010). "Readily available" means "in close proximity or easily accessible during the commission of the underlying PWID offense, as evidenced by lay or expert testimony (and reasonable inferences) describing the distance between the appellant and the firearm, and the ease with which the appellant can reach the firearm during the commission of the offense." *Clyburn v. United States*, 48 A.3d 147, 153-54 (D.C. 2012).

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

First, the revised code defines "possession" in its general part.[33] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[34] The RCC definition of "possession,"[35] with the requirement in the offense that the possession be "knowing,"[36] matches the meaning of possession in current DCCA case law.[37] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Second, the revised offense applies a standardized definition of "dangerous weapon" used throughout the RCC. D.C. Code § 22-4502 prohibits possession of "any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)." The term "dangerous weapon" is not defined in Chapter 45.[38] However, District case law has held that an object is a dangerous weapon if it is detached[39] and "known to be 'likely to produce death or great bodily injury' in the manner it is used, intended to be used, or threatened to be used."[40] The RCC codifies a common definition to be applied to all revised offenses. This change improves the clarity and consistency of the revised offenses.

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[32] D.C. Code § 22-4504(b) makes it unlawful to possess any firearm or imitation firearm "while committing a crime."

[33] RCC § 22E-202.

[34] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

[35] RCC § 22E-701.

[36] RCC § 22E-206.

[37] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

[38] *See* D.C. Code § 22-4501 (Definitions).

[39] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).

[40] *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (citing *Harper v. United States*, 811 A.2d 808, 810 (D.C.2002)); *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005);

RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person.

Explanatory Note. *This section establishes the possession of a firearm by an unauthorized person offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowing possession of a firearm by a person who has been previously been involved in criminal activity or is subject to a relevant court order. The revised offense replaces D.C. Code § 22-4503 (Unlawful Possession of a Firearm).*

Subsection (a) generally punishes possession of a firearm by a person who has been convicted of a violent felony as first degree possession of a firearm by an unauthorized person.

Paragraph (a)(1) specifies that a person must knowingly possess a firearm.[1] "Knowingly" is a defined term[2] and applied here means that the person must be practically certain that they possess the firearm. "Possesses" is a defined term and includes both actual and constructive possession.[3] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[4] The person must know they possess a firearm[5] or that they possess component parts that could be arranged to make a whole firearm.[6] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[7] "Firearm" is a defined term,[8] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[9] but excludes antiques.[10]

Paragraph (a)(2) requires that the person has a prior conviction. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they have a prior conviction. The term "prior conviction" is defined in paragraph (e)(3) to mean a finding of guilt for a criminal offense committed by an adult, with

[1] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

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

[3] RCC § 22E-701.

[4] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[5] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

[6] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

[7] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys

[8] RCC § 22E-701.

[9] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

[10] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

limited exceptions. Paragraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state required as to whether the prior conviction was for a crime of violence or comparable offense.[11] A person is strictly liable as to the prior conviction being of the variety described in paragraph (a)(2).[12] Paragraph (a)(2) requires that the prior offense is a crime of violence other than conspiracy. The term "crime of violence" is defined in the RCC's general part.[13] Whether a prior conviction is for conspiracy is based upon how the crime is charged, not based on the theory of liability that is described in the charging documents or advanced at trial.[14] The term "comparable offense" is defined in RCC § 22E-701 and means "a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime." The determination of whether a conviction in another jurisdiction is for a "comparable offense" is a matter of law.

Subsection (b) establishes six classes of persons who are subject to second degree liability for possession of a firearm by an unauthorized person. The first three classes are persons with recent prior convictions for crimes. Just as in the first degree offense, the defendant must be practically certain that they possess a firearm and practically certain that they have a prior conviction. "Possess" and "firearm" are defined in RCC § 22E-701 and "prior conviction" is defined in subsection (e)(3). Subparagraph (b)(2)(A) uses the term "in fact" to specify that there is no culpable mental state required as to whether the prior conviction was for one of the predicate offenses.[15] A person is strictly liable as to the prior conviction being of the variety described in sub-subparagraphs (b)(2)(A)(i) – (iii).[16] RCC § 22E-203 requires that a person commit the offense voluntarily.[17]

Sub-subparagraph (b)(2)(A)(i) generally criminalizes gun ownership by any person who has been convicted of a District felony, i.e. a crime punishable by more than a year of incarceration.[18] The term "comparable offense" is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.[19] The term "comparable offense" does not mean any offense in another jurisdiction that is punishable

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[11] RCC § 22E-207.

[12] Although a person is strictly liable, justification defenses may apply. *See Blades v. United States*, 2019, 2019 WL 291888. [The Commission's recommendations for general defenses are forthcoming.]

[13] RCC § 22E-701. [The Commission's recommendation for a definition of the term "crime of violence" is forthcoming.]

[14] *See Bland v. United States*, 153 A.3d 78, 81 (D.C. 2016).

[15] RCC § 22E-207.

[16] Although a person is strictly liable, justification defenses may apply. *See Blades v. United States*, 2019, 2019 WL 291888. [The Commission's recommendations for general defenses are forthcoming.]

[17] A person who lawfully owns a firearm does not necessarily commit possession of a firearm by an unauthorized person at the moment the person is convicted of a disqualifying offense. Consider, for example, a person who is awaiting a verdict in a case alleging a disqualifying offense. The person does not commit an offense the instant the verdict is delivered.

[18] *See* RCC § 22E-601. Current District law has both misdemeanors that are punishable by more than one year and felonies that are punishable by less than one year. D.C. Code § 5-115.03 (two-year misdemeanor); D.C. Code § 16-1024(b)(1) (six-month felony). Other jurisdictions also have misdemeanors that are punishable by more than one year. *See, e.g.*, Md. Code, Criminal Law § 3-211 (three-year misdemeanor).

[19] RCC § 22E-701.

by more than a year of incarceration. Sub-subparagraph (b)(2)(A)(i) specifies that the prior conviction must have occcurred within 10 years of the firearm possession.

Sub-subparagraph (b)(2)(A)(ii) criminalizes gun ownership by any person who has been convicted of a weapon offense under Chapter 41. The term "comparable offense" is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.[20] Sub-subparagraph (b)(2)(A)(ii) specifies that the prior conviction must have occurred within 5 years of the firearm possession.

Sub-subparagraph (b)(2)(A)(iii) criminalizes gun ownership by any person who has been convicted of violence against a family member, i.e. an intrafamily felony or misdemeanor[21] offense involving confinement, sexual conduct,[22] bodily injury, or threats. This includes convictions for inchoate versions of such an offense (e.g., attempt, solicitation). The term "intrafamily offense" is defined in D.C. Code § 16-1001 to include interpersonal, intimate partner, or intrafamily violence. "Interpersonal violence," "intimate partner violence," and "intrafamily violence" are also defined in § 16-1001 and broadly include relationships between blood relatives,[23] current and former roommates,[24] and people who have previously shared the same romantic partner.[25] The term "comparable offense" is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.[26] With respect to out-of-state intrafamily offenses, it is not required that the comparable statute include an identical definition of "intrafamily offense." However, the familial relationship must be proven beyond a reasonable doubt in the prosecution of the second degree possession of a firearm by an unauthorized person offense.[27] Sub-subparagraph (b)(2)(A)(iii) specifies that the prior conviction must have occurred within 5 years of the firearm possession.

Subparagraph (b)(2)(B) criminalizes gun ownership by any person who is presently a fugitive from justice. The term "fugitive from justice" is defined in paragraph (e)(2). Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are avoiding apprehension. RCC § 22E-203 requires that a person commit the offense voluntarily.[28]

Subparagraph (b)(2)(C) criminalizes gun ownership by any person who has been ordered to not possess a firearm. Subparagraph (b)(2)(C) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person is subject to an order to not possess any firearms.[29] A person is strictly liable as to the order being

[20] RCC § 22E-701.
[21] *See, e.g., United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010).
[22] The phrase "sexual conduct" refers to both "sexual acts" or "sexual contacts," which are defined in RCC § 22E-701.
[23] D.C. Code § 16-1001(9).
[24] D.C. Code § 16-1001(6)(A).
[25] D.C. Code § 16-1001(6)(B).
[26] RCC § 22E-701.
[27] *See United States v. Hayes*, 555 U.S. 415 (2009) (A domestic relationship, although it must be established beyond a reasonable doubt in an 18 U.S.C. § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense).
[28] A person who lawfully owns a firearm does not necessarily commit possession of a firearm by an unauthorized person at the moment the person becomes a fugitive from justice.
[29] RCC § 22E-207.

of the variety described in sub-subparagraphs (b)(2)(C)(i) or (b)(2)(C)(ii).[30] The term "court order" includes any judicial directive, oral or written, that clearly restricts possession of a firearm.[31] RCC § 22E-203 requires that a person commit this offense voluntarily.[32]

Subsection (c) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[33] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (d) provides the penalty for each gradation of the revised offense. [*See* Second Draft of Report #41.] Paragraph (d)(3) disallows stacking a repeat offender penalty enhancement[34] on top of a penalty for possession of a firearm by an unauthorized person based on a prior conviction. These provisions in the possession of a firearm by an unauthorized person offense accounts for the defendant's prior criminality, obviating the need for multiple penalties.

Subsection (e) cross-references applicable definitions in the RCC and provides definitions for the terms "fugitive from justice" and "prior conviction."

Paragraph (e)(2) specifies three types of fugitives from justice. The term refers to people who are presently avoiding apprehension, prosecution, or other government action. It does not include people who have previously been subject to a warrant that is now closed or a subpoena that was never enforced by a court of law.

Subparagraph (e)(2)(A) specifies that a person is classified as a fugitive from justice if they have fled to avoid prosecution for a crime. This classification is not limited by jurisdiction.[35]

Subparagraph (e)(2)(B) specifies that a person is classified as a fugitive from justice if they have fled to avoid giving testimony in a criminal proceeding. The phrase "criminal proceeding" refers to formal hearings and presentations of evidence, such as a trial or an appearance before a grand jury. It does not include witnesses who have refused to participate in a criminal investigation or negotiation. This classification is not limited by jurisdiction.[36]

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[30] Although a person is strictly liable, justification defenses may apply. *See Blades v. United States*, 2019, 2019 WL 291888. [The Commission's recommendations for general defenses are forthcoming.]

[31] Examples include stay away orders, civil protection orders, family court orders, civil injunctions, and consent decrees.

[32] A person who lawfully owns a firearm does not necessarily commit possession of a firearm by an unauthorized person at the moment an order to relinquish all firearms is entered.

[33] *See, e.g.*, D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991). [The Commission's recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming.]

[34] RCC § 22E-606.

[35] For example, a person who is subject to a non-extraditable bench warrant from another state is a fugitive from justice.

[36] For example, a person who is subject to a non-extraditable bench warrant from another state is a fugitive from justice.

Subparagraph (e)(2)(C) specifies that a person is classified as a fugitive from justice if they have committed an escape, as defined in RCC § 22E-3401.[37]

Paragraph (e)(3) defines the term "prior conviction" to attach at the moment a court enters judgment of guilt for a criminal offense. Subparagraphs (e)(3)(A) – (D) carve out exceptions findings of guilt that have been nullified by vacatur, record sealing, or pardon; or that may be nullified after completion of a supervision program. A conviction that receives a sentence under the Youth Rehabilitation Act is a conviction for purposes of the possession of a firearm by an unauthorized person offense.[38]

Relation to Current District Law. *The revised possession of a firearm by an unauthorized person offense changes current District law in four main ways.*

First, a prior conviction for a nonviolent offense is a predicate for unauthorized possession liability only if it occurred within ten years.[39] Current D.C. Code § 22-4503 generally[40] imposes a five-year time limit for misdemeanor convictions[41] and no time limit for felonies. There is no District case law on the constitutionality of these provisions insofar as they involve non-violent offenses, however the matter has been litigated in other jurisdictions. Some courts have held that Second Amendment rights can be curtailed based on a prior conviction only if the conviction indicates a propensity for gun violence.[42] Other courts have held that a person may prove themselves "unvirtuous"

[37] This offense includes jailbreaks and escaping a law enforcement officer. It does not include resisting or eluding.

[38] *See* D.C. Code §24-901(6) (specifying that a qualifying conviction set aside pursuant to the Youth Rehabilitation Act is a predicate for unlawful possession of a firearm); *see also Wade v. United States*, 173 A.3d 87, 94 (D.C. 2017); *United States v. Aka*, 339 F. Supp. 3d 11 (D.D.C. 2018).

[39] In the RCC (and under the current D.C. Code, excepting drug crimes) there are few offenses other than crimes of violence that carry a 10-year or more imprisonment penalty.

[40] Current District law has both misdemeanors that are punishable by more than one year and felonies that are punishable by less than one year. D.C. Code § 5-115.03 (two-year misdemeanor); D.C. Code § 16-1024(b)(1) (six-month felony). Other jurisdictions also have misdemeanors that are punishable by more than one year. *See, e.g.*, Md. Code, Criminal Law § 3-211 (three-year misdemeanor).

[41] D.C. Code § 22-4504(a)(6).

[42] *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 348 (3d Cir. 2016) (citing *Skoien*, 614 F.3d at 642; *Voisine*, 136 S.Ct. at 2280; *Heller v. District of Columbia*, 554 U.S. at 626; *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 Hastings L.J. 1339, 1363–64 (2009); *Vongxay*, 594 F.3d at 1115); *see also Halloway v. Sessions*, 349 F. Supp. 3d 451, 460-61 (M.D. Pa. 2018) (holding that federal FIP statute 18 U.S.C. § 922(g) was, per the Second Amendment, unconstitutional as applied to a DUI-offender plaintiff because the government failed to prove, under intermediate scrutiny, that applying the statute to offenders like plaintiff sufficiently furthered the compelling interest of "preventing armed mayhem"); *United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012), cert. denied, 133 S. Ct. 962 (2013) (dispossession would be improper if a litigant could demonstrate that he fell within "the scope of Second Amendment protections for 'law-abiding responsible citizens to use arms in defense of hearth and home'"); *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011)("As the Government concedes, Heller's statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose Barton's as-applied challenge."); *United States. v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) ("[T]here must exist the possibility that [a firearm] ban could be unconstitutional in the face of an as-applied challenge."); *see also United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) ("Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons.").

of Second Amendment protections by committing any serious crime.[43] In contrast, the revised offense generally imposes a five-year time limit for misdemeanor convictions, a ten-year time limit for felonies, and no time limit for violent felonies. This change improves the proportionality and, perhaps, the constitutionality of the revised offense.

Second, an intrafamily misdemeanor conviction is a predicate for unauthorized possession liability only if it required proof of confinement, sexual conduct, bodily injury, or threats. Current D.C. Code § 22-4503(6) disallows gun ownership within 5 years of any intrafamily misdemeanor conviction. As a result, a person loses their constitutionally protected right to bear arms if they commit a minor nonviolent crime against someone known to them[44] but not if they commit a violent offense against a stranger.[45] In contrast, the revised offense aligns its unauthorized person criteria with the District's firearm registration requirements, which define "misdemeanor crime of domestic violence" to require "the use or attempted use of physical force, or the threatened use of a deadly weapon."[46] This change improves the consistency and proportionality of the revised offense and may better ensure constitutional applications.[47]

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[43] *See U.nited States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), cert. denied, 131 S. Ct. 1674, 179 L. Ed. 2d 645 (2011) (en banc) (explaining why §922(g) may constitutionally be applied to an individual repeatedly convicted of misdemeanor domestic violence). *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 727-28 (2009).

[44] For example, one roommate who is short on rent may commit misdemeanor check fraud against another roommate. *See* D.C. Code § 22-1510.

[45] For example, a person may commit simple assault in violation of D.C. Code § 22-404(a)(1) or misdemeanor sexual abuse in violation of D.C. Code § 22-3006.

[46] *See* 24 DCMR § 2309; *see also United States v. Castleman*, 572 U.S. 157, 162-63 (2014) (holding that Congress incorporated the common-law meaning of "force"—namely, offensive touching—in § 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence").

[47] There is a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens. *See United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 727-28 (2009). Conversely, a conviction for an offense that is neither violent nor serious may be an improper basis for dispossession. *See Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 348 (3d Cir. 2016) (citing *Skoien*, 614 F.3d at 642; *Voisine*, 136 S.Ct. at 2280; *Heller v. District of Columbia*, 554 U.S. at 626; *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 Hastings L.J. 1339, 1363–64 (2009); *Vongxay*, 594 F.3d at 1115); *see also Halloway v. Sessions*, 349 F. Supp. 3d 451, 460-61 (M.D. Pa. 2018) (holding that federal FIP statute 18 U.S.C. § 922(g) was, per the Second Amendment, unconstitutional as applied to a DUI-offender plaintiff because the government failed to prove, under intermediate scrutiny, that applying the statute to offenders like plaintiff sufficiently furthered the compelling interest of "preventing armed mayhem"); *United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012), cert. denied, 133 S. Ct. 962 (2013) (dispossession would be improper if a litigant could demonstrate that he fell within "the scope of Second Amendment protections for 'law-abiding responsible citizens to use arms in defense of hearth and home'"); *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011)("As the Government concedes, Heller's statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose Barton's as-applied challenge."); *United States. v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) ("[T]here must exist the possibility that [a firearm] ban could be unconstitutional in the face of an as-applied challenge."); *see also United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) ("Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons."). *But see U.S. v. Skoien*, 614 F.3d 638 (7th Cir. 2010), cert. denied, 131 S. Ct. 1674, 179 L. Ed. 2d 645

Third, an out-of-state conviction is a predicate for unauthorized possession liability if it has elements that would necessarily prove the elements of a corresponding District crime. Current D.C. Code § 22-4503(a)(1) disallows gun ownership by any person who has "been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." There are instances in which the District punishes conduct more harshly than other states[48] and vice versa.[49] There are also many instances in which other states punish the same conduct differently. As a result, there are cases in which the current statute punishes constitutionally protected activity based on the location instead of the seriousness of the conduct. The revised offense applies to any person who has been convicted of an offense that would be punished by one year if committed in the District, basing liability on the District's specific legislative views on the seriousness of the conduct, irrespective of the maximum penalty in the other jurisdiction. This change reduces an unnecessary gap in liability and improves the consistency[50] and proportionality of the revised offense.

Fourth, a person's dependency on a controlled substance is not a predicate for unauthorized possession liability. Current law punishes possession of a firearm by a person who is "addicted to any controlled substance."[51] The term "addicted" is not defined in Chapter 45 and case law has not interpreted its meaning.[52] Other considerations of fitness to safely store and use gun—such as age, intellectual disabilities, psychiatric disorders—appear in the District's registration requirements[53] and not in the current unlawful possession of a firearm offense. In contrast, the revised statute eliminates a vague reference to addiction to a controlled substance. The boundaries of addiction are amorphous,[54] making the current provision nearly impossible to enforce evenhandedly and inviting challenges on due process grounds.[55] This change improves the consistency of the revised code and may ensure the constitutionality of the revised statute.

(2011) (en banc) (explaining why §922(g) may constitutionally be applied to an individual repeatedly convicted of misdemeanor domestic violence).

[48] For example, inciting a riot currently carries a maximum penalty of 10 years in the District but carries a maximum penalty of one year in New York. *See* D.C. Code § 22-1322(c); N.Y. Penal Law § 240.08.

[49] For example, possession of 50 grams of marijuana is legal in the District but carries a maximum penalty of 18 months in New Jersey (equivalent to recklessly causing bodily injury with a deadly weapon). *See* D.C. Code § 48-904.01(a)(1)(A); N.J. Stat. Ann. § 2C:35-10.

[50] Current D.C. Code § 22-4503(a)(6) disallows gun ownership by any person who has "been convicted…of an intrafamily offense, *as defined in D.C. Official Code § 16-1001(8)*, or any similar provision in the law of another jurisdiction." (Emphasis added.)

[51] D.C. Code § 22-4503(a)(4).

[52] D.C. Code § 23-1331(5) defines "addict" to mean any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954 so as to endanger the public morals, health, safety, or welfare. D.C. Code § 48-902.01(24) defines "addict" to mean any individual who habitually uses any narcotic drug or abusive drug so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drug or abusive drug as to have lost the power of self-control with reference to his addiction.

[53] *See, e.g.*, D.C. Code §§ 7-2502.03 and 22-4507; 24 DCMR §§ 2308; 2313.8; and 2332(d).

[54] For example, it is unclear whether a person who is predisposed to chemical dependency but is currently drug-free qualifies as an addict.

[55] The current statute does not provide a procedure for notifying a person that they are considered an addict for purposes of D.C. Code § 22-4503 or for providing that person with a hearing.

Beyond these four changes, four other aspects of the revised offense may constitute a substantive change to District law.

First, the revised offense requires that the accused know that they have a prior conviction or open warrant. D.C. Code § 22-4503 does not specify a culpable mental state for any element of the current unlawful possession of a firearm offense. The District of Columbia Court of Appeals ("DCCA") has held that a person must know that they possess a firearm or component parts that can be pieced together to make a firearm.[56] However, the court has not clearly held whether a person must know that they have a conviction, warrant, or court order.[57] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[58] At least one federal court considering a similar federal statute has noted that it would be sensible to require the government to prove that the defendant had knowledge of the only fact (his felony status) separating criminal behavior from not just permissible, but constitutionally protected, conduct.[59] The United States Supreme Court recently interpreted the penalty provision for the same federal offense[60] to require exactly that.[61] The revised statute does not require that a person know of their felony status,[62] but does require that the person know that they have a prior conviction, open warrant, or order to not possess any firearms.[63] This change improves the consistency and proportionality of the revised offense.

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[56] *Myers v. United States*, 56 A.3d 1148, 1152 (D.C. 2012).

[57] *But see Goodall v. United States*, 686 A.2d 178 (D.C. 1996) (permitting the parties to stipulate to the existence of a prior felony at trial); *Bland v. United States*, 153 A.3d 78, 79 (D.C. 2016) (finding that whether a crime is a "crime of violence" for purposes of the statute's sentencing enhancement is a legal question, not a factual question) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

[58] 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)).

[59] *United States v. Games-Perez*, 667 F.3d 1136, 1144-45 (10th Cir. 2012) (Gorsuch, J., concurring) (interpreting 18 U.S.C. § 922(g)).

[60] 18 U.S.C. § 924(a)(2).

[61] *Rehaif v. United States*, 17-9560, 2019 WL 2552487 (U.S. June 21, 2019).

[62] The phrase "in fact" in RCC §§ 22E-4105(a)(2) and (b)(2)(A) holds an actor strictly liable as to a conviction being disqualifying. *See* RCC § 22E-207.

[63] To require actual knowledge that the prior conviction is disqualifying may impose an insurmountable evidentiary burden in some cases, creating an unnecessary gap in liability. For example, the government might be required to prove that the person was not intoxicated, knew the date of their conviction was within the proscribed period, or knew that they conviction was for conduct that is legally considered an act of domestic violence. *See Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *8 (U.S. June 21, 2019) (J. Alito, dissenting).

Second, the revised offense holds the accused strictly liable for the existence of a court order to relinquish all firearms. Current D.C. Code § 22-4503(a)(5) does not specify a culpable mental state. However, the statute specifies that it applies only if the order was issued after the person received actual notice of a hearing and either had an opportunity to participate during the hearing or failed to appear. Although applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[64] a person who fails to appear for a hearing may not have actual knowledge of the relinquishment order. The revised statute nevertheless holds a person strictly liable, provided that the person had notice of their right to appear at the hearing. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

Third, the term "prior conviction" excludes a finding of guilt that is subject to an agreement by the parties to be further reviewed. Title 22 of the D.C. Code does not define the term "conviction." Other titles define it to mean a finding of guilt, an entry of judgment, or a sentence.[65] Defining "conviction" to require a sentencing may result in some unintuitive outcomes.[66] On the other hand, defining "conviction" to attach upon a finding of guilt may be overinclusive of pleas that will not ultimately lead to a final sentence. To resolve this ambiguity, the revised offense defines "prior conviction" to mean a finding of guilt but carves out several exceptions for circumstances in which the finding may be only temporary. This change improves the clarity and proportionality of the revised offense.

Fourth, the RCC clarifies that the term "prior conviction" does not include juvenile adjudications[67] or convictions that have been vacated but does include

[64] 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)).

[65] In Title 2, it means "a judicial finding, jury verdict, or final administrative order, including a finding of guilt, a plea of nolo contendere, or a plea of guilty to a criminal charge…" D.C. Code § 2-1515.01(3). In Title 3, it means "a finding by a court that an individual is guilty of a criminal offense through adjudication, or entry of a plea of guilt or no contest to the charge by the offender." D.C. Code § 3-1271.02(3). In Title 4 and Title 42, it means "a verdict or plea of guilty or nolo contendere."[65] D.C. Code §§ 4-1305.01(3); 42-3541.01(4). In Title 16, it means "the judgment (sentence) on a verdict or a finding of guilty, a plea of guilty or a plea of nolo contendere, or a plea or verdict of not guilty by reason of insanity." D.C. Code § 16-801(3). In Title 24, it means "the judgment on a verdict or a finding of guilty, a plea of guilty, or a plea of no contest." D.C. Code § 24-901(2). In Title 32, it means "any sentence arising from a verdict or plea of guilty or nolo contendere, including a sentence of incarceration, a suspended sentence, a sentence of probation, or a sentence of unconditional discharge." D.C. Code § 32-1341(4).

[66] Consider, for example, a person who is found guilty but flees before sentencing. *See* D.C. Super. Ct. R. Crim. P. 32 (requiring a defendant's presence at sentencing).

[67] D.C. Code § 16-2318 states that a juvenile delinquency adjudication is not a conviction of a crime.

convictions that have been set aside under the Youth Rehabilitation Act.[68] D.C. Code § 22-4503 does not define the term "conviction." This change clarifies the revised statute.

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

The revised code defines "possession" in its general part.[69] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[70] The RCC definition of "possession,"[71] with the requirement in the offense that the possession be "knowing,"[72] matches the meaning of possession in current DCCA case law.[73] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

[68] *See* D.C. Code §24-901(6) (specifying that a qualifying conviction set aside pursuant to the Youth Rehabilitation Act is a predicate for unlawful possession of a firearm); *see also Wade v. United States*, 173 A.3d 87, 94 (D.C. 2017); *United States v. Aka*, 339 F. Supp. 3d 11 (D.D.C. 2018).
[69] RCC § 22E-202.
[70] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[71] RCC § 22E-701.
[72] RCC § 22E-206.
[73] *See United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

RCC § 22E-4106. Negligent Discharge of Firearm.

Explanatory Note. *This section establishes the negligent discharge of a firearm offense for the Revised Criminal Code (RCC). The offense proscribes discharging a firearm without permission to do so.*[1] *The revised offense replaces D.C. Code § 22-4503.01 (Unlawful discharge of a firearm) and 24 DCMR §§ 2300.1 – 2300.3 (Discharge of weapons).*

Paragraph (a)(1) specifies that to be criminally liable for discharging a firearm, a person must act at least negligently, a defined term.[2] That is, at a minimum, the person should be aware of a substantial risk that the object is a firearm and that it has discharged in a location other than a licensed firing range. Negligence also requires that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive that risk is clearly blameworthy.[3] To discharge a firearm means to shoot a loaded weapon. A discharge does not require aiming the weapon. "Firearm" is a defined term,[4] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[5] but excludes antiques.[6]

Paragraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has lawful authority to discharge a firearm.[7]

Subparagraph (a)(2)(A) provides that a person may discharge a firearm if the Metropolitan Police Department ("MPD") grants written permission to do so. MPD may permit the discharge of a firearm by a particular person, in a particular location, or at a specified time.

Subparagraph (a)(2)(B) provides that a person may discharge a firearm if they have any other permission to do so under District or federal law. If a discharge is permitted by law[8] a person does not violate this section.

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. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised negligent discharge of a firearm offense changes current District law in five main ways.*

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[1] RCC § 22E-1202 punishes negligently causing a bodily injury by discharging a firearm as fifth degree assault.
[2] RCC § 22E-206.
[3] RCC § 22E-206.
[4] RCC § 22E-701.
[5] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[6] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[7] RCC § 22E-207.
[8] Consider, for example, a 21-gun salute at a military funeral service.

First, the revised statute requires that the accused act at least negligently with respect to discharge of a firearm outside a firing range. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[9] even though it is highly unusual to provide criminal liability for merely negligent conduct.[10] This change improves the clarity, consistency, and proportionality of the revised offense.

Second, the revised statute includes only one offense and one penalty gradation for negligent discharge of a firearm. A violation of current D.C. Code § 22-4503.01 is subject to a maximum penalty of specifies a maximum penalty of 1 year of incarceration and a $2,500 fine.[11] A violation of 24 DCMR §§ 2300.1 – 2300.3 is subject to a fine of $300 and is not punishable by jail time.[12] In contrast, the revised statute provides a single offense gradation. This change logically reorders and improves the consistency proportionality of the revised statutes.

Third, the revised offense does not punish discharge of an air gun, spring gun, or torpedo. Current 24 DCMR § 2300.1 prohibits the discharge of any "gun, air gun, rifle, air rifle, pistol, revolver, or other firearm, cannon, or torpedo" without the written permission of the Chief of Police. The term "gun" is not defined in the statute or in District case law and may broadly include spring guns, paintball guns, cap guns, water guns, and other toys. The revised code defines the term "firearm" to include a rifle, pistol, revolver, and cannon,[13] however, it does not include air rifles or torpedo. Discharging an air rifle outside a building is punished as carrying an air or spring gun.[14] Releasing a torpedo—or any other restricted explosive—is punished as possession of a prohibited weapon or accessory.[15] This change improves the logical organization and proportionality of the revised offenses.

Fourth, the revised offense does not allow firearms to be discharged in theaters. Current 24 DCMR § 2300.3 states, "This section shall not apply to the discharge of

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[9] RCC § 22E-206.

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

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

[11] D.C. Code §§ 22-4515; 22-3571.01.

[12] 24 DCMR § 100.6.

[13] RCC § 22E-701.

[14] RCC § 7-2502.17.

[15] RCC § 22E-4101.

firearms or explosives in a performance conducted in or at a regular licenses [sic.] theater or show." The statute does not specify the type of license required and District case law has not addressed the issued. Under the revised code, a person must obtain written permission to discharge a firearm in a theater or during a show. An air or spring gun may be used as part of a lawful theatrical performance or athletic contest.[16] Other common stage props such as block-barreled guns designed for movie or theatrical use, block-barreled starter guns, and percussion (cap) guns do not constitute firearms in the RCC or under current D.C. Code definitions in Title 7 or Title 22, and could be used in theaters and shows. This change eliminates an unnecessary gap in the revised offenses.

Fifth, the revised offense clarifies that a person may discharge a firearm if lawful authority to do so exists under District or federal law. Current 24 DCMR § 2300.1 requires "special" written permission from the Chief of Police to discharge a weapon. The revised offense notes that either written permission or other lawful authority is sufficient.

Beyond these changes, two other aspects of the revised offense may constitute a substantive change to District law.

First, the revised statute holds an actor strictly liable as to whether they have permission to discharge a firearm. The current statutes do not specify any culpable mental states and District case law has addressed their meaning. The revised statute nevertheless holds a person strictly liable as to whether there is permission under District or federal law to fire a gun. Although applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[17] and legal experts[18] for any non-regulatory crimes, the negligent discharge of a firearm offense is largely regulatory in nature. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

Second, the revised offense uses the phrase "firing range" instead of "shooting gallery." Current 24 DCMR § 2300.2 provides, "This section shall not apply to licensed shooting galleries between 6:00 a.m. and 12:00 midnight on Monday through Saturday,

[16] E.g., an actor in a play may use an air or spring gun to simulate a firearm in a shooting scene, a referee may use an air or spring gun to signal the start of a race. *See* RCC § 7-2502.17(b)(1)(A) and corresponding commentary.

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

[18] *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).

or between the hours of 2:00 p.m. and 11:00 p.m. on Sundays." This term "licensed shooting gallery" is not defined in the DCMR or in District case law. The firearms regulations in the D.C. Code do not refer to "shooting galleries," but do refer to "firing ranges."[19] The time restriction does not correspond with any District regulations for firing ranges and are incongruent with District regulations of loud noise.[20] The revised offense uses the Title 7 terminology and deletes the time restriction.[21] This change improves the clarity 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 offense does not include a self-defense provision. Current D.C. Code § 22-4503.01 provides that a person may discharge a firearm "as otherwise permitted by law, including legitimate self-defense." In contrast, under the RCC, where a person acts in defense of one's self, a third person, or property, a general defense may apply.[22] This change improves the consistency of the revised offenses.

[19] D.C. Code § 7-2507.03.

[20] Loud noise that recklessly or negligently disturbs others may be punished under 20 DCMR § 2701, depending upon the volume and location.

[21] Additionally, Merriam Webster defines "shooting gallery" to include "a building (usually abandoned) where drug addicts buy and use heroin." *See* Merriam-Webster Online Dictionary at https://www.webster-dictionary.org/definition/shooting%20gallery.

[22] [The Commission's recommendations for general defenses are forthcoming.]

RCC § 22E-4107. Alteration of a Firearm Identification Mark.

Explanatory Note. *This section establishes the alteration of a firearm identification mark offense for the Revised Criminal Code (RCC). The offense proscribes knowingly altering or obscuring identifying marks on a firearm. The revised offense replaces D.C. Code §§ 22-4512 (Alteration of identifying marks of weapons prohibited) and 7-2505.03(d) (Microstamping).*

Paragraph (a)(1) requires that the accused knowingly alters or removes an identification mark. "Alters" is an undefined term, intended to be broadly construed. The term "firearm" is defined in RCC § 22E-701. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which, applied here, requires that the accused must be practically certain that their conduct will alter or remove an identification mark.

Paragraph (a)(2) further specifies that the accused must alter a mark "with intent to" conceal or misrepresent the identity of the firearm. "Intent" is a defined term in RCC § 22E-206 which, applied here, means the accused must be practically certain that the alteration would conceal or misrepresent[1] the identity of the firearm. 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 accused actually concealed or misrepresented the identity of the firearm, only that the accused was practically certain that he or she would do so.

Subsection (b) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised alteration of a firearm identification mark offense changes current District law in three main ways.*

First, the revised alteration of a firearm identification mark statute applies to any firearm. The current D.C. Code statutes apply only to a pistol, machine gun, or sawed-off shotgun.[2] In contrast, the revised offense applies to any firearm, as defined in RCC § 22E-701, which includes other long guns, such as shotguns and rifles. There is no apparent reason to exclude liability for long guns which may be legally purchased and possessed by law enforcement officers. This change eliminates an unnecessary gap in liability.

Second, the revised statute requires that the accused have intent to conceal or misrepresent the identity of the firearm. The current D.C. Code statutes do not specify a culpable mental state,[3] and it appears that a person commits an offense by any alteration or removal of a mark, including by accident, unless the purpose is experimental work by

[1] The government is not required to prove that the accused intended to mislead a specific person, only that the markings are removed or altered.
[2] D.C. Code §§ 22-4512 and 7-2505.03(d).
[3] *But see* D.C. Code § 7-2505.03 which provides an exception for "normal wear."

a government officer or agent,[4] safety, or sporting.[5] No case law exists as to whether a person would be guilty under the current statutes for altering an identification mark for some other purpose. In contrast, the revised statute eliminates liability for a person who alters a mark by accident or for purposes other than concealing or misrepresenting the identity of the weapon. The RCC contains similar language for the revised alteration of bicycle identification number[6] and alteration of a motor vehicle identification number[7] offenses. This change clarifies and improves the consistency and proportionality of the revised offenses.

Third, the revised alteration of a firearm identification mark statute is prosecutable only by the Office of the United States Attorney for the District of Columbia ("USAO"). Current D.C. Code § 22-4512 (Alteration of identifying marks of weapons prohibited) is prosecutable by USAO. However, current D.C. Code § 7-2505.03(d) (Microstamping) is prosecutable by the Office of the Attorney General for the District of Columbia. In contrast, the revised statute includes only a single gradation of a single offense prosecutable by USAO. This change reduces unnecessary overlap between the revised statutes.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires that the accused act knowingly with respect to removal or alteration of the identification mark. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. To resolve this ambiguity, the revised offense requires at least knowledge as to the conduct of removing or altering the mark. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] A knowledge culpable mental state is also consistent with similar offenses in the D.C. Code[9] and RCC. This change clarifies the revised statute.

[4] D.C. Code § 22-4512.
[5] D.C. Code § 7-2505.03(d)(2).
[6] RCC § 22E-2404.
[7] RCC § 22E-2403.
[8] 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)).
[9] See, e.g., § 22–3233, Altering or removing motor vehicle identification numbers ("It is unlawful for a person to knowingly remove, obliterate, tamper with, or alter any identification number on a motor vehicle or a motor vehicle part.").

Second, the revised offense does not specify exceptions for normal wear,[10] experimental work by a government officer or agent,[11] safety, or sporting.[12] These exceptions are not required because the revised offense requires knowledge and intent, as defined in RCC § 22E-206. The RCC will also include standardized general defenses, including a defense for execution of public duties.[13]

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

First, the current statutes make it a crime to "alter, remove, or obliterate" an identifying mark.[14] The revised statute only uses the words "alter" and "remove," which are intended to be broadly construed to cover removing or obliterating a mark. The change is not intended to narrow the scope of the offense.

Second, the revised offense does not include a permissive inference. Current D.C. Code § 22-4512 states, "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia." The D.C. Court of Appeals held that this inference is "irrational" or "arbitrary," and hence unconstitutional, because it cannot 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.[15]

[10] D.C. Code § 72505.03(d)(1).
[11] D.C. Code § 22-4512.
[12] D.C. Code § 7-2505.03(d)(2).
[13] [The Commission's recommendations for general defenses are forthcoming.] *See, e.g.*, Model Penal Code § 3.03.
[14] D.C. Code §§ 22-4512 and 7-2505.03(d).
[15] *Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, (1969); *Turner v. United States*, 396 U.S. 398 (1970)); *see also United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (noting it would be constitutional to instead criminalize possession of a firearm with an obliterated serial number).

RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for prohibits of firearms on public or private property for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4503.02, (Prohibition of firearms from public or private property). The revised civil provisions for prohibition of firearms on public or private property may change current District law in two ways.*

First, the revised provision clarifies that the statute operates as a civil provision and does not create a misdemeanor offense. Current D.C. Code § 22-4503.02 does not explicitly prohibit or affirmatively require any particular conduct.[1] However, § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes the statute as civil provisions instead of an offense. This change clarifies the revised statute.

Second, the revised code defines "law enforcement officer" and "property" in its general part.[2] D.C. Code § 22-4503.02 does not define the terms "law enforcement personnel" or "property" and District case law has not addressed their meaning. It is unclear which employees of which agencies and private businesses qualify as "law enforcement personnel." In contrast, the revised statute applies standardized definitions for "firearm," "law enforcement officer," and "property," used throughout the revised code.

[1] The statute does not explicitly require a person carrying a firearm to stay off of premises where firearms are disallowed, it merely describes when persons may disallow firearms. If the statute does create a misdemeanor offense, it largely overlaps with D.C. Code § 7-2509.07, which prohibits carrying a pistol with a license in 15 different locations. It is unclear what, if any, impact the signage requirements in 24 DCMR § 2346 have on a person's liability under either statute.

[2] RCC § 22E-202.

RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for lawful transportation of a firearm or ammunition for the Revised Criminal Code (RCC). These provisions establish a right to possess and transport a firearm in a specified manner.*[1] *The revised statute replaces D.C. Code § 22-4504.02 (Lawful transportation of firearms).*[2]

The revised civil provisions for lawful transportation of a firearm or ammunition provision may change current District law in two ways.

First, the revised provision clarifies that the statute operates as a civil provision and does not, of itself, create criminal liability for non-compliance. Current D.C. Code § 22-4504.02(a) does not explicitly prohibit or affirmatively require any particular conduct. However, § 22-4504.02(b)(1) states (in the passive voice), "neither the firearm nor any ammunition being transported shall be readily accessible or directly accessible…" and § 22-4504.02(b)(2) states (in the passive voice), "the firearm or ammunition shall be contained…" and "the firearm shall be unloaded." D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The District of Columbia Court of Appeals has not published any opinion interpreting this statute. Legislative history for the current provision in D.C. Code § 22-4504.02 does not clearly indicate whether or not the provision was intended to create criminal liability by itself. However, predecessor statutes suggest that D.C. Code § 22-4504.02 may have been intended to create an exclusion from liability for carrying a concealed weapon in violation of D.C. Code § 22-4504(a) and (a-1) rather than a misdemeanor offense.[3] The

[1] *See also* 18 U.S.C. § 926A.

[2] [A conforming amendment will be required for cross-references in Title 7.]

[3] In 1932, much like current D.C. Code § 22-4504, the District's carrying a concealed weapon statute stated, "No person shall within the District of Columbia carry concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon." In addition to the exceptions that appear in current D.C. Code § 22-4505(a)(1), (3), and (5), the 1932 legislation specified that the prohibition did not apply to "any person while carrying a pistol unloaded and in a secure wrapper" to and from the locations specified in the contemporary § 22-4505(a)(6). The 1932 "unloaded and in a secure wrapper" exception language was most recently changed to a cross-reference to § 22-4504.02, which largely mirrors 18 U.S.C. § 926A (Firearm Owners Protection Act), establishing a right and not a criminal offense. Consequently, it appears that D.C. Code § 22-4504.02 may have been intended merely as an exception to the District's carrying statute.

On the contrary, if current D.C. Code § 22-4504(a) were construed to create a misdemeanor offense, it may run afoul of D.C. Code § 23–101(a) and case law on Home Rule limitations on assignment of prosecutorial authority. Prior to home rule, the only stand-alone offense regarding transportation of firearms appears to have been a police regulation delegated to the Office of the Office of the Attorney General for the District of Columbia. *See* Police Traffic and Motor Vehicle Regulations of the District of Columbia, Art. 52, Sec. 8(b), August 12, 1968 (establishing an offense prosecutable by Corporation Counsel that states, "Any pistol carried by any person not having a licensed issued under these Regulations shall be carried In a closed container or securely wrapped and while being carried shall be kept unloaded. Containers of such pistols or such securely wrapped pistols shall be carried in open view."). The District is barred from reassigning prosecutorial authority over a crime that is a police regulation to the United States Attorney by D.C. Code § 23-101(a). *See In re Hall*, 31 A.3d 453, 458 (D.C. 2011).

revised statute establishes the transportation requirements as a right instead of an offense. This change clarifies the revised statute.

Second, the revised statute clarifies that there is a lawful means of transportation whether or not the ammunition is transported at the same time. Current D.C. Code § 22-4504.01(b)(1) appears to assume that the firearm will be accompanied by ammunition, stating "neither the firearm nor any ammunition being transported shall be readily accessible." This change clarifies the revised statute.

RCC § 22E-4110. Civil Provisions on Issuance of a License to Carry a Pistol.

Explanatory Note and Relation to Current District Law. *This section establishes the issuance of a license to carry a pistol civil provision for the Revised Criminal Code (RCC). The provision specifies the requirements for obtaining a carry license in the District. The revised provision replaces D.C. Code § 22-4506 (Issue of a license to carry a pistol). The current statute has been copied verbatim, with the exception of applying standardized RCC definitions and striking a phrase that was held to be unconstitutional in 2016.*[1]

[1] The District's requirement that applicants for a license to carry a concealed firearm demonstrate a "good reason to fear injury to his or her person or property" or "any other proper reason for carrying a pistol," as further defined by District law and regulations (collectively "the 'good reason' requirement"), is inconsistent with the individual right to bear arms under the Second Amendment and therefore unconstitutional. *Grace v. Dist. of Columbia*, 187 F. Supp. 3d 124 (D.D.C. 2016).

RCC § 22E-4111. Unlawful Sale of a Pistol.

Explanatory Note. *This section establishes the unlawful sale of a pistol offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4507 (Certain sales of pistols prohibited).*

Paragraph (a)(1) requires that the accused knowingly sells a pistol. "Sells" is an undefined term, intended to include any exchanging of pistol for monetary remuneration. The term "pistol" has the meaning specified in D.C. Code § 7-2501.01. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which, applied here, requires that the accused must be practically certain that they are selling and practically certain that the item is a pistol.

Paragraph (a)(2) further specifies that the accused must sell a pistol reckless as to the fact that the purchaser is one of three types of people who are legally unfit to own a firearm. "Reckless" is a defined term in RCC § 22E-206 which, applied here, means the person must consciously disregard a substantial risk that the purchaser is not of sound mind, prohibited from possessing a firearm under RCC § 22E-4105, or under 21 years of age. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.[1]

Subsection (b) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

Subsection (c) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised unlawful sale of a firearm offense changes current District law in one main way.*

The revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Beyond this change, three aspects of the revised unlawful sale of a pistol offense may constitute substantive changes to District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4507 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute clearly establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to selling a pistol. The current statute is silent as to the applicable culpable

[1] RCC § 22E-206.

mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[2] This change clarifies the revised statute.

Third, the revised statute requires that a person be at least reckless as to the status of the purchaser. Current D.C. Code § 22-4507 requires that a person have "reasonable cause to believe" that the purchaser is not of sound mind, prohibited from possessing a firearm under § 22-4503, or under 21 years of age. There is no case law construing the meaning of this language. To resolve this ambiguity, the revised statute applies the RCC's standard mental state definition for recklessness[3] which requires that a person consciously disregard a substantial risk that the purchaser is legally barred from having a weapon. 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.[4] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[5] This change improves the consistency of the revised offenses.

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

The revised code defines "possession" in its general part.[6] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[7] The RCC definition of "possession,"[8] with the requirement in the offense that the possession be "knowing,"[9] matches the meaning of possession in

[2] 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)).

[3] RCC § 22E-206.

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

[5] *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.").

[6] RCC § 22E-202.

[7] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

[8] RCC § 22E-701.

[9] RCC § 22E-206.

current DCCA case law.[10] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

[10] *See United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

RCC § 22E-4112. Unlawful Transfer of a Firearm.

Explanatory Note. *This section establishes the unlawful transfer of firearm offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4508 (Transfers of firearms regulated).*

Paragraph (a)(1) requires that a person knowingly deliver a firearm to a purchaser. "Delivers" is an undefined term, intended to be broadly construed. The term "firearm" is defined in RCC § 22E-701. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are delivering an item and practically certain that the item they are delivering is a firearm.

Subparagraph (a)(1)(A) specifies that a transfer that occurs in fewer than 10 days of purchase is an unlawful transfer, unless the purchaser is a law enforcement officer. The term "law enforcement officer" is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the transfer occurred within 10 days of the sale.

Subparagraph (a)(1)(B) specifies that a transfer that occurs in a manner other than the manner specified in RCC § 22E-4109 is an unlawful transfer. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is transporting it in the manner that fails to comply with RCC § 22E-4109.

Alternatively, paragraph (a)(2) requires that a person knowingly fail to deliver a written statement with certain information, when purchasing a firearm. The writing must be duplicated and include the purchaser's full name, address, occupation, date and place of birth. It must also include the date of purchase, the caliber, make, model, and manufacturer's number of the firearm. And, it must also include a statement that the purchaser is not prohibited from possessing a firearm by RCC § 22E-4105. Paragraph (a)(2) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that they are failing to deliver the required writing when they are purchasing a firearm.

Alternatively, paragraph (a)(3) requires that a person knowingly fail to deliver a completed purchase statement to the Metropolitan Police Department, when selling a firearm. The writing must be duplicated, include the seller's signature and address, and be retrained for 6 years. Paragraph (a)(3) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that they are failing to deliver the required writing when they are selling a firearm.

Alternatively, paragraph (a)(4) applies to a person who knowingly sells an assault weapon, machine gun, or sawed-off shotgun. A "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that the item they are selling is an assault weapon, machine gun, or sawed-off shotgun.

Subparagraph (a)(4)(A) prohibits selling an assault weapon, machine gun, or sawed-off shotgun to any person other than the persons designated in RCC § 22E-4118(b) as entitled to possess the same. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are selling an assault weapon to someone who qualifies as an unauthorized person.

Subparagraph (a)(4)(B) prohibits selling an assault weapon, machine gun, or sawed-off shotgun without prior permission to make such sale obtained from the Chief of the Metropolitan Police Department ("MPD"). Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are not authorized to sell the assault weapon, machine gun, or sawed-off shotgun.

Subsection (b) excludes liability for wholesalers.

Subsection (c) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

Subsection (d) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised unlawful transfer of a firearm offense changes current District law in four main ways.*

First, paragraph (a)(4) of the revised offense restricts the sale of an assault weapon, machine gun, or sawed-off shotgun. Current D.C. Code § 22-4508 provides that "No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-4514…" The revised statute does not address transfers of blackjacks, but does address transfers of assault weapons,[1] the possession of which—like machine guns and sawed-off shotguns—is prohibited as contraband under RCC § 22E-4101. It is unclear why blackjacks, as compared to other non-firearm dangerous weapons, are regulated in this manner. The statute's failure to cover sales of assault weapons may be an oversight during recent legislative changes regarding the definition of a machine gun.[2] This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Second, the revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Third, the revised statute includes a cross-reference to the persons described in RCC § 22E-4118(b), Exclusions from Liability for Weapon Offenses. Current D.C. Code § 22-4508 cross-references "the persons designated in § 22-4514." The revised code replaces the exceptions in Chapter 45 of current D.C. Code Title 22 with a single,

[1] The term "assault weapon" has the meaning specified in D.C. Code § 7-2501.01.

[2] Before 2009, the term "machine gun" was defined in D.C. Code § 7-2501.01 to include "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot…[s]emiautomatically, more than 12 shots without manual reloading." The District of Columbia Court of Appeals interpreted this language to include a handgun fitted with a magazine that holds more than twelve rounds of ammunition (even if the magazine is defective). *See Moore v. United States*, 927 A.2d 1040, 1054 (D.C. 2007); *United States v. Woodfolk*, 656 A.2d 1145, 1147–48 (D.C. 1995). In 2009, the D.C. Council redefined "machine gun" to include only fully automatic weapons and simultaneously criminalized possession of a large capacity ammunition feeding device under D.C. Code § 7-2506.01(b). D.C. Law 17-372, Firearms Control Amendment Act of 2008.

comprehensive list of exclusions from liability in RCC § 22E-4118 and changes current District law as described in the commentary. Each change affects the scope of the revised unlawful transfer of a firearm offense. These changes improve the consistency and proportionality of the revised offenses.

Fourth, the revised statute applies a standardized definition of "law enforcement officer." Current D.C. Code § 22-4508 except sales to "sales to marshals, sheriffs, prison or jail wardens or their deputies, policemen, or other duly appointed law enforcement officers." The word "policemen" is not defined in the statute and District case law has not addressed its meaning. In contrast, the RCC defines the term "law enforcement officer" with specificity[3] and applies this definition to all revised offenses. This change improves the clarity and consistency of the revised offense.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4508 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute more clearly frames the statute as establishing an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[4] This change clarifies the revised statute.

[3] RCC § 22E-701.

[4] 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)).

RCC § 22E-4113. Sale of Firearm Without a License.

Explanatory Note. *This section establishes the sale of a firearm without a license offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4509 (Dealers of weapons to be licensed).*

Paragraph (a)(1) applies to retail dealers. Subparagraph (a)(1)(A) requires that a retail dealer knowingly sell, expose for sale, or possess with intent to sell a firearm. "Sells" is an undefined term, intended to include any exchanging of pistol for monetary remuneration. The terms "possess" and "firearm" are defined in RCC § 22E-701. Subsection (a) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are selling, exposing for sale, or possessing with intent to sell a firearm. Per the rules of interpretation in RCC § 22E-207, subparagraph (a)(1)(B) requires that a retail dealer also know—that is, be practically certain—that they are not licensed to sell, expose for sale, or possess with intent to sell a firearm.

Paragraph (a)(2) applies to wholesalers. Paragraph (a)(2) requires that a wholesale dealer not sell, expose for sale, or possess with intent to sell a firearm to someone other than a licensed dealer licensed under RCC § 22E-4114. Per the rules of interpretation in RCC § 22E-207, subparagraph (a)(1)(B) requires that a retail dealer also know—that is, be practically certain—that they are selling, exposing for sale, or possessing with intent to sell. The person must also be practically certain that the item is a firearm. The person must also be practically certain that the purchaser is not a dealer licensed under RCC § 22E-4114.

Subsection (b) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised sale of a firearm without a license offense changes current District law in one main way.*

The revised statute applies to all firearms. Current D.C. Code § 22-4509 restricts the sale of any "pistol, machine gun, sawed-off shotgun, or blackjack." In contrast, the revised statute does not include address sales of blackjacks but does address sales of all firearms. There is no clear rationale for not including long guns such as rifles and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4509 does not itself provide a criminal penalty, however, D.C. Code § 22-4510 cross-references § 22-4509 and states that a breach "shall be subject to forfeiture and the licensee subject to punishment as provided in this chapter." D.C. Code § 22-4515 provides a criminal penalty for "any

violation of any provision of this chapter." The revised statute more establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[1] This change clarifies 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 code defines "firearm," "assault weapon," "machine gun," "sawed-off shotgun," and "possession" in its general part.[2] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[3] The RCC definition of "possession,"[4] with the requirement in the offense that the possession be "knowing,"[5] matches the meaning of possession in current DCCA case law.[6] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[1] 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)).

[2] RCC § 22E-202.

[3] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

[4] RCC § 22E-701.

[5] RCC § 22E-206.

[6] *See United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4509 restricts the sale of firearms "within the District of Columbia." This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District's boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for licenses of firearms dealers for the Revised Criminal Code (RCC). Together with RCC § 22E-4115, the revised statute replaces D.C. Code § 22-4510 (Licenses of weapons dealers).*

The revised civil provisions for licenses of firearms dealers changes current District law in five main ways.

First, the revised statute regulates all firearms. Current D.C. Code § 22-4510 restricts the sale of any "pistol, machine gun, sawed-off shotgun, or blackjack." In contrast, the revised statute does not include address sales of blackjacks, but does address transfers of all firearms. There is no clear rationale for not including long guns such as rifles and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Second, paragraph (b)(4) of the revised offense restricts the sale of an assault weapon, machine gun, or sawed-off shotgun. Current D.C. Code § 22-4510(a)(3) provides that "No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-4514…" The revised statute does not include address sales of blackjacks, but does address sales of assault weapons,[7] which—like machine guns and sawed-off shotguns—are prohibited as contraband under RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Third, the revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person, consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Fourth, the revised statute replaces the word "business" with the phrase "firearm sales." Current D.C. Code § 22-4510(a)(1) states, "The business shall be carried on only in the building designated in the license." The word "business" is not defined in the statute and District case law has not addressed its meaning. Read literally, "business" may be understood to include work unrelated to firearm transactions, such as accounting, marketing, and banking. In contrast, the revised statute limits only the sales to the physical confines of the building designated in the license. This change clarifies and may improve the proportionality of the revised statute.

Fifth, the revised statute does not require a firearms dealer to record a purchaser's color. Current D.C. Code § 22-4510(a)(5) requires a firearms dealer to record this information. In contrast, the revised statute does not include "color," which is a protected

[7] The term "assault weapon" has the meaning specified in D.C. Code § 7-2501.01.

trait under the District's Human Rights Act.[8] This change improves the 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 defines the terms "assault weapon," "building," "firearm," "imitation firearm," "machine gun," "manufacturer," "possess," and "sawed-off shotgun," using standardized definitions in current law and the RCC. The revised statute also updates the phrase "Chief of Police for the District of Columbia" with "Chief of the Metropolitan Police Department," consistent with more recent provisions in current law and in the RCC.

Second, the revised statute uses the phrase "clearly and conspicuously displayed" instead of "displayed on the premises where it can be read," consistent with more recent provisions in current law and in the RCC.[9] These changes clarify the revised statute and improve the consistency of the revised code.

[8] D.C. Code § 2-1401.01 et. seq.
[9] *See* RCC §§ 7-2502.15(a)(1)(C); 22E-4102(a)(2)(C)(ii).

RCC § 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer.

Explanatory Note. *This section establishes the unlawful sale of a firearm by a licensed dealer offense for the Revised Criminal Code (RCC). Together with RCC § 22E-4114, the revised statute replaces D.C. Code § 22-4510 (Licenses of weapons dealers).*

Paragraph (a)(1) specifies that the revised statute applies to anyone who is a dealer licensed under RCC § 22E-4114. Paragraph (a)(1) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has a dealer's license.[1]

Paragraph (a)(2) requires that a dealer recklessly violate one or more of the licensure requirements in RCC § 22E-4114(b). "Reckless" is a defined term,[2] which, applied here, means the person must consciously disregard a substantial risk that their conduct violates a licensure requirement. The risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.[3]

Subsection (b) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *Two aspects of the revised offense may constitute substantive changes to District law.*

First, the revised statute requires that the accused act at least recklessly with respect to violating a licensure requirement. Current D.C. Code § 22-4510(a)(3) requires that a person have "reasonable cause to believe" that the purchaser is not of sound mind, prohibited from possessing a firearm under § 22-4503, or under 21 years of age. Other provisions in the current statute do not specify a requisite mental state and District case law has not addressed the issue. To resolve this ambiguity, the revised statute applies the RCC's standard mental state definition of recklessness[4] which, applied here, requires that a person consciously disregard a substantial risk that they are engaging in the prohibited conduct and that the conduct violates the District's licensing rules. The revised civil provisions for licenses of firearms dealers no longer include the phrase "reasonable cause to believe."[5] This change improves the consistency of the revised offenses.

Second, the revised statute holds an actor strictly liable as to the existence of a dealer's license. Current D.C. Code § 22-4510 does not specify any culpable mental states. District case law has not interpreted the statute's meaning. The revised statute nevertheless holds a person strictly liable as to this offense element. Although applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[6] and legal experts[7] for any non-regulatory crimes, the

[1] RCC § 22E-207.
[2] RCC § 22E-206.
[3] RCC § 22E-206.
[4] RCC § 22E-206.
[5] RCC § 22E-4114.
[6] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea

unlawful sale of a firearm by a licensed dealer offense is largely regulatory in nature and requires recklessness as to the violation of a licensure requirement. 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 provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4510 does not itself provide a criminal penalty, however, it states that a licensee shall be "subject to punishment as provided in this chapter." D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute does not provide liability for violations of D.C. Code § 22-4509. Current D.C. Code § 22-4510 cross-references § 22-4509 and states that a breach "shall be subject to forfeiture and the licensee subject to punishment as provided in this chapter." The revised code replaces § 22-4509 with RCC § 22-4112. This change logically reorders and clarifies the revised statutes.

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4510 restricts the sale of firearms "within the District of Columbia." This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District's boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

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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).").

[7] *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).

RCC § 22E-4116. Use of False Information for Purchase or Licensure of a Firearm.

Explanatory Note. *This section establishes the use of false information for purchase or licensure of a firearm offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4511 (False information in purchase of weapons).*

Subsection (a) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are giving false information or false evidence. Paragraph (a)(1) requires the false information or evidence be given to purchase a firearm. "Purchase" is an undefined term, intended to include any exchanging of firearm for monetary remuneration. The term "firearm" is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, paragraph (a)(1) requires that the person also know—that is, be practically certain—that they are giving the information in order to purchase a firearm.

Alternatively, paragraph (a)(2) requires the false information or evidence be given to apply for a license to carry a pistol. Paragraph (a)(2) requires that a person know—that is, be practically certain—that they are giving the information in order to apply for a license to carry a pistol under RCC § 22E-4110. The term "pistol" has the meaning specified in D.C. Code § 7-2501.01.

Subsection (b) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

Subsection (c) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised use of false information for purchase or licensure of a firearm offense changes current District law in one main way.*

The revised statute applies to all firearms. Current D.C. Code § 22-4511 prohibits using false information to purchase "a machine gun, sawed-off shotgun, or blackjack." In contrast, the revised statute does not include address purchases of blackjacks, but does address purchases of all firearms. There is no clear rationale for not including other firearms, such as pistols, rifles, and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Beyond this change, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4509 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes the statute as an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying

a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[1] This change clarifies the revised statute.

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

The revised statute defines the terms "firearm" and "pistol" using standardized definitions in current law and the RCC. These changes clarify the revised statute and improve the consistency of the revised code.

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4511 restricts the sale of firearms "within the District of Columbia." This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District's boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

[1] 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)).

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for taking and destruction of dangerous articles for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4517 (Dangerous articles; definition; taking and destruction; procedure).*

The revised civil provisions for taking and destruction of dangerous articles may change current District law in two ways.

First, the revised provision clarifies that the statute operates as a civil provision and does not create a misdemeanor offense. Current D.C. Code § 22-4517 does not explicitly prohibit or affirmatively require any particular conduct. However, § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes the statute as civil provisions instead of an offense. This change clarifies the revised statute.

Second, the revised statute updates the definition of "dangerous article" to align with the definitions in the revised criminal code. Current D.C. Code § 22-4517 defines the term "dangerous article" to mean "(1) Any weapon such as a pistol, machine gun, sawed-off shotgun, blackjack, slingshot, sandbag, or metal knuckles; or (2) Any instrument, attachment, or appliance for causing the firing of any firearms to be silent or intended to lessen or muffle the noise of the firing of any firearms." The term "weapon" is not defined in the statute and District case law has not addressed its meaning. In contrast, the revised statute defines the term "dangerous article" to include a firearm,[1] a restricted explosive,[2] firearm silencer, a bump stock,[3] or a large-capacity ammunition feeding device.[4] Although bump stocks and large-capacity ammunition feeding devices do not necessarily constitute weapons, like silencers they are designed to make firearms more lethal. The phrase "any weapon such as" may be broader or narrower than the revised definition. This change clarifies and improves the consistency of the revised statutes.

[1] Defined in RCC § 22E-701.
[2] Defined in RCC § 22E-701.
[3] Defined in RCC § 22E-701.
[4] Defined in RCC § 22E-701.

RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

Explanatory Note. *This section establishes exclusions from liability for specified weapons offenses in the Revised Criminal Code (RCC). The provision excludes liability for legal duties and activities that necessarily require possessing or carrying dangerous weapons. The revised statute replaces D.C. Code §§ 22-4504.01 (Authority to carry firearm in certain places and for certain purposes) and 22-4505 (Exceptions to § 22-4504). The revised statute also effectively replaces the exclusion clauses within D.C. Code §§ 7-2502.15(c) (Possession of stun guns);[1] 7-2506.01(a)(1), (2), and (5) (Persons permitted to possess ammunition); 22-4514(a) (Possession of certain dangerous weapons prohibited; exceptions);[2] and 22-4502.01(c) (Gun Free Zones).[3]*

Subsection (a) specifies that the exclusions from liability apply only to certain offenses in Chapter 41 of Title 22E. The exclusions apply to possession of an unregistered firearm, destructive device, or ammunition;[4] possession of a stun gun;[5] carrying an air or spring gun;[6] carrying a pistol in an unlawful manner;[7] possession of a prohibited weapon or accessory,[8] and carrying a dangerous weapon.[9] The exclusions do not apply to unlawful storage of a firearm;[10] possession of a dangerous weapon with intent to commit crime;[11] possession of a dangerous weapon during a crime;[12] possession of a firearm by an unauthorized person;[13] negligent discharge of firearm;[14] alteration of a

[1] "…[E]xcept a law enforcement officer as defined in § 7-2509.01."
[2] "…[M]achine guns, or sawed-off shotgun, knuckles, and blackjacks may be possessed by the members of the Army, Navy, Air Force, or Marine Corps of the United States, the National Guard, or Organized Reserves when on duty, the Post Office Department or its employees when on duty, marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly-appointed law enforcement officers, including any designated civilian employee of the Metropolitan Police Department, or officers or employees of the United States duly authorized to carry such weapons, banking institutions, public carriers who are engaged in the business of transporting mail, money, securities, or other valuables, wholesale dealers and retail dealers licensed under § 22-4510."
[3] "The provisions of this section shall not apply to…members of the Army, Navy, Air Force, or Marine Corps of the United States; the National Guard or Organized Reserves when on duty; the Post Office Department or its employees when on duty; marshals, sheriffs, prison, or jail wardens, or their deputies; policemen or other duly-appointed law enforcement officers; officers or employees of the United States duly authorized to carry such weapons; banking institutions; public carriers who are engaged in the business of transporting mail, money, securities, or other valuables; and licensed wholesale or retail dealers."
[4] RCC § 7-2502.01.
[5] RCC § 7-2502.15.
[6] RCC § 7-2502.17.
[7] RCC § 7-2509.06.
[8] RCC § 22E-4101.
[9] RCC § 22E-4102.
[10] RCC § 7-2507.02.
[11] RCC § 22E-4103.
[12] RCC § 22E-4104.
[13] RCC § 22E-4105.
[14] RCC § 22E-4106.

firearm identification mark,[15] or any other weapons offense. However, other exclusions under federal law may apply to these latter offenses.[16]

Subsection (b) excepts from liability 10 classes of professionals who handle dangerous weapons as a part of their work. Paragraph (b)(1) excludes liability for a member of the Army, Navy, Air Force, or Marine Corps of the United States.[17] Paragraph (b)(2) excludes liability for a member of the National Guard or Organized Reserves when on duty.[18] Paragraph (b)(3) excludes liability for a qualified law enforcement officer as defined in 18 U.S.C. § 926B.[19] Paragraph (b)(4) excludes liability for a qualified retired law enforcement officer as defined in 18 U.S.C. § 926C, who carries a concealed pistol that is registered under D.C. Code § 7-2502.07 in a location that is conveniently accessible and within reach.[20] Paragraph (b)(5) excludes liability for an on-duty licensed special police officer or campus police officer, who possesses or carries a firearm registered under D.C. Code § 7-2502.07 in accordance with D.C. Code § 5-129.02 and all rules promulgated under that section.[21] Paragraph (b)(6) excludes liability for an on-duty director, deputy director, officer, or employee of the District of Columbia Department of Corrections who possesses or carries a firearm registered under D.C. Code § 7-2502.07.[22] Paragraph (b)(7) excludes liability for an employee of the District or federal government, who is on duty and acting within the scope of those duties.[23] Paragraph (b)(8) excludes liability for a person who is lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense.[24] The word "lawfully" should be construed to require that the person is authorized by law to manufacture, repair, or sell weapons. Paragraph (b)(9) excludes liability for a person who is lawfully acting as a public carrier.[25] The word "lawfully" should be construed to

[15] RCC § 22E-4107.
[16] *See, e.g.*, 18 U.S.C. §§ 926A, B, and C.
[17] D.C. Code §§ 22-4514(a); 22-4502.01(c); 22-4505(a)(3).
[18] D.C. Code §§ 22-4514(a); 22-4502.01(c); 22-4505(a)(3).
[19] *See* D.C. Code §§ 7-2502.15(c); 22-4514(a); 22-4502.01(c); 22-4505(a)(1) and (3) (IRS and OIG agents appear to meet the definition of a "qualified law enforcement officer" in 18 U.S.C. 926B(c)).
[20] D.C. Code § 22-4505(b).
[21] D.C. Code §§ 7-2502.15(c); 22-4514(a) ("other duly-appointed law enforcement officers"); 22-4505(a)(2).
[22] D.C. Code §§ 22-4514(a) ("prison or jail wardens, or their deputies"); 22-4502.01(c) ("prison or jail wardens, or their deputies"); 22-4505(a)(1) ("prison or jail wardens, or their deputies").
[23] *See* D.C. Code §§ 7-2506.01(a)(2) ("an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties"); 22-4514(a) ("any designated civilian employee of the Metropolitan Police Department, or officers or employees of the United States duly authorized to carry such weapons"); 22-4502.01(c) ("officers or employees of the United States duly authorized to carry such weapons"); 22-4505(a)(4) ("Officers or employees of the United States duly authorized to carry a concealed pistol"). For example, an Assistant United States Attorney may inspect or transport a weapon to court as evidence in a criminal trial.
[24] D.C. Code §§ 7-2506.01(a)(1) ("a licensed dealer pursuant to subchapter IV of this unit"); 22-4505(a)(5) ("Any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business").
[25] D.C. Code §§ 22-4514(a); 22-4502.01(c) ("the Post Office Department or its employees when on duty… [or] public carriers who are engaged in the business of transporting mail, money, securities, or other valuables").

require that the person is authorized by law to ship or deliver weapons.[26] Paragraph (b)(10) excludes liability for a person who is acting within the scope of authority granted by the Metropolitan Police Department[27] or a competent court.[28]

Subsection (c) applies to registered firearm owners. Subparagraph (c)(2)(A) provides that a registered owner may carry their firearm or ammunition where the firearm is registered.[29] Subparagraph (c)(2)(B) provides that a registered owner may carry their firearm or ammunition in accordance with RCC § 22E-4109 to or from their home or business,[30] a place of sale,[31] a place of repair,[32] a training class,[33] or a recreational activity.[34] Subparagraph (c)(2)(C) provides that a registered owner may carry their firearm while transporting it for any other lawful purpose expressly authorized by a District or federal statute, provided that it is transported in accordance with the requirements of that statute.[35]

Subsection (d) applies to any person who is participating in a class taught by a firearm instructor.[36] The term "firearm instructor" has the meaning specified in D.C. Code § 7-2501.01.

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised exclusions from liability for weapons offenses provision changes current District law in six main ways.*

First, the revised statute applies standardized exclusions from liability to all possessory weapons offenses. Under current law, there is considerable inconsistency between the exclusionary provisions. The following three examples provide an illustrative, though inexhaustive, list. First, a person who participates in a firearms training and safety class is not liable for transporting a registered firearm to or from the class[37] and is not liable for possessing ammunition during the class,[38] however, there is no exception in current law for possessing a firearm during a firearm training and safety class. Second, a member of the military avoids prosecution for possession of an assault

[26] For example, if a particular FedEx store is out of compliance with the noise regulations in 20 DCMR § 2701, the exclusion from liability nevertheless extends to each carrier in the store.
[27] For example, MPD may authorize a defense investigator to view a weapon or authorize a fingerprint expert to inspect a weapon at its evidence control office.
[28] *See, e.g.*, Model Penal Code § 3.03(1)(c).
[29] D.C. Code § 22-4504.01(1). In *Heller I*, the United States Supreme Court explained that it violates the Second Amendment to forbid carrying a lawful firearm in the home for the purpose of immediate self-defense. 554 U.S. 570 (2008).
[30] D.C. Code §§ 22-4504.01(1) and (3); 22-4505(a)(6).
[31] *See* D.C. Code § 22-4505(a)(6) ("place of purchase"). The phrase "place of sale" includes the place where the registrant bought the firearm and the place where the registrant sells the firearm to a licensed dealer, pursuant to D.C. Code § 7-2505.02.
[32] D.C. Code § 22-4505(a)(6).
[33] D.C. Code § 22-4505(c).
[34] D.C. Code §§ 22-4504.01(2); 22-4505(a)(6).
[35] D.C. Code §§ 22-4504.01(4); 22-4504.02(a).
[36] D.C. Code § 7-2506.01(a)(5).
[37] *See, e.g.*, D.C. Code § 22-4504.02(a); 22-4505(c).
[38] D.C. Code § 7-2506.01(a)(5).

weapon, machine gun, or sawed-off shotgun,[39] however, there is no military exception for possession of a large-capacity ammunition feeding device.[40] Third, consistent with 18 U.S.C. 926C, D.C. Code § 22-4505(b) provides that a retired Metropolitan Police Officer who carries a registered firearm is not liable for carrying a dangerous weapon, however, D.C. Code § 22-4514(a) does not include a similar exception for possession of a prohibited weapon. In contrast, the revised statute applies identical exclusions to all weapons offenses that do not involve some other criminal intent or harm. This change logically reorders the revised statutes and improves the consistency and proportionality of the revised code.

Second, the revised statute excludes liability for a public carrier only if that person is acting within the scope of their professional duties. Current D.C. Code §§ 22-4515(a) (Possession of certain dangerous weapons prohibited; exceptions) and 22-4502.01(c) (Gun Free Zones) exclude from liability "the Post Office Department or its employees when on duty" as well as "public carriers who are engaged in the business of transporting mail, money, securities, or other valuables." The Post Office Department was subsequently abolished and all its functions, powers, and duties were transferred to the United States Postal Service.[41] Although a carrier should not be liable for possession of an object it has been hired to ship and deliver, there is no clear rationale for a blanket exception that allows a postal worker to carry their own assault weapon or machine gun while on duty. The revised statute specifies that the exclusion applies only if the person is lawfully engaging in the business of shipping or delivering the weapon involved in the offense. This change eliminates an unnecessary gap in liability.

Third, the revised statute narrows the exclusion from liability for the subclass of law enforcement officers who do not have arrest authority. Current D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) exclude from liability "prison or jail wardens, or their deputies." District case law has held that a Department of Corrections employee may carry a firearm whether on or off duty.[42] Current D.C. Code §§ 7-2502.15(c) (concerning possession of stun guns);[43] 22-4514(a) (concerning possession of a prohibited weapon);[44] and 22-4505(a)(2) (concerning carrying a dangerous weapon)[45] each include an exclusion for special police officers and campus police officers. D.C. Code § 22-4505(a)(2) specifies that its exclusion applies only to special police officers and campus police officers who are carrying a firearm and only if they are acting within

[39] D.C. Code § 22-4514(a).
[40] D.C. Code § 7-2506.01(b).
[41] § 4(a) of the Act of August 12, 1970, 84 Stat. 773, Pub.
[42] *See United States v. Pritchett*, 470 F.2d 455 (D.C. Cir. 1972).
[43] D.C. Code § 7-2502.15(c) excludes liability for "a law enforcement officer as defined in § 7-2509.01." The definition that appears in § 7-2509.01 includes "a special police officer appointed pursuant to § 5-129.02, and a campus and a university special police officer appointed pursuant to the College and University Campus Security Amendment Act of 1995, effective October 18, 1995 (D.C. Law 11-63; 6A DCMR § 1200 et seq.)." However, 6A DCMR § 1200 was repealed on September 6, 2016.
[44] D.C. Code § 22-4514(a) excludes "other duly-appointed law enforcement officers."
[45] D.C. Code § 22-4505(a)(2) excludes "Special police officers and campus police officers who carry a firearm in accordance with D.C. Official Code § 5-129.02, and rules promulgated pursuant to that section."

the scope of their deputization.[46] Although an officer should not be liable for possession of a service weapon while on duty, there is no clear rationale for a blanket exception that allows a special police officer or Department of Corrections ("DOC") employee to carry their own firearm, prohibited weapon, or dangerous weapon under other circumstances. The revised statute effectively limits special police officers, campus police officer, and DOC employees to the firearms they are authorized to use in the course of their duties. This change reduces an unnecessary gap in liability.

Fourth, the revised statute excludes from liability any person who is acting within the scope of authority granted by the Metropolitan Police Department ("MPD") or a competent court. Current D.C. Code §§ 22-4514(a) and 22-4502.01 exclude liability for "any designated civilian employee of the Metropolitan Police Department." Although an unsworn administrative staff member may be tasked with ordering weapons or organizing inventory, there is no clear rationale for fully exempting—while on duty and off duty—approximately 600 employees who serve a variety of functions including software development, policy writing, and community outreach. On the other hand, this provision appears to be underinclusive, failing to reach non-employees (e.g., firearms instructors, forensic experts, defense investigators) who are temporarily authorized to handle weapons at a firing range or through the evidence control branch. The revised provision specifies that any person who is authorized by the police chief or a court to possess or carry a weapon may not be prosecuted for any offense listed in subsection (a). This change eliminates an unnecessary gap in liability and improves the proportionality of the revised offenses.

Fifth, the exclusion for manufacturing, repairing, or dealing applies to all weapons, not only firearms. D.C. Code § 22-4505(a)(5) provides that §§ 22-4504(a) and 22-4504(a-1) do not apply to "[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business." There is no similar exclusion under current law for the producers and retailers of other weapons, such as stun guns or ammunition. In contrast, the revised statute provides a safe harbor for anyone who is "lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense." This change improves the consistency and proportionality of the revised offenses.

Sixth, the revised statute does not provide an exclusion for bankers. Current D.C. Code §§ 22-4514(a) and 22-4502.01 explicitly exclude "banking institutions." There is no clear rationale for the categorical exception for banks. Where a bank or other public storage provider permits a customer to keep a weapon a safe deposit box, the institution does not meet the revised definition of "possession," which requires the ability and desire to exercise control over the object and to guide its destiny.[47] The revised statute eliminates the exception for banking institutions and thereby eliminates an unnecessary gap in liability.

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[46] *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979) (explaining a special police officer will be considered a policeman or law enforcement officer only to the extent that he acts in conformance with the regulations governing special officers).

[47] RCC § 22E-701; *see also In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

Beyond these changes, six other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute uses standardized definitions of "qualified law enforcement officer" and "qualified retired law enforcement officer" in Title 18 of the United States Code. Current D.C. Code § 7-2502.15(c), by cross reference to § 7-2509.01, provides an exception for members of a law enforcement agency operating in the District of Columbia. D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) provide an exception for "policemen," an undefined term. D.C. Code § 7-2506.01(a)2) provides an exception for "an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties." D.C. Code § 22-4505(b) provides an exception for retired MPD officers. The definitions of "qualified law enforcement officer" in 18 U.S.C. § 926B and "qualified retired law enforcement officer" in 17 U.S.C. § 926C appear to be broader than District-operating officers but narrower than "policemen." The revised statute aligns the revised statutes with federal law. This change improves the consistency and proportionality of the revised offenses.

Second, the revised statute includes an exception for DOC employees. D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) provide an exception for "prison or jail wardens, or their deputies." The term "deputy" is not defined in the statute, however, District case law explains that it includes, not only the warden's direct supervisees, but also corrections officers.[48] Case law has not addressed whether other DOC employees, such as administrative staff, are also included. Consistent with the definition of "law enforcement officer" in RCC § 22E-701, the revised statute applies to a "Director, deputy director, officer, or employee of the District of Columbia Department of Corrections." This change improves the clarity and consistency of the revised statute.

Third, the revised statute clarifies and possibly narrows the exclusion for transporting a firearm. D.C. Code § 22-4505(a)(6) provides an exception for someone who is transporting a pistol "from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business or in moving goods from one place of abode or business to another, or to or from any lawful recreational firearm-related activity." The current statutory language does not specify that the pistol must be lawfully purchased or registered. There is no clear rationale for excluding people who purchase firearms illegally from the reach of the carrying a dangerous weapon statute. [49] The current statutory language includes transportation from "place of purchase" but does not mention transportation to a licensed firearms dealer for

[48] *United States v. Pritchett*, 470 F.2d 455, 456 (D.C. Cir. 1972).

[49] In contrast, current D.C. Code § 22-4504.01(4) permits a registrant to carry their firearm "While it is being transported for a lawful purpose as expressly authorized by District or federal statute and in accordance with the requirements of that statute." And, D.C. Code § 22-4504.02(a) more broadly permits any person to "transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm." Current D.C. Code § 7-2502.01(b)(3) requires that "possession or control of such firearm is lawful in the jurisdiction in which [the defendant] resides."

the purpose of reselling the firearm pursuant to D.C. Code § 7-2505.02.[50] The current statutory language does not define the phrase "moving goods from one place of abode to or business to another." The statute could be read narrowly to mean changing one's residence or business address. Or, the statute could be read broadly to include traveling from one's own residence or business to another person's residence or business. In contrast, the revised exclusion in RCC § 22E-4118(c)(2) applies only to registered owners and only to transportation to or from a place of sale, the person's home or business, a place of repair, a training and safety class, or a lawful recreational firearm-related activity. These changes improve the clarity and consistency of the revised statutes and may eliminate an unnecessary gap in liability.

Fourth, the revised statute clarifies that the exclusion only applies to a person who is manufacturing, repairing, or dealing in weapons if that person is doing so lawfully. D.C. Code § 22-4505(a)(5) provides that §§ 22-4504(a) and 22-4504(a-1) do not apply to "[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business." District case law has clarified, however, that this exception does not categorically apply to all persons engaged in manufacturing, repairing, or dealing. For this exception to apply the person's activity must be more than a hobby[51] and the conduct in question must coincide with the actual performance of a business duty.[52] To capture the limitations in District case law and ensure only legitimate business activities are excluded, the revised statute requires that the dealer—or the dealer's designee—be "lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense." There is no clear rationale for excepting illegal arms dealers from the carrying a dangerous weapon offense. This change clarifies the revised statute and may reduce an unnecessary gap in liability.

Fifth, the revised statute clarifies that a person who may carry or transport a firearm may also carry or transport ammunition for that firearm. D.C. Code § 22-4504.01 begins, "Notwithstanding any other law, a person holding a valid registration for a firearm may carry the firearm…" D.C. Code § 22-4504.02(a) begins, "Any person who is not otherwise prohibited by the law from transporting, shipping, or receiving a firearm shall be permitted to transport a firearm…" There is no clear rationale for failing to include ammunition within the scope of each exclusion. In fact, § 22-4504.01(b)(1) appears to assume that the firearm will be accompanied by ammunition, stating "neither the firearm nor any ammunition being transported shall be readily accessible." However, there is no case law construing this provision. This change clarifies the revised statute and may improve the proportionality of the revised offenses.

Sixth, the revised statute does not contain a specific exclusion for members of an organization duly authorized to purchase or receive weapons from the United States.

[50] *But see* D.C. Code § 22-4504.02(a), which more broadly permits any person to "transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm."
[51] *Cormier v. United States*, 137 A.2d 212, 215 (D.C. 1957).
[52] *Bsharah v. United States*, 646 A.2d 993, 998 (D.C. 1994).

Current D.C. Code § 22-4505(a)(3) excludes "the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States; provided, that such members are at or are going to or from their places of assembly or target practice." It is not clear who would meet this classification other than members of the military,[53] qualified law enforcement officers as defined in 18 U.S.C. 926B,[54] and persons acting within the acting within the authority of the Chief of Police or a competent court,[55] each of which is excluded under the revised statute. Accordingly, this exception is removed as superfluous. This change improves the logical ordering and clarity of the revised statute and may eliminate an unnecessary gap in liability.

[53] Excepted under RCC § 22E-4118(b)(1).
[54] Excepted under RCC § 22E-4118(b)(3).
[55] Excepted under RCC § 22E-4118(b)(10).

RCC § 22E-4119. Limitation on Convictions for Multiple Related Weapons Offenses.

Explanatory Note and Relation to Current District Law. *This section establishes a merger provision for weapons offenses in the Revised Criminal Code (RCC). The provision limits the number of convictions that can be entered for a single instance of possessing, carrying, and using a weapon. There is no corresponding provision in current District law.*

The revised statute is consistent with the procedural aspects of the provisions in RCC § 22E-214, merger of related offenses. The offenses enumerated in subsection (a) involve similar social harms. Namely, each offense requires that a person possess or carry one or more weapons without permission to do so. The offenses enumerated in subsection (b) are also related by the social harm involved, namely, the possession or carrying of a weapon in order to perpetrate another crime.[1]

The revised statute, by omission, allows for multiple convictions and possible consecutive sentences: unlawful storage of a firearm;[2] carrying a pistol in an unlawful manner;[3] possession of a prohibited weapon or accessory;[4] possession of a firearm by an unauthorized person;[5] negligent discharge of firearm;[6] alteration of a firearm identification mark;[7] and any other offense.

The revised limitation on convictions for multiple related weapons offenses provision changes current District law in three main ways.

First, under the RCC, a conviction for possession of an unregistered firearm, destructive device, or ammunition will merge with a conviction for other possessory weapons offenses arising out of the same course of conduct. The current D.C. Code does not address merger of these offenses. Under current District case law, multiple convictions for a possession of an unregistered firearm[8] merge and multiple convictions for possession of ammunition[9] merge.[10] However, possession of an unregistered firearm[11] does not merge with carrying a pistol without a license.[12] In contrast, the

[1] *See Hawkins v. United States*, 119 A.3d 687, 703 (D.C. 2015) (explaining that carrying a pistol without a license does not merge with possession of a firearm during a crime of violence because the latter does not require proof that the person was unlicensed to carry the weapon).
[2] RCC § 7-2507.02.
[3] RCC § 7-2509.06.
[4] RCC § 22E-4101.
[5] RCC § 22E-4105.
[6] RCC § 22E-4106.
[7] RCC § 22E-4107.
[8] D.C. Code § 7-2507.06.
[9] D.C. Code § 7-2506.01.
[10] Under current District law, the court may only enter a single judgment of conviction for a single instance of possessing or carrying multiple weapons without permission. *Cormier v. United States*, 137 A.2d 212, 217 (D.C.1957); *Little v. United States*, 709 A.2d 708, 715 (D.C. 1998); *Headspeth v. Dist. of Columbia*, 53 A.3d 304, 307 (D.C. 2012); *but see Chapman v. United States*, 493 A.2d 1026 (1985) (permitting the government to charge one count of possession of an *unregistered* firearm for one gun and one count of carrying pistol without *license* for another gun possessed at the same time).
[11] D.C. Code § 7-2507.06.
[12] D.C. Code § 22-4504(a); *Tyree v. United States*, 629 A.2d 20 (D.C. 1993).

revised statute merges possession of an unregistered firearm with carrying without a license as both statutes are directed at similar social harms. This change improves the proportionality of the revised statutes.

Second, under the RCC, a conviction for possession of a dangerous weapon with intent to commit crime[13] and a conviction for possession of a dangerous weapon during a crime[14] merge with any offense against persons that accounts for the display or use of a dangerous weapon in its gradation structure. Under current law, a conviction for possession of a prohibited weapon with intent to commit crime ("PPW-b")[15] and a conviction for possession of a firearm during a crime of violence or dangerous crime ("PFCV")[16] do not merge.[17] Further, under current law, a crime of violence that includes as an element possession of a firearm—e.g., armed kidnapping, armed burglary, armed robbery, assault with a dangerous weapon—does not merge with PFCV, even though a person who commits the predicate offense necessarily commits PFCV also.[18] In contrast, the RCC prevents stacking weapons-based penalty enhancements in the Subtitle II with penalties for weapons possession in Chapter 41, as these statutes are directed at similar social harms.[19] This change improves the proportionality of the revised offenses.

[13] RCC § 22E-4103.
[14] RCC § 22E-4104.
[15] D.C. Code § 22-4514(b).
[16] D.C. Code § 22-4504(b).
[17] *Bell v. United States*, 950 A.2d 56, 73 (D.C. 2008) (finding each offense requires an element that the other does not).
[18] *See*, *Thomas v. United States*, 602 A.2d 647 (D.C. 1992); *see also Stevenson v. United States*, 760 A.2d 1034, 1035 (D.C. 2000) (affirming convictions for armed robbery, armed burglary, and one count of PFCV for each); *Sanders v. United States*, 809 A.2d 584, 603 (same); *Hanna v. United States*, 666 A.2d 845, 855 (D.C. 1995).
[19] Consider, for example, a person who carries a concealed, licensed firearm when the person assaults and breaks a person's finger—the firearm never being used or displayed. Under current law, such a person faces a mandatory minimum of 5 years and a maximum penalty of 48 years imprisonment: 3 years for felony assault (D.C. Code § 22-404(a)(2)) based on the harm of breaking the finger, plus an additional 5-15 years for possessing a firearm during the assault (D.C. Code § 22-4504(b)), plus an additional 5-30 years for having a firearm readily available during the robbery (D.C. Code § 22-4502). The liability for committing the offense while armed but not using the firearm is 16 times the maximum penalty a person would otherwise face for the harm done to the victim under D.C. Code § 22-404(a)(2).

RCC § 22E-4201. Disorderly Conduct.

Explanatory Note. *This section establishes the disorderly conduct offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that disrupts or potentially disrupts a public place and is not protected by the First Amendment or District law. The RCC disorderly conduct statute addresses conduct that: causes a person reasonably to believe a specified criminal harm is likely to occur to them; directs someone present to engage in a specified criminal harm where the harm is likely to occur; directs abusive speech to a person that is likely to provoke a specified retaliatory criminal harm; or involves continued fighting after receiving a law enforcement officer's order to cease. The disorderly conduct statute uniquely addresses inchoate conduct that may not constitute an attempted criminal threat, menace, assault, destruction of property, or theft. The revised offense replaces subsection (a) and, in concert with other provisions of the RCC,[1] subsection (g) of D.C. Code § 22-1321, the District's disorderly conduct statute.[2] The revised offense also replaces the District's affrays statute in D.C. Code § 22-1301.[3]*

Paragraph (a)(1) provides that the accused's conduct must occur in a place that is either open to the general public or the communal area of multi-unit housing. The phrase "open to the general public" is defined to mean no payment, membership, affiliation, appointment, or special permission is required to enter.[4] "In fact," a defined term,[5] is used to indicate that there is no culpable mental state requirement as to whether the location is open to the general public or a communal area of multi-unit housing.

Paragraph (a)(2) specifies four basic types of disorderly conduct: causing fear of crime, inciting crime, provoking crime, and public fighting.

Subparagraph (a)(2)(A) punishes reckless conduct other than speech that causes another person to fear that they will sustain a bodily injury, taking of property, or damage to property. The accused's conduct must actually cause another person to reasonably believe that one of those dangers is likely to occur immediately and that he or she will be the victim.[6] "Speech" is a defined term and means oral or written language, symbols, or gestures.[7] "Bodily injury" is a defined term and means physical pain, illness, or any

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[1] *See* commentary regarding theft from a person RCC § 22E-2101(c)(4) and RCC § 22E-1205 offensive physical contact.

[2] Other subsections of D.C. Code § 22-1321, concerning nuisance and stealthily looking into a dwelling where there is an expectation of privacy, are addressed in different sections of the RCC. *See* RCC §§ 22E-4202 (Public Nuisance) and 22E-4205 (Breach of Home Privacy).

[3] D.C. Code § 22-1301 ("Whoever is convicted of an affray in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both.").

[4] RCC § 22E-701. 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. Similarly, a restaurant and bar may be open to the general public during the day but impose an age limit and require identification late at night. 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" for the purposes of this statute.

[5] RCC § 22E-207.

[6] "We hold that § 22-1321 (a)(1) requires proof that the defendant's charged conduct placed another person in fear of harm to his or her person." *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).

[7] RCC § 22E-701.

impairment of physical condition.[8] "Property" is a defined term and means anything of value. The affected person must be placed in fear of a criminal harm.[9] The affected person must fear that the criminal harm will occur immediately, not in the future. And, the affected person's fear must be objectively reasonable.[10]

Subparagraph (a)(2)(A) also specifies the culpable mental state required is recklessness, a term defined in RCC § 22E-206. As applied here, the accused must be aware that there was a substantial risk that the conduct will cause another person to be afraid of suffering a criminal harm.[11] The conduct must also be clearly blameworthy under the circumstances. A person does not commit disorderly conduct when he or she exercises reasonable caution or where he or she deviates only slightly from the ordinary standard of care.[12]

Subparagraph (a)(2)(B) punishes publicly inciting others to violence consisting of a criminal harm involving bodily injury, taking of property, or damage to property. It also must be proven that the harm is likely[13] to occur. This provision requires two culpable mental states. First, the person must act purposely, a defined term,[14] which here means the person must consciously desire to cause another person to immediately engage in criminal harm. The person's statement must be a specific directive to act now, not merely general encouragement of violence against a particular group or in the name of a particular cause. Second, the person must be reckless as to the fact that the solicited harm is likely to occur. "Recklessness" is defined in the revised code,[15] and here means that the person must be aware of a substantial risk that the listener will follow the command and the person's conduct must be clearly blameworthy under the circumstances.

Subparagraph (a)(2)(C) punishes directing abusive speech[16] to someone in a public place, which are likely[17] to provoke immediate, violent retaliation. To commit

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[8] RCC § 22E-701.

[9] Consider, for example, a person who becomes afraid that a repossession officer will tow away their car, due to delinquent payments. That harm (alone) is not a criminal taking of property and, without more, the officer's conduct is not disorderly.

[10] For example, a fear of theft or violence based on prejudicial beliefs about race or sex is not objectively reasonable.

[11] For example, a person who enters an area of a park that, on inspection, appears to be vacant. She then swings a stick wildly while screaming obscenities, scaring someone who walks into the area, thinking they are being attacked. She has not committed disorderly conduct because she was not aware of a substantial risk that any person could see her or hear her.

[12] For example, a person playing kickball in a public park who chases the ball near a group of uninvolved bystanders, alarming them. However agile or clumsy the athlete might be, it is unlikely that her movements will rise to the level of disorderly conduct because a person of ordinary caution would likely chase after the ball in the same manner, under the same circumstances.

[13] Whether a harm is likely to occur is a fact-sensitive inquiry. For example, where a person commands one unarmed person to "attack" a group of four well-armed police officers, it may not be likely that the listener will heed the command. Consider also, a person who tries to persuade a group of pacifist protestors to burn down the city.

[14] RCC § 22E-206.

[15] RCC § 22E-206.

[16] "Abusive speech" has the same meaning as "fighting words:" "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, (1942).

[17] Whether a harm is likely to occur is a fact-sensitive inquiry. For example, where a person commands one unarmed person to "attack" a group of four well-armed police officers, it may not be likely that the

disorderly conduct by abusive speech, a person must act with the purpose of directing the speech to another person.[18] "Purposely" is a defined term[19] and here means that the speaker must consciously desire that the manner of the speech be seriously upsetting the listener.[20] The term "speech" is defined in RCC § 22E-701 to mean oral or written language, symbols,[21] or gestures.[22] The person must also be reckless as to the fact that the speech is likely to provoke a violent response. "Recklessness" is also defined in the revised code,[23] and here means that the person must be aware of a substantial risk that the listener will retaliate[24] and the person's conduct must be clearly blameworthy under the circumstances.

Subparagraph (a)(2)(D) prohibits public fighting after receiving a law enforcement officer order to stop. The term "fighting" is not statutorily defined, and is not restricted to the infliction of bodily injury required for assault offenses[25] or offensive touching as is required for offensive physical contact.[26] Unlike assault and offensive physical contact, effective consent is not an available defense to public fighting that violates subparagraph (a)(2)(D).[27] The government must prove that the accused received a law enforcement order to stop fighting and that the accused continued or resumed fighting in disregard of that directive. "Knowingly" is a defined term[28] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[29] "Law enforcement officer" is a defined term.[30] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the order to cease. A person must be afforded fair notice and a reasonable opportunity to comply with the law

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listener will heed the command. Consider also, a person who tries to persuade a group of pacifist protestors to burn down the city.

[18] The intended recipient of the speech may be a particular individual or a large and amorphous group of people near enough to see or hear the speaker.

[19] RCC § 22E-206.

[20] No particular word or image categorically qualifies as abusive speech. A word's connotation and denotation may change over time. The offensiveness of a word may depend on the identity of speaker, the audience, or the sensitivity of the moment.

[21] For example, a sign with a swastika, a car decal bearing a Redskins logo, a red hat with the initials "MAGA," or a noose as a prop, could be considered an abusive symbol, depending on the time, place, and manner of their use.

[22] Some gestures (e.g., a raised middle finger) are widely understood to carry a particular verbal meaning. Whether a gesture is abusive and whether provocation is likely depends on the time, place, and manner in which the gesture is used, not the content of the verbal translation alone.

[23] RCC § 22E-206.

[24] Whether a listener is likely to be provoked to immediate, retaliatory criminal harm is a fact-sensitive inquiry.

[25] RCC § 22E-1202.

[26] RCC § 22E-1205.

[27] *See Woods v. United States*, 65 A.3d 667, 669-671 (D.C. 2013) (explaining consent is no defense to an assault that occurs in a public place because a public assault is a crime against the public generally); *see also* D.C. Code § 22-1301 (criminalizing affrays).

[28] RCC § 22E-206.

[29] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit disorderly conduct by public fighting.

[30] RCC § 22E-701.

enforcement order to stop fighting.[31] Where a person is uncertain as to whether they can safely comply with the order, a justification defense also may apply.

Subsection (b) establishes two exclusions from liability for the revised disorderly conduct offense. Paragraphs (b)(1) and (b)(2) categorically exclude as a basis for disorderly conduct liability behaviors that frighten, offend, or provoke a law enforcement officer in the course of his or her official duties.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised disorderly conduct statute changes current District law[32] in two main ways.*

First, the revised statute specifies that conduct that frightens, offends, or provokes a law enforcement officer can never be the basis for disorderly conduct.[33] Subsection (a) of the current disorderly conduct statute punishes three basic types of misconduct in public: causing fear of crime,[34] inciting crime,[35] and provoking crime.[36] Only the third type of conduct, criminalized by paragraph (a)(3) of the statute, explicitly excludes from liability language or gestures directed at a law enforcement officer while acting in his or her official capacity. Conduct criminalized under subsections (a)(1) and (a)(2) of the current statute does not provide an exception for conduct directed at law enforcement officers.[37] In contrast, the RCC codifies an exception to liability for engaging in conduct other than speech that causes a law enforcement officer to reasonably believe that he or she is likely to suffer an immediate criminal harm involving bodily injury, taking of property, or damage to property. Unlike other citizens, law enforcement officers regularly confront alarming behavior, are specially trained to resist provocation and

[31] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[32] The current disorderly conduct statute, D.C. Code § 22-1321, was revised in 2011 to significantly change the scope and language.

[33] RCC §§ 22E-4201(b)(2) and (b)(3).

[34] D.C. Code §22-1321(a)(1).

[35] D.C. Code §22-1321(a)(2).

[36] D.C. Code §22-1321(a)(3).

[37] To the extent that the current subsections (a)(1) and (a)(2) of the disorderly conduct statute, which do not explicitly exclude behavior directed at a law enforcement officer, include conduct also addressed by subsection (a)(3), the three provisions are in apparent conflict. For example, consider an actor, with a group of like-minded companions nearby, shouts racial slurs and gestures with his middle finger at an on-duty law enforcement officer, deserves to be taught a lesson. Depending on the facts, such conduct may satisfy the objective elements of subsection (a)(1) (causing the officer to be in reasonable fear he is about to be assaulted), subsection (a)(2) (provoking others to attack the officer), and (a)(3) (provoking immediate physical retaliation, although only subsection (a)(3) says that it cannot be applied to an on-duty officer.

determine what behavior is criminal or an attempted crime, and have the power to arrest where they reasonably believe a crime or attempted crime is occurring. Consequently, it is not necessary to criminalize conduct that falls short of such an attempted crime, and that is merely alarming to the law enforcement officer. On the other hand, when a person's conduct indicates that they are about to assault a law enforcement officer or harm the officer's property, a more serious punishment than disorderly conduct is warranted. This revision may better reflect recent Council determinations about the proper scope of the assault on a police officer statute,[38] and the Council's rationale for the current disorderly statute's exception[39] for fighting words directed at a law enforcement officer. This change improves the clarity, consistency, and proportionality of the offense.

Second, the revised disorderly conduct statute limits liability for consensual public fighting to continuing or resuming such conduct after a law enforcement order to cease. The current D.C. Code codifies a penalty for committing an "affray,"[40] however, no elements of the offense are codified.[41] There are no published cases where an individual has been convicted under the codified 'affray' statute in the District, however, a District court opinion from the mid-1800s references the fact that a common law affray occurs when two persons fight in public.[42] Dicta in District assault case law has stated that a public assault is punishable to the extent that it breaches public peace and order,[43] perhaps indirectly referring to the crime of affrays. In contrast, the revised disorderly conduct statute specifically punishes participating in public fighting only after a law enforcement officer has ordered the fight to end. This change eliminates liability for mutually-consensual horseplay or low-level fighting that does not involve significant bodily injury. The RCC disorderly conduct statute, per subparagraph (a)(2)(A) also provides liability for public fighting whenever a person recklessly causes another to reasonably believe that there is likely to be immediate and unlawful bodily injury—covering public fighting that involves infliction of significant bodily injury and non-

[38] *See generally* Report on Bill 21-360, "Neighborhood Engagement Achieves Results Act of 2015," Council of the District of Columbia Committee on Public Safety and the Judiciary (January 28, 2016).

[39] *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 Page 8 ("[T]he crime of using abusive or offensive language must focus on the likelihood of provoking a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse that might provoke or offend the ordinary citizen." And, "it seems unlikely at best that the use of bad language toward a police officer will provoke immediate retaliation or violence, not by him, but by someone else.").

[40] D.C. Code § 22-1301 provides, "Whoever is convicted of an affray in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

[41] The offense is an example of a "common law" offense whose elements are defined wholly by courts in past case opinions rather than in legislative acts.

[42] *Hedgpeth v. Rahim*, 213 F. Supp. 3d 211, 223 (D.D.C. 2016) (citing *United States v. Herbert*, 26 F. Cas. 287, 289, F. Cas. No. 15354a, 2 Hay. & Haz. 210 (D.C. Crim. Ct. 1856) ("In the case of sudden affray, where parties fought on equal terms, that is, at the commencement or onset of the conflict, it matters not who gave the first blow.")

[43] *See Woods v. United States*, 65 A.3d 667, 669-671 (D.C. 2013) (explaining consent is no defense to an assault that occurs in a public place because a public assault is a crime against the public generally).

consensual public fighting.[44] This change clarifies and improves the clarity, consistency, and proportionality of District laws, and reduces unnecessary overlap.

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

First, the revised statute specifies a culpable mental state for all offense elements other than the location, which is specified to be a matter of strict liability. The current disorderly conduct statute[45] begins with a prefatory clause "In any place open to the general public, and in the communal areas of multi-unit housing," but does not specify a culpable mental state for that circumstance. District case law does not address the matter. In paragraph (a)(1), the current statute specifies a mental state of "intentionally or recklessly." However, the current statute does not define "recklessly" and does not make clear whether a person must be reckless as to every result and circumstance in paragraph in (a)(1), or the following paragraphs (a)(2) and (3), which do not state any culpable mental states of their own. Again, District case law to date does not address culpable mental states for these provisions. The RCC resolves these ambiguities by clearly specifying the culpable mental states for all elements of the revised offense as being either strict liability (through use of the phrase "in fact") as to the location, or recklessly, purposely, or knowingly as to all other offense elements. These culpable mental state terms are defined in RCC § 22E-206.[46] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[47] However, recklessness is required for assault liability in RCC § 22E-1202, which criminalizes conduct closely related to paragraph (a)(2)(A) in the revise disorderly conduct offense. The heightened culpable mental state of purposely in paragraphs (a)(2)(B)-(a)(2)(C) distinguishes the use of speech which the actor does not know, or knows but does not wish, to be construed as provoking violence. This change improves the clarity, completeness, and the consistency of the revised offense, and, to the extent it may require a new culpable mental state as to some of the principal elements of the offense, improves its proportionality.[48]

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[44] Some instances of mutual combat are lawful and others are not. RCC § 22E-1202 explains that a person may not consent to significant bodily injury or serious bodily injury or to use of a firearm. "Significant bodily injury" and "serious bodily injury" are defined in RCC § 22E-701. "Firearm" is defined in D.C. Code § 22-4501(2A).

[45] D.C. Code § 22-1321.

[46] The revised disorderly conduct statute makes clear that the actor must consciously disregard a substantial risk that her conduct will lead an onlooker to reasonably believe one of three harms is likely to immediately occur. The RCC also makes clear that actor must be clearly blameworthy under the circumstances. Finally, the RCC makes clear that a person is strictly liable with respect to whether she is located in a place that is open to the general public or is the communal area of multi-unit housing.

[47] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[48] Were a person strictly liable for conduct that causes a breach of peace per D.C. Code § 22-1321(a)(2) and (a)(3), even mistakes or accidents by a defendant could be the basis of criminal liability for disorderly conduct. For example, a person who reasonably believes themselves to be alone in a park and recites provocative song lyrics containing "fighting words" may be guilty of disorderly conduct.

Second, the revised code defines the phrase "open to the general public."[49] The current disorderly conduct statute uses this phrase but does not define it, and there are no District of Columbia Court of Appeals ("DCCA") published opinions construing the phrase. The legislative intent behind the phrase is unclear,[50] and case law does not directly address its meaning.[51] To resolve any ambiguity, the RCC states that "open to the general public" means no payment or permission is required to enter. The revised definition effectively excludes public conveyances, private event arenas, schools, and detention facilities from the purview of the disorderly conduct statute. What amounts to disorderly conduct in any of these locations may result in other criminal liability under current law and the RCC,[52] giving law enforcement officers authority to immediately intervene and arrest when necessary to restore public order.[53] This change clarifies and improves the consistency and proportionality of the revised statute, and reduces unnecessary overlap.

Third, the revised statute, in concert with other RCC statutes, eliminates separate, distinct liability for jostling, crowding, and placing a hand near someone's purse or wallet. Subsection (g) of the current disorderly conduct statute provides, "It is unlawful, under circumstances whereby a breach of the peace may be occasioned, to interfere with any person in any public place by jostling against the person, unnecessarily crowding the person, or placing a hand in the proximity of the person's handbag, pocketbook, or

[49] RCC § 22E-701.

[50] In an earlier draft of the disorderly conduct legislation, before the Council formed the Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence, Bill 18-151 defined "public" as "affecting or likely to affect persons in a place to which the public has access; including but not limited to highways, streets, sidewalks, transportation facilities, schools, places of business or amusement."

[51] The District of Columbia Court of Appeals has not addressed the meaning of the phrase "open to the general public," however, it has required that disorderly conduct occur in a location and under circumstances in which a breach of public peace and tranquility could occur. *See Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[52] Current law separately punishes conduct that is disruptive to riders on public conveyances and authorizes the Washington Metropolitan Area Transit Authority ("WMATA") to refuse service to any rider who violates its rules of conduct. *See* D.C. Code §§ 22-1321(c), 35-252, 35-251, and 35-216. Additionally, any person who remains on a public conveyance without WMATA's effective consent is guilty of trespass and subject to arrest on that basis. *See generally* RCC § 22E-2601. Similarly, a private arena may eject any patron from their premises at any time and failure to leave as directed amounts to a trespass. The Central Detention Facility ("D.C. Jail") and the Central Treatment Facility ("CTF") are empowered to quell any threat of public alarm or breach of peace by immediately separating inmates, placing inmates in protective custody, and placing inmates in disciplinary detention. *See* D.C. Department of Corrections Inmate Handbook 2015-2016. Public and private schools also have authority to remove and suspend rulebreakers. *See* Tex. Penal Code § 42.01 (providing that its disorderly conduct statute categorically "do[es] not apply to a person who, at the time the person engaged in conduct prohibited under the applicable subdivision, was a student younger than 12 years of age, and the prohibited conduct occurred at a public school campus during regular school hours.").

[53] "Disorderly conduct is distinct from many other statutes in that most criminal prohibitions are intended to punish and deter crimes, whereas disorderly conduct is meant to give police the power to defuse a situation that disturbs the public. The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance." Committee on Public Safety and the Judiciary Report on Bill 18-425 at Page 3.

wallet." DCCA case law interpreting a prior version of the disorderly conduct statute stated that "jostling against" "contemplates rough physical touching of one individual by another."[54] However, in the RCC, jostling, crowding, and reaching toward a wallet that actually places a person in fear of an immediate unlawful taking[55] is criminalized by the disorderly conduct statute subparagraph (a)(2)(A). Other RCC offenses such as offensive physical contact[56] and attempted theft from a person[57] also criminalize aspects of the current disorderly statute's jostling provision. It is unclear whether the current jostling provision in the D.C. Code covers any further conduct. [58] This change clarifies and reduces unnecessary overlap in the revised offenses.

Fourth, the revised statute more precisely defines committing disorderly conduct by means of incitement to violence. Paragraph (a)(2) of the current disorderly conduct statute explicitly provides that it is unlawful to, "Incite or provoke violence where there is a likelihood that such violence will ensue." [59] The term "incite" is not defined by in the statute, and case law has not interpreted the term. Legislative history provides no indication of the term's intended meaning.[60] "Incites," however, is also predicate conduct in the current D.C. Code rioting statute.[61] To resolve ambiguities about the scope and meaning of disorderly conduct by incitement, subparagraph (a)(2)(B) of the revised statute punishes a person who "[p]urposely commands, requests, or tries to persuade any person present to cause immediate criminal harm involving bodily injury, taking of property, or damage to property, reckless as to the fact that the harm is likely to occur." Similar language appears in the provision governing liability for criminal solicitation in the general part of the revised code.[62] The terms "bodily injury,"

[54] *Matter of A. B.*, 395 A.2d 59, 62 (D.C. 1978).

[55] The revised statute may be narrower than the current jostling provision in D.C. Code § 22-1321(g). Although the statutory language requires "circumstances whereby a breach of peace may be occasioned," the DCCA recently explained that this provision also reaches instances in which the victim is unaware of the offensive behavior. *See Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018) (citing 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 Page 9).

[56] RCC § 22E-1205;

[57] RCC § 22E-2101; RCC § 22E-301.

[58]Although the statutory language requires "circumstances whereby a breach of peace may be occasioned," legislative history cited in dicta by the DCCA suggests that this provision also reaches instances in which the victim is unaware of the offensive behavior. *See Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018) (citing 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 Page 9).

[59] D.C. Code § 22-1321(a)(2).

[60] Legislative adoption of the "incite" language in subsection (a)(2) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE) and included language identical to the current subsection (a)(2). *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) ("CCE Report") at Page 16. The CCE recommendations did not provide an explanation for the meaning or significance of the "incite" language in their recommendation beyond a general statement that that and other language was a reformulation of the "catchall" provision in the disorderly conduct statute prior to 2011, which referred to "acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others." CCE Report at 9.

[61] D.C. Code § 22-1322(c).

[62] RCC § 22E-302.

"property," and "reckless" each have standardized definitions in RCC §§ 22E-701 and 22E-206. 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 replaces the words "reasonable fear" with "reasonably believe" that that there will be immediate and unlawful harm. The current disorderly conduct statute states that it is unlawful for a person to "cause another person to be in reasonable fear" of specified harms that generally appear to entail immediate acts.[63] The statute does not define the term "fear." A recent DCCA opinion held that the statute "requires proof that the defendant's charged conduct placed another person in fear of harm to his or her person."[64] The revised disorderly conduct statute specifies that the observer must reasonably believe that they will suffer an immediate and unlawful harm. This word choice clarifies that it is the observer's reasoned judgment, not their emotion that matters as to liability. It also clarifies, through the requirement of immediacy, that the harm must be imminent.

Second, the revised statute explicitly distinguishes between speech and non-speech conduct, consistent with standard definitions that apply throughout the RCC. Current D.C. Code § 22-1321(a) uses the verb "act" in paragraph (1), "[i]ncite or provoke" in paragraph (2), and "[d]irect abusive or offensive language" in paragraph (3). The D.C. Code does not define the word "act" in the disorderly conduct statute or provide a general definition. District case law has not addressed the issue. The RCC uses standardized definitions of "act"[65] and "speech,"[66] which provide that an act includes verbal speech, and that speech includes certain non-verbal conduct. Consistent with these definitions, and to clarify that the intended meaning of paragraph (a)(1) of the current disorderly statute is intended to not include verbal speech, the revised statute uses different terminology. The revised statute replaces the word "act" with the phrase "conduct other than speech"[67] in subparagraph (a)(2)(A) and uses the defined term "speech" in subparagraph (a)(2)(C).

Third, the revised statute clarifies that conduct that raises concerns about self-injury,[68] other than provoking an injury to oneself by abusive language, is not disorderly conduct. The current disorderly conduct statute states that it is unlawful for a person to "intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that *a person* or property in *a person*'s immediate possession is likely to be harmed or taken" (emphasis added).[69] The DCCA recently interpreted this language as requiring that the conduct cause fear of harm to the observer's own person.[70] The RCC accordingly clarifies that conduct raising concerns solely about self-injury, other

[63] D.C. Code § 22-1321(a)(1).
[64] *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).
[65] RCC § 22E-202 ("'Act' means a bodily movement.").
[66] RCC § 22E-701 ("'Speech' means oral or written language, symbols, or gestures.").
[67] RCC § 22E-4201(a)(2)(A).
[68] Examples include a person angrily kicking the fender of their broken-down car which is parked on the street, and a skate-boarder doing jaw-dropping tricks at a public park.
[69] D.C. Code §22-1321(a)(1).
[70] *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).

than provoking an injury to oneself by abusive language, is not a basis for disorderly conduct liability.[71]

Fourth, the revised statute replaces the phrase "abusive or offensive" with the term "abusive," which has the same general meaning.[72]

[71] There is separate authority for an officer to detain and transport for emergency medical care any person believed to be mentally ill and likely to injure herself. *See* D.C. Code § 21-521.

[72] *See* Merriam-Webster Online Dictionary at https://www.merriam-webster.com/dictionary/abusive (defining "abusive" as "harsh and insulting").

RCC § 22E-4202. Public Nuisance.

Explanatory Note. *This section establishes the public nuisance offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that deliberately disturbs others and is not protected by the First Amendment or District law relating to freedom of assembly. The revised offense replaces subsections (b), (c), (c-1), (d), and (e) of D.C. Code § 22-1321 (Disorderly Conduct).*[1]

Subsection (a) requires that there be a significant interruption to others' activities.[2] This interruption must be committed purposely, a term defined in RCC § 22E-206. The accused must consciously desire that his or her conduct cause a significant interruption of specified activity.[3] Determination of whether a particular interruption is "significant" is an objective, fact-sensitive inquiry that, in part, must take into account the time, place, and manner of the conduct, as well as account public norms about what kinds of behavior should reasonably be expected and tolerated.[4]

Paragraphs (a)(1)-(4) list four specific types of nuisance that are prohibited. Paragraph (a)(1) replaces D.C. Code § 22-1321(c-1) and prohibits interference with the orderly conduct of a District or federal public body's meeting. The culpable mental state of "purposely" applies to the fact that the event is a public body meeting, requiring that it be the actor's conscious object to interrupt such an event. The terms "public body" and "meeting" are defined in the District's Open Meeting Act,[5] which includes hearings of record and excludes chance or social meetings of councilmembers.[6]

Paragraph (a)(2) replaces D.C. Code § 22-1321(d) and prohibits causing a significant interruption of any person's objectively reasonable quiet enjoyment of their dwelling between 10:00 p.m. and 7:00 a.m., and continuing or resuming such conduct after receiving oral or written notice to stop. "Dwelling" is a defined term[7] and means a

[1] Subsections (a) and (g) of D.C. Code § 22-1321 are replaced wholly or in part by RCC § 22E-4201 (Disorderly Conduct). [Subsection (f) of D.C. Code § 22-1321 concerning stealthily looking into a dwelling where there is an expectation of privacy has not yet been addressed in the RCC.]

[2] As the Council observed during its recent rewrite of the disorderly conduct statute, "Freedom of speech permits loud and annoying language, which some people might find 'threatening' or 'abusive,' so more is required. The speech should have *both* the 'intent and effect' of impeding or disrupting a gathering. In this regard, 'disturbing' is too subjective." *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 Page 8.

[3] Persisting in disruptive conduct after receiving a law enforcement officer's warning may be evidence of that person's purposeful conduct.

[4] For example, loud church bells at 12:00 p.m. may be reasonable, whereas knocking on a private door at 1:00 a.m. may not be.

[5] D.C. Code § 2-574.

[6] Legislative adoption of the "public building" language in subsection (c-1) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE). *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) ("CCE Report"). While D.C. Code § 22-1321 does not define a "public building," the CCE recommendations encouraged the Council to enact a provision that forbids disruption of the D.C. Council or other public meetings, comparable to D.C. Code §10-503.15, which prohibits the disruption of Congress. CCE Report at Page 11.

[7] RCC § 22E-701.

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, including, in multi-unit buildings, communal areas secured from the general public. An interruption of reasonable quiet enjoyment means a significant interference with the in-home activities of a person of ordinary sensitivity.[8] The intrusion may be a noise, smell, light, disturbing image or otherwise.[9] The culpable mental state of "purposely" applies to the fact that the effect of the conduct is a disturbance of a person's quiet enjoyment of their residence from 10:00 p.m. to 7:00 a.m.[10] The "purposely" culpable mental state requirement also applies to the fact that the accused continued or resumed the conduct after previously receiving notice, directly or indirectly, to cease the conduct. The person must be afforded a reasonable opportunity to comply with the notice to cease.[11] Where a person is uncertain as to whether they can safely comply with the notice, a justification defense may apply.

Paragraph (a)(3) replaces D.C. Code § 22-1321(c) and prohibits interruption of any person's lawful use of a public conveyance. RCC § 22E-701 defines a public conveyance as any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat. Such interruption may consist of diverting a passenger's pathway or the pathway of the vehicle. The culpable mental state of "purposely" applies to the fact that the actor is interrupting another's lawful use of a public conveyance. Conduct intended to generally disrupt traffic in which a public conveyance operates is insufficient,[12] rather the conscious object of the actor must be to interrupt the use of the complainant's particular public conveyance.

Paragraph (a)(4) replaces D.C. Code § 22-1321(b) and prohibits the disruption of a lawful religious service, funeral.[13] The culpable mental state of "purposely" applies to the fact that the event is a lawful religious service, funeral, or wedding, requiring that it

[8] What is reasonable, depends on the time, place, and manner of the activity. For example, at midnight on New Year's Day it may be reasonable to blare noisemakers for several seconds, but unreasonable to do so for several minutes.

[9] Intrusions into the enjoyment of one's home may be appropriately regulated without offending the First Amendment, under the captive audience doctrine. *See Rowan v. Post Office Dept.*, 397 U.S. 728, 736-738 (1970); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

[10] Loud noise that recklessly or negligently disturbs others, or occurs at different hours or in different locations, may be punished under 20 DCMR § 2701.

[11] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[12] Such conduct may be punished as Blocking a Public Way, under RCC § 22E-4203.

[13] In the current D.C. Code disorderly conduct statute, subsection (b) prohibits impeding "a lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding." Legislative history indicates this provision was intended to broaden an 1892 law titled "Disturbing Religious Congregation" beyond churches to include other worship services and funerals. *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 Page 8.

be the actor's conscious object to interrupt such an event. The event must occur in a location that is "open to the general public," a defined term that excludes locations that require payment or special permission to enter.[14] The word "lawful" requires that the gathering or event not violate another District or federal law.[15] The term "in fact" specifies that the accused is strictly liable[16] with respect to whether the event lawful and with respect to whether the event is in a public place. The accused's conduct must have the intent and effect of interrupting the event, not merely upsetting participants and onlookers.[17]

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 offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised public nuisance statute changes current District law in three mean ways.*

First, the revised public nuisance statute potentially includes any type of offensive conduct, not just noise, that disturbs a person in his or her residence at night. The D.C. Code disorderly conduct statute currently makes it unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences.[18] In contrast, the revised statute includes all nuisances that cause a significant interruption to any person's reasonable, quiet enjoyment of their dwelling at night, including noises, smells, and bright lights. This change clarifies the statute and eliminates an unnecessary gap in the law.

Second, the revised statute limits the residential intrusion provision to interactions that follow a notice to cease the interruption. The D.C. Code disorderly conduct statute currently does not limit liability for disturbing noises to situations where the accused has received notice to cease the disturbance, and it appears that a single loud noise "that is likely to annoy" may constitute a violation under the current statute. There is no case law on point. By contrast, the revised statute requires proof of prior notice to the actor to stop the conduct, followed by continuance or resumption of the conduct. Notice to cease makes future disturbances into an act of ignoring the victim's directive to be left alone and invading the victim's privacy. Having prior notice does not necessarily mean that continuance or resumption of the disruption is done with the purpose of disrupting the complainant, but it will typically show that the conduct is at least knowingly done with that effect. The revised statute more narrowly criminalizes behavior that is calculated to

[14] RCC § 22E-701.
[15] Consider, for example, a wedding that is blasting music in violation of the District's noise control regulations under 20 DCMR § 2701. A neighbor who disrupts the event by shouting, "Hey, keep it down!" does not commit a public nuisance offense.
[16] RCC § 22E-207.
[17] *See Snyder v. Phelps*, 562 U.S. 443, 445 (2011) (upholding First Amendment protections where there was no indication that the picketing interfered with the funeral service itself.)
[18] D.C. Code § 22-1321(d).

torment the complainant without reaching other legitimate or protected conduct.[19] This change improves the proportionality and, perhaps, the constitutionality of the revised statute.

Third, the revised public nuisance statute eliminates urinating and defecating in a public place as a distinct basis of criminal liability. Current District statutory law explicitly punishes public urination or defecation as a form of disorderly conduct[20] and as defacing property.[21] Legislative history indicates that when the Council revised the disorderly conduct statute in 2011, it retained a provision separately criminalizing public urination at subsection (e) only because the executive did not appear to have an adequate process for civil infraction enforcement.[22] In contrast, the RCC does not specifically criminalize urination or defecation. In the RCC there may still be liability for such conduct insofar as it causes property damage,[23] causes another person to reasonably believe that the conduct will cause property damage,[24] or involves publicly exposing genitalia.[25] Persons experiencing homelessness and mental illness may be disproportionately affected by criminal sanctions for defecation and urination,[26] and other, non-criminal remedies may address the problem as, or more, effectively. This change improves the proportionality of the revised offense.

Beyond these three changes to current District law, three additional aspects of the revised public nuisance statute may be viewed as substantive changes in law.

First, the revised statute specifies "purposely" as the required culpable mental state as to causing a significant interruption of lawful activity. Three of the four relevant subsections of the current disorderly conduct statute, D.C. Code § 22-1321, that are replaced by the revised public nuisance statute require that the accused act "with the intent and effect of impeding or disrupting" lawful activity.[27] However, the meaning of acting "with intent" is not defined by the statute. The fourth relevant subsection of the

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

[20] D.C. Code § 22-1321(e).

[21] D.C. Code § 22-3312.01 (making it unlawful to "place filth or excrement of any kind…upon…[a]ny structure of any kind or any movable property"); *see Scott v. United States*, 878 A.2d 486 (D.C. 2005).

[22] See Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 9 (stating, "The committee agrees that public urination would be better handled as a civil infraction punishable by a ticket and a fine.")

[23] RCC § 22E-2503(c)(5) would punish public urination and defecation as fourth degree criminal damage to property to the extent it causes a permanent, observable or measurable diminution in value to public or private property—however urination and defecation are not specifically referenced in the statute.

[24] *See* RCC § 22E-4201, Disorderly Conduct.

[25] *See* RCC § 22E-4206, Indecent Exposure.

[26] In 2011, Metropolitan Police Department statistics indicated that a large number of the 300-400 persons arrested for public urination each year were not homeless, however, a concern remains that persons experiencing homeslessness are impacted disproportionately. *See* CCE Report at 12.

[27] D.C. Code §§ 22-1321(b), concerning worshippers; subsection (c), concerning public conveyances; and subsection (c-1), concerning public buildings.

current disorderly conduct statute, D.C. Code § 22-1321, that is replaced by the revised public nuisance statute does not specify any culpable mental state.[28] There is no relevant case law on the culpable mental states for any of these provisions.[29] To resolve this ambiguity, the RCC public nuisance offense requires proof that the defendant acted purposely, a defined term in the RCC that requires that it be the conscious object of an actor to cause a significant interruption.[30] A purposeful culpable mental state distinguishes interruptions to lawful activities that are deliberate and in committed in bad faith, from other common interruptions of such activities. This change clarifies and improves the consistency and proportionality of the revised statute.

Second, the revised statute replaces the phrase "lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding"[31] with "lawful religious service, funeral, or wedding, that is in a location that, in fact, is open to the general public." The current disorderly conduct statute does not define the term "public gathering," and there is no case law on point. The legislative history of D.C. Code § 22-1321(b) states that the Council intended to broaden an 1892 law titled "Disturbing Religious Congregation" so that it is "applicable to any religious service or proceeding, or any similar gathering engaged in worship, including a funeral."[32] The legislative history does not provide any examples of gatherings other than worship services that it intended to include. To resolve ambiguity about the scope of a "lawful public gathering," the revised statute includes only religious services, and funerals and weddings—which may be religious or secular—provided that they occur in a location open to the public.[33] A broad construction of a "lawful public gathering" would potentially reach any gathering of people[34] and may be vulnerable to challenges for vagueness or overbreadth.[35] This change clarifies the revised statute and may ensure its constitutionality.

Third, the revised statute replaces the phrase "disrupting the orderly conduct of business in that public building"[36] with significant interruption of "[t]he orderly conduct of a meeting by a District or federal public body" and the inclusion in the statute of cross-references to specific definitions of "public body" and "meeting" in the D.C. Code. The terms "orderly conduct," "business," and "public building" are not defined in the current disorderly conduct statute or in District case law. However, legislative history indicates this provision was intended to forbid disruption of the D.C. Council or other public meetings, in a manner comparable to D.C. Code §10-503.15, which prohibits the

[28] D.C. Code § 22-1321(d), concerning disturbance of persons in their residences.
[29] Since the disorderly conduct statute was revised in 2011 to significantly change its scope and language, the D.C. Court of Appeals ("DCCA") has yet to publish an opinion interpreting the statute.
[30] RCC § 22E-206.
[31] D.C. Code § 22-1321(b).
[32] *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 Page 8.
[33] If a person disrupts a religious service, funeral, or wedding in a private place, that conduct may be punishable as a trespass. RCC § 22E-2601.
[34] For example, players in a game in a public park, a gathering of acquaintances at a street corner, or a couple on a sidewalk might all reasonably fall within the ambit of a broad construction of "a public gathering."
[35] Consider, for example, a counter-protest that aims to disrupt a lawful public demonstration.
[36] D.C. Code § 22-1321(c-1).

disruption of Congress.[37] To resolve ambiguities about the scope of this provision, the revised statute clarifies that it is the nature of the meeting as one of a public decision-making body that is controlling, and not the ownership or operation of the building. The revised statute incorporates the definition of a public body meeting from the District's Open Meetings Act[38] to clarify what types of governmental decision-making bodies are included, be they federal or District. This change improves the clarity of the revised statute.

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

The RCC criminalizes public nuisances in a stand-alone offense. Under current District law, conduct constituting a public nuisance is criminalized in the disorderly conduct statute,[39] along with crimes such as stealthily looking into a dwelling where there is an expectation of privacy and engaging in conduct that puts someone in reasonable fear a crime is to occur. The RCC separately groups and subjects to the same punishment public nuisance-type offenses.

[37] CCE Report at Page 11.
[38] D.C. Code § 2-574.
[39] D.C. Code § 22-1321.

RCC § 22E-4203. Blocking a Public Way.

Explanatory Note. *This section establishes the blocking a public way for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that renders impassable, without unreasonable hazard, public ways after receiving a law enforcement order to stop such conduct. The revised Blocking a Public Way offense and revised Unlawful Demonstration offense[1] together replace the current District offense of Crowding, obstructing, or incommoding.[2] The revised blocking a public way offense also replaces the crime of Obstructing a Bridge Connecting Virginia to the District of Columbia[3] and, in conjunction with other RCC provisions, also replaces several older District offenses.[4]*

Paragraph (a)(1) specifies that a person's conduct must block a street, sidewalk, bridge, path, entrance, exit, or passageway.[5] The term "blocks" is defined in RCC § 22E-701 to mean "render safe passage through a space difficult or impossible."[6] The revised offense does not include minor incommoding that poses no risk to passers-by.[7] However, a person is liable under the revised statute for conduct that, but for the intervention of a law enforcement officer, would render the public way impassable without unreasonable hazard.[8] Because the definition refers to "render impassable," no proof that a person actually attempted to make use of the public way and was unable to do so is required.[9] Paragraph (a)(1) also specifies the culpable mental state for subsection (a) to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "blocks" a street, sidewalk, bridge, etc.

Paragraph (a)(2) specifies that the area the person is blocking must occur while the person is on land or in a building that is owned by a government,[10] government agency,[11] or government-owned corporation.[12] This includes passageways through or

[1] RCC § 22E-4204.
[2] D.C. Code § 22-1307.
[3] D.C. Code § 22-1323.
[4] Specifically, D.C. Code § 22-3320 (Obstructing public road) is replaced by this revised statute and RCC § 22E-2403 (criminal damage to property); D.C. Code § 22-3321 (Obstructing public highway) is entirely replaced by this revised statute; D.C. Code § 22-3319 (Placing obstructions on or displacement of railway tracks) is replaced by this revised statute, and RCC § 22E-2403 (criminal damage to property); and D.C. Code § 22-1318 (driving or riding on footways in public grounds) is replaced by this revised statute.
[5] The words "street" and "path" broadly encompass all roads, trails, tunnels, alleys, boulevards and avenues.
[6] For example, a person blocking a sidewalk such that pedestrians have to walk around onto a busy street in order to pass likely is an offense.
[7] For example, a person standing or sitting on part of a sidewalk that pedestrians have to step around likely is not committing an offense.
[8] For example, a person lying down and blocking two lanes of a highway, forcing police to redirect traffic around the person to avoid an unreasonable hazard, likely is an offense.
[9] For example, if a group of persons blocked off a street that was not currently in use by cars or pedestrians, and refused to move after receiving a police order to do so, these persons would be guilty of completed blocking a public way.
[10] E.g., District of Columbia, federal government.
[11] E.g., Washington Metropolitan Area Transit Authority.
[12] E.g., Amtrak.

within a park or reservation.[13] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), requiring the defendant to be at least aware to a practical certainty that they are in a government-owned space.

Paragraph (a)(3) requires the government to prove that the accused received a lawful law enforcement order to stop blocking and that the accused disregarded that directive. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to most elements in paragraph (a)(3). "Knowingly" is a defined term[14] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[15] "Law enforcement officer" is a defined term.[16] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. The order may be temporary or enduring in scope.[17] There is no requirement that the police order indicate the reasons for the order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop blocking.[18] Where a person is uncertain as to whether they can safely comply with the order, a justification defense may apply. The accused must also be practically certain that his or her action constitutes a continuance or resumption of the blocking conduct that was the object of the law enforcement officer order. The order itself must be lawful.[19] "In fact," a defined term,[20] is used to indicate that there is no culpable mental state requirement as to whether the order is lawful.[21]

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 offense. [*See* Second Draft of Report #41.]

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[13] D.C. Code § 22-1307(a)(1)(D).

[14] RCC § 22E-206.

[15] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit blocking a public way.

[16] RCC § 22E-701.

[17] Consider, for example, a person who is asked by the same officer day after day to move away from blocking a store entrance and is then warned, "I've told you to move every day, and if I come back here tomorrow and you are blocking this doorway again, you will be arrested." If the person resumes the blocking the next day, they have committed a blocking offense. A new warning is not required.

[18] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[19] Where a law enforcement officer infringes on a person's freedom of movement without requisite cause or authority, in violation of any federal or District law, the person has not committed a blocking offense.

[20] RCC § 22E-207.

[21] Consider, for example, a construction team or a group of organized protesters that (incorrectly) believes it has a valid permit to block a particular street. Such a group is subject to criminal liability for blocking. Such conduct also may subject to arrest pursuant to 18 DCMR § 2000.2 (Failure to Obey a Lawful Order of a Police Officer) or 24 DCMR § 2100 (Crowd and Traffic Control).

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

Relation to Current District Law. *The revised blocking a public way statute changes current District law in three main ways.*

First, the revised statute does not prohibit blocking use of or passage through a public conveyance. In addition to public land and buildings, the current D.C. Code § 22-1307(a)(1)(C) refers to "The use of or passage through any…public conveyance." The term "public conveyance" is not defined, and there is no case law on point. The District's disorderly conduct statute contains a similar provision relating to public conveyances.[22] In contrast, the RCC punishes purposely interrupting a person's lawful use of a public conveyance as a public nuisance crime.[23] This change clarifies and eliminates unnecessary overlap between revised offenses.

Second, the revised statute applies only to land or buildings owned by a government, government agency, or government-owned corporation. The current crowding, obstructing, or incommoding statute is unclear as to whether the streets, sidewalks, etc.,[24] or entrances to buildings[25] covered by the statute must be on publicly owned property. However, while noting that it would be possible to construe the statute as covering only public locations where an unlawful entry charge could not be brought and recognizing the absence of any legislative history,[26] the DCCA has upheld a conviction for blocking an area "inside a private inclosure on a private driveway leading to the door of a private building."[27] In contrast, the RCC blocking a public way statute excludes conduct on or in all privately owned land and buildings. Unwanted entries onto private property remain separately criminalized as trespass.[28] The revised statute's phrase "owned by a government, government agency, or government-owned corporation" makes clear that land or buildings owned by the Washington Metropolitan Area Transit Authority, Amtrak, and similar locations are within the scope of the revised statute. This change clarifies and reduces unnecessary overlap between revised offenses.

Third, the revised statute repeals and replaces the archaic and unused offense of Driving or riding on footways in public grounds[29] and several other older District offenses.[30] Since this statute was codified in 1892, modes of transportation have

[22] D.C. Code § 22-1321(c) ("It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct with the intent and effect of impeding or disrupting the lawful use of a public conveyance by one or more other persons.").
[23] RCC § 22E-4202.
[24] D.C. Code § 22-1307(a)(1)(A).
[25] D.C. Code § 22-1307(a)(1)(B).
[26] *Morgan v. District of Columbia*, 476 A.2d 1128, 1130 (D.C. 1984).
[27] *Id*.
[28] RCC § 22E-2601.
[29] D.C. Code § 22-1318 ("If any person shall drive or lead any horse, mule, or other animal, or any cart, wagon, or other carriage whatever on any of the paved or graveled footways in and on any of the public grounds belonging to the United States within the District of Columbia, or shall ride thereon, except at the intersection of streets, alleys, and avenues, each and every such offender shall forfeit and pay for each offense a sum not less than $1 nor more than $5.").
[30] Specifically, D.C. Code § 22-3320 (Obstructing public road) is replaced by this revised statute and RCC § 22E-2403 (criminal damage to property); D.C. Code § 22-3321 (Obstructing public highway) is entirely

drastically change and the District now regulates licensure, traffic, and safety through other mechanisms. Statistics indicate that the statute has not been charged in recent years and the penalty—$1-5—indicates that it has not been a practical deterrent in decades. In contrast, the revised statute provides a clear, consistent way to address misuse of public ways. This change clarifies the revised statute.

Beyond these three substantive changes to current District law, two other aspects of the revised blocking a public way statute may constitute substantive changes of law.

First, the revised statute specifies that knowledge is the mental state that applies to the elements in paragraphs (a)(1)-(a)(3). No mental state is specified in the current D.C. Code § 22-1307 statute with respect to any elements. Case law indicates some kind of intent is necessary, though the precise kind of intent is unclear.[31] In one case, the District of Columbia Court of Appeals ("DCCA") has recognized that a reasonable mistake defense may apply to crowding, obstructing, or incommoding.[32] The Obstructing bridges connecting D.C. and Virginia statute[33] specifies a culpable mental state of "knowingly and willfully" but does not require a prior law enforcement order to cease obstructing a bridge. To resolve this ambiguity, the revised statute clearly specifies a culpable mental state of "knowingly." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[34] Given that the current and revised statutes require a warning from a law enforcement officer to the defendant, the defendant will typically have actual knowledge that he or she is blocking a public way. This change improves the clarity, consistency, and completeness of the revised statute.

Second, through its use of the definition of "block," the revised blocking a public way offense specifies that the standard for determining prohibited conduct is whether it makes safe passage on the street, sidewalk, etc., difficult or impossible. The current statute is silent as to the meaning of the verbs "crowd, obstruct, or incommode"[35] used to indicate the prohibited behavior. No case law has defined these words either, although the fact patterns in cases are generally consistent with the revised definition of

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replaced by this revised statute; and D.C. Code § 22-3319 (Placing obstructions on or displacement of railway tracks) is replaced by this revised statute, and RCC § 22E-2403 (criminal damage to property).

[31] The DCCA has stated that the offense is one of "general intent" which it noted is frequently defined to require "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984). Under the RCC all physical acts must be voluntary per RCC § 22E-203, but neither the *Morgan* court nor any other DCCA rulings specifically address in detail the culpable mental state required for particular elements in the current crowding, obstructing, or incommoding statute.

[32] *Morgan v. District of Columbia*, 476 A.2d 1128, 1133 (D.C. 1984).

[33] D.C. Code § 22-1323.

[34] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted.)"). See also *Carrell v. United States*, 165 A.3d 314, 323 n. 22 (D.C. 2017) (analogizing the difference between "general intent" and "specific intent" as recognized in Supreme Court case law to the difference between "knowledge" and "purpose," respectively.

[35] D.C. Code § 22-1307.

"blocks."[36] To resolve this ambiguity, the revised statute codifies a standard definition of what constitutes blocking. The requirement that the accused's conduct render safe passage difficult or impossible does not provide liability for mere loitering, where a person can still navigate around the accused without undue risk. This change improves the clarity 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, in combination with unlawful demonstration, RCC § 22E-4204, divides and replaces the current District offense of crowding, obstructing, or incommoding.[37] The revised blocking a public way offense effectively replaces subsection (a) of the current law and the revised unlawful demonstration offense replaces subsection (b). This change logically reorganizes the statutes, given that each provision describes markedly different conduct.

Second, the revised statute prohibits blocking a street, sidewalk, bridge, path, entrance, exit, or passageway. Current D.C. § 22-1307(a) makes it unlawful to block (A) The use of any street, avenue, alley, road, highway, or sidewalk; (B) The entrance of any public or private building or enclosure; (C) The use of or passage through any public building or public conveyance; (D) The passage through or within any park or reservation. These terms are not defined by statute or in case law. The Obstructing bridges connecting D.C. and Virginia statute[38] refers only to "any bridge connecting the District of Columbia and the Commonwealth of Virginia." The revised statute simplifies the list of covered locations to a street, sidewalk, bridge, path, entrance, exit, or passageway. The common meanings of these undefined terms are intended, and they should be construed broadly.

Third, the revised offense blocking a public way offense merges in the existing District offense for obstructing bridges connecting D.C. and Virginia statute.[39] A separate statute regarding bridges to Virginia is unnecessary. The revised statute specifically lists bridges as one of the covered locations, and the revised statute is intended to cover bridges to the same extent as the prior statute.[40]

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[36] For example, the DCCA affirmed a conviction where protestors blocked the front of the Rayburn congressional office building and "the trial judge found that, 'while not 100 percent blocked, [the building entrance] was significantly impeded or incommoded' because 'people had to pick their way around individuals lying on the ground in sheets,' some 'less than two or three feet…from the entryway.'" *Tetaz v. District of Columbia*, 976 A.2d 907, 911 (D.C. 2009). Such facts would likely constitute blocking under revised statute because the entryway was rendered impassable without unreasonable hazard.

[37] D.C. Code § 22-1307.

[38] D.C. Code § 22-1323.

[39] D.C. Code § 22-1323 ("Effective with respect to conduct occurring on or after August 5, 1997, whoever in the District of Columbia knowingly and willfully obstructs any bridge connecting the District of Columbia and the Commonwealth of Virginia: (1) Shall be fined not less than $1,000 and not more than $5,000, and in addition may be imprisoned not more than 30 days; or (2) If applicable, shall be subject to prosecution by the District of Columbia under the provisions of District law and regulation amended by the Safe Streets Anti-Prostitution Amendment Act of 1996.").

[40] Notably, unlike the revised Blocking a Public Way offense, current D.C. Code § 22-1323 does not require a lawful law enforcement order. Additionally, current law authorizes a fine of $5,000, making it a jury-demandable offense. D.C. Code § 16-705(b)(1)(A).

RCC § 22E-4204. Unlawful Demonstration.

Explanatory Note. *This section establishes the unlawful demonstration offense for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that constitutes a demonstration, in locations where demonstration is prohibited by law, after receiving a law enforcement order to stop such conduct. The revised Unlawful Demonstration offense and revised Blocking a Public Way offense[1] together replace the current District offense of Crowding, obstructing, or incommoding.[2]*

Paragraph (a)(1) describes the conduct required for the offense: engaging in a demonstration. The term "demonstration" is defined in RCC § 22E-701 and means marching, congregating, standing, sitting, lying down, parading, demonstrating, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief. Paragraph (a)(1) also specifies that the person must act "knowingly," a term that is defined in RCC § 22E-206 and here requires that the defendant at least be aware to a practical certainty that his or her conduct constitutes a demonstration.

Paragraph (a)(2) requires that the defendant engage in a demonstration in a place where it is otherwise unlawful. Thus, if a civil or criminal statute specifically prohibits a demonstration inside the United States Capitol[3] or the Supreme Court,[4] a person may commit the revised unlawful demonstration offense by engaging in a demonstration in that location. However, there is no liability for unlawful demonstration unless some other law prohibits demonstration in that location.[5] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), here requiring the defendant at least to be aware to a practical certainty that the location is one where demonstration is otherwise unlawful.

Paragraph (a)(3) requires the government to prove that the accused received a law enforcement order to stop demonstrating and that the accused disregarded that directive. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(3). "Knowingly" is a defined term[6] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[7] "Law enforcement officer" is a defined term.[8] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the order. The

[1] RCC § 22E-4203.
[2] D.C. Code § 22-1307.
[3] D.C. Code § 10-503.16.
[4] 40 U.S.C. § 6135.
[5] For example, absent any law prohibiting demonstration on a particular sidewalk, an advocacy group does not commit unlawful demonstration by standing on that sidewalk and soliciting petition signatures or donations. Similarly a group of laborers who are picketing on a sidewalk does not commit unlawful demonstration absent a law prohibiting demonstration in that location. Notably, a person may be liable under RCC § 22E-4203, blocking a public way, for related conduct.
[6] RCC § 22E-206.
[7] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit blocking a public way.
[8] RCC § 22E-701.

person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop demonstrating.[9] Where a person is uncertain as to whether they can safely comply with the order, a justification defense may apply. The accused must also be practically certain that his or her action constitutes a continuance or resumption of the demonstrating conduct that was the object of the law enforcement officer order

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *One aspect of the revised unlawful demonstration statute may constitute a substantive change of law.*

The revised statute clarifies that a culpable mental state of "knowingly" applies to all elements of the offense, except strict liability is required as to the fact that demonstration in the location is otherwise unlawful under District of Columbia or federal law. The current statute is silent as to culpable mental state elements. There is no case law on the unlawful demonstration portion of the crowding, obstructing, or incommoding offense.[10] To resolve this ambiguity, the revised statute specifies a knowledge culpable mental state requirement to most elements, except it applies strict liability to the unlawfulness of demonstrating in the particular location. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[11] Given that the current and revised statute require a warning from a law enforcement officer to the defendant, a defendant will typically have actual knowledge that he or she is demonstrating in an area where demonstration is not permitted. However, given that failure to obey a lawful law enforcement order likely already involves prohibited conduct,[12] strict liability is imposed as to the additional fact of the location being barred from demonstration under another law. This change improves the clarity and completeness of the revised statute.

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[9] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[10] D.C. Code § 22-1307(b). Note that this portion of the statute is new, having been introduced as legislation in as part of the omnibus Criminal Code Amendments Act of 2012 at the suggestion of the United States Attorney. Report on Bill 19-645, the "Criminal Code Amendments Act of 2012," Council of the District of Columbia Committee on the Judiciary (December 1, 2012).

[11] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted.)").

[12] *See* 18 DCMR § 2000.2 and RCC § 22E-4203.

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

The revised statute, in combination with blocking a public way, RCC § 22E-4203, divides and replaces the current District offense of crowding, obstructing, or incommoding.[13] The revised blocking a public way offense effectively replaces subsection (a) of the current law and the revised unlawful demonstration offense replaces subsection (b). This logically reorganizes the offense, given that each provision describes markedly different conduct.

[13] D.C. Code § 22-1307.

RCC § 22E-4205. Breach of Home Privacy.

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).*[1]

Paragraph (a)(1) specifies that a person must act knowingly and surreptitiously. "Knowingly" is a defined term[2] and, applied here, means that the person must be practically certain that they are observing inside a dwelling. The term "dwelling" is defined in RCC § 22E-701 to include any structure that is designed for lodging or residing overnight, including, in multi-unit buildings, communal areas secured from the general public.[3] The dwelling may be occupied or unoccupied at the time of the offense. The phrase "by any means" clarifies that, unlike a trespass,[4] the offense does not require a physical intrusion into the dwelling. Unlike a burglary,[5] 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.[6]

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. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *One aspect of the revised breach 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, including, in multi-unit buildings, communal areas secured from the general public." This change improves the consistency of the revised statutes.

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[1] Other subsections of the current disorderly conduct statute have been addressed elsewhere in the revised code.

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

[3] This includes motor vehicles, watercraft, and tents that are designed or used as a residence.

[4] RCC § 22E-2601.

[5] RCC § 22E-2701.

[6] 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.

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

First, the revised offense clarifies that the observation may occur "by any means." Current D.C. Code § 22-1321(f) makes it unlawful to "stealthily look into a window or other opening of a dwelling." It is unclear from the phrase "look into" whether the statute includes a person hacking into a camera inside a home.[7] District case law has not addressed this issue. The revised offense explicitly criminalizes observations "by any means." This change eliminates a possible gap in liability.

Second, the revised statute substitutes the word "surreptitiously" for "stealthily," for continuity with the revised burglary offense.[8] This change is not intended to substantively change the offense elements.

[7] *See, e.g.,* Allyson Chiu, *She installed a Ring camera in her children's room for 'peace of mind.' A hacker accessed it and harassed her 8-year-old daughter.*, Washington Post (December 12, 2019).
[8] RCC § 22E-2701.

RCC § 22E-4206. Indecent Exposure.

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.*[1]

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,[2] or anus, when there is less than a full opaque covering. "Knowingly" is a defined term[3] and applied here means that the person must be practically certain that they are engaging in the prohibited conduct.[4] The term "sexual act" is defined in RCC § 22E-701 and does not include a mere simulation.[5]

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.[6] Per the rules 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, an express or implied 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.[7]

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

[1] 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].

[2] Reference to "pubic area" is intended to include liability for frontal nudity where the groin is visible but not the external genitalia.

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

[4] 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)).

[5] *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).

[6] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

[7] 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)).

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.[8] 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.[9]

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" and "public conveyance" are defined in RCC § 22E-701 and "rail transit station" is defined in this section. A location is open to the general public only if no payment, membership, affiliation, appointment, or special permission is required to enter.[10] The word "visible" means within the complainant's sightline and does not require proof that the complainant actually viewed the indecent display.[11] 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.[12]

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

[8] The phrase "with the purpose," like the phrase "with intent," makes the language that follows inchoate. *See* RCC § 22E-205(b).

[9] *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.

[10] 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 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.").

[11] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

[12] RCC § 22E-206.

require proof that the complainant actually viewed the indecent display.[13] 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.[14]

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, an express or implied 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[15] 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 three 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) excludes liability for a person who is engaging in conduct that 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)(3) 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.[16] 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. [*See* Second Draft of Report #41.]

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,

[13] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.
[14] *See Peyton v. Dist. of Columbia*, 100 A.2d 36, 37 (D.C. 1953).
[15] The word "alarm" is not defined and should be construed broadly per its ordinary meaning. Consider, for example, a crossing guard who is not personally offended but is nevertheless alarmed out of concern for children who might see the exposure.
[16] The exclusion does not apply to a rogue employee who is acting *ultra vires.*

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."[17] 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 effective consent and targets a complainant may not be otherwise criminal,[18] 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 this section an in 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.[19] 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.[20] In contrast, the revised statute uses the RCC's general provisions that define "purposefully," "knowingly," and "recklessly"[21] and specify that culpable mental states apply until the

[17] *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).").

[18] 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.

[19] RCC §§ 22E-4206(c)(3) and (4).

[20] *Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1143 (D.C. 2016).

[21] RCC § 22E-206.

occurrence of a new culpable mental state in the offense.[22] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[23] 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.[24] However, the DCCA has held that the term "genitalia" in a prior version of D.C. Code § 22-1312 includes the "front vaginal area."[25] 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

[22] RCC § 22E-207(a).

[23] 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)).

[24] 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 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).

[25] *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…").

applies the standardized RCC definition of "sexual act" which, in relevant part,[26] 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.[27] This revision improves the clarity and consistency of the revised statute.

[26] 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.

[27] 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).

RCC § 22E-4301. Rioting.

Explanatory Note. *This section establishes the rioting offense for the Revised Criminal Code (RCC). The offense proscribes knowingly participating in a group of eight or more people who are each personally engaging in a criminal harm involving injury, property loss, or property damage. The revised offense replaces D.C. Code § 22-1322 (Rioting or inciting to riot).*

Paragraph (a)(1) requires that the accused act "knowingly," a defined term,[1] which here means the person must be practically certain that he or she is personally attempting or committing a District crime involving bodily injury, taking of property, or damage to property.[2] A person who is engaging in conduct that is merely obnoxious, disruptive, or provocative is not liable for rioting.[3] "Bodily injury" is defined in RCC § 22E-701 and means physical pain, illness, or any impairment of physical condition. "Property" is defined in RCC § 22E-701 and means "anything of value." Conduct that threatens a non-criminal harm or a harm not involving bodily injury, taking of property, or damage to property[4] is not a predicate for rioting liability.

Paragraph (a)(2) requires proof that seven[5] or more persons are also engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be the precise type of conduct the actor is engaged in, but must also be criminal harm involving bodily injury, taking of property, or damage to property.[6] The revised statute does not require that the eight people act in concert with one another[7] or organize together in advance.[8] However, the others' conduct must be in a location where the actor

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[1] RCC § 22E-206.

[2] RCC offenses that involve bodily injury, loss of property, or damage to property include: Assault (RCC § 22E-1202), Robbery (RCC § 22E-1201), Murder (RCC § 22E-1101), Theft (RCC § 22E-2101), Arson (RCC § 22E-2501), Criminal Damage to Property (RCC § 22E-2503), and Criminal Graffiti (RCC § 22E-2504).

[3] The RCC does not outlaw "all 'offensive conduct' that disturbs 'any neighborhood or person.'" *See Cohen v. California*, 403 U.S. 15, 22 (1971); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression…[T]o justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

[4] For example, the RCC criminal threats statute is not included in the scope of the revised rioting statute.

[5] The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense, RCC § 22E-4301 requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense, RCC § 22E-4302, does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot.

[6] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[7] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

[8] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

can see or hear their activities.[9] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that seven or more persons are engaged in riotous conduct nearby. A person who is merely present in or near a riot is not criminally liable under the revised rioting statute,[10] nor is a person engaged in First Amendment activities or seeking to prevent criminal activities liable.[11]

Subsection (b) specifies that there is no attempt liability for the rioting offense as a whole. However, attempts to commit specified District crimes are part of the element specified in paragraph (a)(1).

Subsection (c) provides the penalty for this offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *The revised rioting statute changes current District law in four main ways.*

First, the revised rioting statute has only one gradation that addresses attempted and completed criminal harms involving bodily injury, taking of property, or damage to property. The current rioting statute addresses a "public disturbance" that involves "tumultuous and violent conduct" and is divided into two sentencing gradations.[12] The lower grade consists of such conduct that merely "creates grave danger of damage or injury to property or persons" or incites persons to such risk-creating behavior.[13] Limited case law indicates that this lower grade does not include "minor breaches of the peace," but instead reaches "frightening group behavior" and "will usually be accompanied by the use of actual force or violence against property or persons."[14] The higher grade

[9] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[10] S*ee United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("The mere accidental presence of the Defendant among persons engaged in such a public disturbance, however, without more, does not establish willful conduct or involvement.").

[11] For example, the following persons are not liable under the RCC rioting statute: a journalist who is present to observe and report on riotous activities; a demonstrator (or counter-demonstrator) who decides to peacefully remain at a particular location in protest; a community leader who acts as a "counterrioter" and attempts to calm the crowd; or a local resident using public ways to leave and return home through a group engaged in riotous activity.

[12] D.C. Code § 22-1322(a).

[13] D.C. Code §§ 22-1322(b) and (c).

[14] *United States v. Matthews*, 419 F.2d 1177, 1184-85 (1969) ("The conduct involved must be something more than mere loud noise-making or minor breaches of the peace. The offense requires a condition that has aroused or is apt to arouse public alarm or public apprehension where it is occurring. It involves frightening group behavior. Tumultuous and violent conduct will usually be accompanied by the use of actual force or violence against property or persons. At the very least it must be such conduct as has a clear and apparent tendency to cause force or violence to erupt and thus create a grave danger of damage or injury to property or persons.").

consists of inciting such conduct that actually causes "serious bodily harm or there is property damage in excess of $5,000."[15] The current statute's higher gradation has a maximum penalty twenty-times that of the lower gradation.[16] In contrast, the revised statute consists of one penalty gradation based on the attempt or commission of actual criminal harms involving bodily injury, taking of property, or damage to property. Revising the statute to require the attempt or commission of actual harms by the actor more clearly distinguishes rioting liability from minor breaches of the peace by a group, and, unlike the current statute, does not base the degree of punishment on the extent of others' misconduct.[17] Or, in the case of police-monitored crowds, such conduct may violate the RCC failure to disperse offense.[18] This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute requires eight people to form riot. The District's current rioting statute states that a riot is a "public disturbance involving an assemblage of 5 or more persons..."[19] Legislative history indicates that the threshold of five people was a subjective judgment based, in significant part, on administrative considerations that it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[20] In contrast, the revised statute raises the number of people that must be involved in riotous conduct to eight. This number excludes many common types of group misconduct from being categorized as a riot,[21] focusing the offense on large-scale events that may give rise to a mob mentality and overwhelm the ability of a few law enforcement officers to control the scene. This change improves the proportionality of the revised offense and reduces an unnecessary overlap between the composite offense of rioting and common occurrences of predicate offenses.

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[15] D.C. Code § 22-1322(d).

[16] The maximum imprisonment penalty for violations of subsection (b) and (c) is 180 days, compared to a 10-year maximum for a violation of subsection (d).

[17] The felony gradation in subsection (c) of the current rioting statute does not specify any culpable mental state as to the amount of overall injury resulting from the riot. Strict liability for the results of the riot would mean that a person would be liable even if a factfinder found that the defendant could not and should not have been expected to know that the bad results could occur—the defendant is liable even for unforeseeable accidents that may arise from the unanticipated actions of others in the disorderly group.

[18] RCC § 22E-4302.

[19] D.C. Code § 22-1322(a).

[20] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses."); *see also United States v. Bridgeman*, 523 F.2d 1099, 1113 (D.C. Cir. 1975) (finding that the District's rioting statute was a codification of common law rioting except for its requirement of 5 participants).

[21] Common examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

Third, the revised statute eliminates incitement as a distinct basis for rioting liability.[22] Subsection (c) of the current rioting statute separately criminalizes behavior that "incites or urges other persons to engage in a riot," and subsection (d) imposes heightened liability for conduct that "incited or urged others to engage in the riot" and serious bodily harm or property damage in excess of $5,000 resulted.[23] The terms "incite" and "urge" are not defined in the statute or in case law.[24] Legislative history suggests that Congress' targeting of incitement as a form of rioting may have been based on an assumption about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated.[25] Regardless, legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation."[26] In contrast, under the revised statute, a person who "incites" or "encourages" rioting is only liable if his or her conduct suffices to meet requirements for liability as an accomplice[27] or is part of a criminal conspiracy.[28] The revised statute relies on general provisions regarding accomplice and conspiracy liability to more precisely establish the limits of what instances of "incitement" or "urging" are criminal, and to provide a proportionate penalty for acting as an accomplice or co-conspirator. This change improves the clarity, consistency, and proportionality of the revised offense.

Fourth, the revised offense bars any attempt liability. Under current law, rioting or inciting to riot is subject to the general attempt statute.[29] In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to rioting, that person has committed no offense under the revised code. Completed rioting is already an inchoate crime, closely related to predicate offenses involving bodily injury, taking of property, and damage to property, for which the RCC

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[22] Speech that incites violence as punished as disorderly conduct. RCC § 22E-4001(a)(2)(B). Abusive speech that is likely to provoke violence is punished as disorderly conduct. RCC § 22E-4001(a)(2)(C).

[23] D.C. Code § 22-1322(c).

[24] *But see United States v. Jeffries*, 45 F.R.D. 110, 117 (D.D.C. 1968) ("In the District of Columbia riot statute speech is only regulated under (b) where it is so closely brigaded with illegal action as to be an inseparable part of it.") (citing *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 426 (1966) (J. Douglas concurring)).

[25] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[26] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

[27] *See* RCC § 22E-210.

[28] *See* RCC § 22E-303.

[29] 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.").

provides separate liability. This change improves the proportionality of the revised statute.

Beyond these changes to current District law, one other aspect of the revised rioting statute may be viewed as a substantive change of law.

The revised statute does not require that rioting occur in a public location. The current rioting statute defines rioting as a "public disturbance," but does not explain whether the term "public" refers to the character of the location of the riot or to the persons whose tranquility is disturbed. There is no case law on point.[30] In contrast, the revised statute provides that where eight or more people are simultaneously engaging in conduct that causes injury or damage, that group conduct amounts to a riot, irrespective of where it occurs. Such disturbances, whether in a sports arena or Congress,[31] run a similar risk of escalating into mob-like action. This change clarifies the revised statute and eliminates an unnecessary gap in liability.

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

First, the revised statute clarifies that an unlawful taking of property may be a predicate for rioting liability. The current rioting statute[32] criminalizes "tumultuous or violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons." District case law has established that this reference to "injury to property" includes "either actual physical damage to property or the taking of another's property without the consent of the owner."[33] The revised rioting statute specifically refers to conduct that not only involves unlawful "damage" to property but also unlawful "taking" of property. This change clarifies the revised statute.

Second, the revised rioting statute replaces the archaic term "assemblage" with a reference to other persons being in a location where the actor can perceive them at the time of the target conduct, and requires a culpable mental state of recklessness as to their activities. The current law defines a riot as an "assemblage of 5 or more persons,"[34] but does not define "assemblage." District case law, however, has held that an "assemblage" refers to a group of people in close physical proximity to the defendant such that the person could "could reasonably have been expected to see or to hear" their action.[35] The

[30] *But see, e.g., Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct, with an element that location of the offense be open to the general public, where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[31] *See, e.g.*, United States House of Representatives, *The Most Infamous Floor Brawl in the History of the U.S. House of Representatives: February 06, 1858*, History, Art, and Archives (available at https://history.house.gov/Historical-Highlights/1851-1900/The-most-infamous-floor-brawl-in-the-history-of-the-U-S--House-of-Representatives/).

[32] DC Code § 22-1322.

[33] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).

[34] D.C. Code § 22-1322(a).

[35] *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the

revised statute codifies and clarifies this requirement as to others nearby activities by using the standard culpable mental state definition of "reckless." The actor need not be practically certain as to the scope and nature of others' activities, but must be aware of a substantial risk as to the others' numbers and conduct. No special connection or common purpose is required of the other persons engaged in unlawful conduct. This change clarifies and improves the consistency of the revised statute.

Third, the revised statute requires a culpable mental state of knowledge for an actor engaging in the riotous conduct. The current rioting statute specifies that a person must "willfully" engage in, incite, or urge a riot,[36] however, the current statute does not define "willfully." District case law states that "willfulness" is required of each of the other riot participants also.[37] The RCC clarifies this culpable mental state requirement as to riotous activities by using the standard definition of knowledge[38] as the culpable mental state for paragraph (a)(1). Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[39] This change clarifies and improves the consistency of the revised statute.

Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[36] D.C. Code § 22-1322.

[37] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("[Willfully] means the Defendant and at least four members of the assemblage participated in the public disturbance on purpose, that is, that each knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally.").

[38] RCC § 22E-206.

[39] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (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)).

RCC § 22E-4302. Failure to Disperse.

Explanatory Note. *This section establishes the new failure to disperse offense for the Revised Criminal Code (RCC). The offense does not exist under current District law but is closely related to conduct already punished in D.C. Code § 22-1322 (Rioting or inciting to riot) and 18 DCMR § 2000.2 (Failure to obey a lawful police order).*[1]

Paragraph (a)(1) requires that the accused act "knowingly," a term defined in RCC § 22E-206, that here means a person must be practically certain that he or she received a dispersal order from someone he or she is practically certain is a law enforcement officer.[2] "Law enforcement officer" is a defined term.[3] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the dispersal order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to disperse from the scene.[4] Where a person is uncertain as to whether they can safely comply with the dispersal order, a justification defense may apply.

Paragraph (a)(2) requires proof that eight[5] or more persons are engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be identical, but each person's conduct must be criminal harm involving bodily injury, taking of property, or damage to property.[6] The revised statute does not require that the eight people act in concert with one another[7] or organize together in advance.[8] However, the others' conduct must be in a location where the actor can see or hear their

[1] The failure to disperse offense does not replace or subsume the existing regulation in 18 DCMR § 2000.2.

[2] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit failure to disperse.

[3] RCC § 22E-701.

[4] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[5] The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense, RCC § 22E-4301 requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense, RCC § 22E-4302, does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot.

[6] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[7] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

[8] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

activities.[9] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that eight or more persons are engaged in riotous conduct nearby.

Paragraph (a)(3) requires that the presence of the person substantially impairs the ability of a law enforcement officer to stop the riotous conduct. The impairment must be substantial, not trivial, and is a highly fact-specific assessment.[10] The term 'in fact' here means that no culpable mental state is required as to the need for the order to disperse, but the objective fact still must be proven that the actor's presence substantially impairs the ability of a law enforcement officer to stop the conduct. False assertions that an actor must disperse because they are substantially impairing the law enforcement response would not satisfy this element of the failure to disperse offense.

Subsection (b) provides the penalties for the offense. [*See* Second Draft of Report #41.]

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

Relation to Current District Law. *Failure to disperse is a new offense and, in that sense, all aspects of the crime are substantive changes to District law. However, as compared to the District's current rioting[11] and failure to obey a lawful police order[12] laws, four aspects of the revised offense may constitute substantive changes of law.*

First, the RCC failure to disperse statute specifies that a culpable mental state of knowing is required for failing to disperse. The current D.C. Code does not include a failure to disperse offense but it does punish rioting[13] which requires "willful" conduct. A District municipal regulation criminalizes failure to obey a lawful police order,[14] and case law holds that a knowing refusal to obey a lawful order is sufficient for liability.[15] The RCC clearly specifies that knowledge, defined in RCC § 22E-206, is the applicable

[9] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[10] For example, the need for a law enforcement officer to walk around a peaceable demonstrator in order to reach the place where the group disorderly conduct is occurring would not, alone, amount to substantial impairment. On the other hand, peaceful demonstrators linking arms in a manner that blocks police access to a site where rioters are engaged in setting fire to a building may amount to substantial impairment. Relevant considerations may include: the delay in response time to the arson due to the demonstrators' continued presence, the potential severity of the arson, and the vulnerability of the demonstrators to unintended harm if there is resistance by those committing arson to the course of a law enforcement response.

[11] D.C. Code § 22-1322.

[12] 18 DCMR § 2000.2.

[13] D.C. Code § 22-1322.

[14] 18 DCMR § 2000.2.

[15] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998) ("According to his own testimony, Karriem *knowingly* refused to comply with lawful police orders. That refusal provided an objective basis for the police officers' probable cause determination, and thus as a matter of law their arrest of Mr. Karriem was valid.") (emphasis added).

mental state. The focus of the offense is the person's response to a law enforcement order. Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[16] This change improves the clarity and the consistency of the revised offense, and, to the extent it may require a new culpable mental state as to some of the principal elements of the offense, improves its proportionality.[17]

Second, the revised statute specifies that no culpable mental state needs to be proven as to the substantial impairment to law enforcement resulting from the person's failure to disperse. The current District regulation in 18 DCMR § 2000.2 is silent as to the culpable mental state, if any, required for this element of the offense. Case law interpreting 18 DCMR § 2000.2 suggests that a person need not believe or agree that an order is lawful before being required to obey it.[18] The RCC clearly specifies that no culpable mental state is required as to this element. The focus of the revised offense is the person's response to a law enforcement order and, in some situations, a person in a crowd may not know that their continued presence in the crowd substantially impairs law enforcement's ability to respond. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[19] This change improves the clarity and consistency of the revised offense.

Third, the revised statute specifies that a reckless culpable mental state must be proven as to the existence of riotous activity nearby. This culpable mental state of recklessness as to the criminal conduct being attempted or committed in the area perceptible to the actor distinguishes the culpability of an actor for the crime of failure to disperse as compared to the civil penalties for failure to obey a law enforcement officer's order per 18 DCMR § 2000.2 (Failure to obey a lawful police order). This change improves the consistency and proportionality of the revised offenses.

Fourth, the revised offense requires eight or more actors be engaged in riotous activity for an actor to be liable for failure to disperse liability. Current District law defines a riot as five or more people engaged in "tumultuous and violent conduct,"[20] in part because it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[21] However, there are many instances in which a group of five

[16] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[17] Were a person strictly liable for conduct that causes liability under 18 DCMR § 2000.2, even mistakes or accidents by a defendant could be the basis of criminal liability for failing to obey a lawful police order. For example, a person who starts to disperse but twists their ankle and cannot move further without severe pain would be liable.

[18] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998).

[19] *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, (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

[20] D.C. Code § 22-1322.

[21] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people.

disorderly persons may not rise to the level of a riot.[22] This change reduces unnecessary overlap between the composite offense of rioting and the underlying substantive offenses.

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

The revised offense requires proof that the person's continued presence substantially impairs the ability of a law enforcement officer to stop the riotous conduct of others nearby. In such circumstances, a law enforcement order to disperse is a "lawful" order under current District law. Under current law, a refusal to follow a necessary[23] and lawful[24] move-on order may subject a person to arrest in a variety of circumstances.[25] Crowd control measures in current law are designed to ensure law enforcement has adequate authority to immediately intervene when necessary to restore public order.[26] The revised offense merely clarifies the particular circumstances in which a law enforcement dispersal order is valid.

There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses.").

[22] Examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

[23] *See Bolz v. District of Columbia*, 149 A.3d 1130, 1137 (D.C. 2016).

[24] *See Streit v. District of Columbia*, 26 A.3d 315, 319 (D.C. 2011).

[25] *See, e.g.*, 18 DCMR § 2000.2 (Failure to Obey a Lawful Order of a Police Officer); 24 DCMR § 2100 (Crowd and Traffic Control); D.C. Code § 22-1307 (Crowding, obstructing, or incommoding); D.C. Code § 22-1314.02 (Prohibited acts); D.C. Code § 22-1321 (Obstructing bridges connecting D.C. and Virginia); D.C. Code § 22-2752 (Engaging in an unlawful protest targeting a residence); D.C. Code § 22-3302 (Unlawful entry on property); D.C. Code § 22-3321 (obstructing public highway).

[26] "The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance." 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 Page 3.

COMMENTARY
OFFENSES OUTSIDE TITLE 22 AND OFFENSES RECOMMENDED FOR REPEAL

RCC § 7-2502.01. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

Explanatory Note. *This section establishes the possession of an unregistered firearm, destructive device, or ammunition offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes possessing a firearm or ammunition without having registered a firearm under D.C. Code § 7-2502.07. The revised statute replaces the first sentence of D.C. Code § 7-2502.01(a) (concerning possession of an unregistered firearm or destructive device); 7-2506.01(a) (Persons permitted to possess ammunition); and 7-2507.06 (Penalties); and 24 DCMR § 2343.2 (Ammunition carried by licensee). This section is added to the list of excepted code provisions in D.C. Code § 7-2507.06(a).*

Subsection (a) specifies the elements of first degree possession of an unregistered firearm, destructive device, or ammunition. Subsection (a) specifies that a person must knowingly possess[1] an unregistered firearm, destructive device, or restricted pistol bullet. "Knowingly" is a defined term[2] and applied here means that the person must be practically certain that they possess the firearm or destructive device. "Possesses" is a defined term and includes both actual and constructive possession.[3] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[4] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[5]

Paragraph (a)(1) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing an unregistered firearm. "Firearm" is a defined term,[6] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[7] but excludes antiques.[8] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess a firearm[9] or that they possess component parts

[1] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).
[2] "Knowingly" is defined in RCC § 22E-206.
[3] RCC § 22E-701.
[4] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[5] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).
[6] D.C. Code § 7-2501.01.
[7] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[8] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[9] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

that could be arranged to make a whole firearm.[10] Paragraph (a)(1) requires proof that the accused lacked a firearm registration certificate on the day in question.[11] Paragraph (a)(1) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has a registration certificate.[12] It is not a defense that the person was unaware of the duty to register the firearm.[13] It is not a defense that the firearm cannot be registered lawfully in the District.[14]

Paragraph (a)(2) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing a destructive device. The term "destructive device" is a defined[15] term that includes certain explosives and lacrimators but excludes B-B guns and flare guns. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of "destructive device."

Paragraph (a)(3) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing one or more restricted pistol bullets. The term "restricted pistol bullet" is defined[16] to include several categories of pistol and rifle ammunition that are likely to pierce through bullet-resistant tactical vests. The term does not include hollow-point bullets. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of "restricted pistol bullet."

Subsection (b) specifies the elements of second degree possession of an unregistered firearm, destructive device, or ammunition. Subsection (b) specifies that a person must knowingly possess a specified object.[17] "Knowingly" is a defined term[18]

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[10] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

[11] *See Herrington v. United States*, 6 A.3d 1237, 1244-45 (D.C. 2010) (stating a legislature may not presume criminality from Second Amendment-protected conduct and put the burden of persuasion on the accused to prove facts necessary to establish innocence); *see also Walker v. United States*, 982 A.2d 723, 738 (D.C. 2009) (explaining to convict a defendant on an aiding and abetting theory, the government must show that the principal (not the aider and abettor) was not licensed) (citing *Halicki v. United States*, 614 A.2d 499, 503-04 (D.C.1992)); *Tabaka v. Dist. of Columbia*, 976 A.2d 173, 175 (D.C. 2009) (explaining that a record of no permit is testimonial, triggering the Confrontation Clause of the Sixth Amendment to the United States Constitution).

[12] RCC § 22E-207.

[13] *McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978); *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987); *District of Columbia v. Lewis*, 136 WLR 2609 (Super. Ct. 2008).

[14] *See United States v. Carmel*, 548 F.3d 571, 579 (7th Cir.2008) (holding that defendant could have complied with statute prohibiting possession of unregistered firearms "simply by declining to possess…illegal machine guns," which could not be registered because they could not legally be possessed); *United States v. Grier*, 354 F.3d 210, 214–15 (3d Cir.2003) (same); *United States v. Bournes*, 339 F.3d 396, 399 (6th Cir.2003) (same); *United States v. Elliott*, 128 F.3d 671, 672 (8th Cir.1997) (same); *Hunter v. United States*, 73 F.3d 260, 261–62 (9th Cir.1996) (same); *United States v. Ardoin*, 19 F.3d 177, 179–80 (5th Cir.1994) (same); *United States v. Jones*, 976 F.2d 176, 183 (4th Cir.1992) (same); *but see United States v. Dalton*, 960 F.2d 121, 124 (10th Cir.1992) (reversing conviction for possession of unregistered machine gun, holding that a conviction for a crime that "ha[s] as an essential element [the defendant's] failure to do an act that he is incapable of performing" violates due process).

[15] D.C. Code § 7-2501.01.

[16] RCC § 22E-701.

[17] Knowledge of ammunition's presence may be inferred from surrounding circumstances; direct evidence is not required. *See Ko v. United States*, 722 A.2d 830 (D.C. 1998) (upholding conviction of unlawful

and applied here means that the person must be practically certain that they possess the object. "Possesses" is a defined term and includes both actual and constructive possession.[19] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[20] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[21]

Subsection (b) provides that a person commits second degree possession of an unregistered firearm, destructive device, or ammunition by possessing ammunition without having a registered firearm of the same caliber. "Ammunition" is a defined term,[22] which means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of "ammunition." Subsection (b) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person lacked a firearm registration certificate on the day in question.[23] It is not a defense that the person was unaware of the duty to have a registered firearm. It is not a defense that a firearm of the same caliber cannot be registered lawfully in the District.

Subsection (c) establishes six exclusions from liability.Paragraph (c)(1) excludes from liability possession of a firearm frame, receiver, muffler, or silencer.[24] Possession of a silencer is punished as possession of a prohibited weapon or accessory.[25]

Paragraph (c)(2) excludes from liability possession of a lacrimator or sternutator.[26]

Paragraph (c)(3) excludes from liability possession of a firearm by a nonresident who is traveling through the District with the firearm that they have registered in another state. Subparagraph (c)(2)(A) excludes nonresidents who are participating in a lawful recreational firearm-related activity[27] inside the District. Subparagraph (c)(2)(B) excludes non-residents who are traveling to or from a lawful recreational firearm-related activity outside the District. Subparagraph (c)(2)(B) requires that the person comply with

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possession of ammunition on evidence that defendant, who had purchased a restaurant, found ammunition owned by seller in office, put that ammunition in his desk drawer, and made no attempt for several months to return ammunition to the seller).

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

[19] RCC § 22E-701.

[20] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[21] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

[22] RCC § 22E-701.

[23] *Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017); *Herrington v. United States*, 6 A.3d 1237 (D.C. 2010).

[24] D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers.

[25] RCC § 22E-4101.

[26] D.C. Code § 7-2501.01 defines "destructive device" to include any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known.

[27] E.g., safety training course, firing range practice, gun show, shooting competition.

any law enforcement officer's demand for proof that they meet the exclusion criteria. "Law enforcement officer" is a defined in RCC § 22E-701. Subparagraph (c)(2)(B) also requires that the firearm be safely transported consistent with RCC § 22E-4109.

Paragraph (c)(4) excludes from liability possession of ammunition by any person who holds an ammunition collector's certificate issued before the Firearms Control Regulation Act of 1975 became effective. Where the government presents a *prima facie* case of possession of ammunition without the necessary firearm registration, the defendant has the burden of proving this exclusion from liability by a preponderance of the evidence.[28]

Paragraph (c)(5) excludes empty cartridge casings, shells, and spent bullets from the reach of the second degree possession of an unregistered firearm, destructive device, or ammunition offense.[29]

Paragraph (c)(6) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (d) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[30] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (e) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.[31]

Subsection (f) provides the penalty for each gradation of the revised offense. [*See* Second Draft of Report #41.] Paragraph (f)(3) provides that the Attorney General may allow a person charged with possession of an unregistered firearm, destructive device, or ammunition to resolve the charge using the District's post-and-forfeit procedure.[32]

Subsection (g) cross-references applicable definitions in the RCC and the D.C. Code.

Subsection (h) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 7 offense.

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[28] *See Herrington v. United States*, 6 A.3d 1237, n. 31 (D.C. 2010).

[29] For example, a person who keeps a shotgun shell as a souvenir, after a day of recreational skeet shooting, does not commit a second degree possession of unregistered firearm, destructive device, or ammunition offense.

[30] *See, e.g.*, D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991). [The Commission's recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming.]

[31] Because provisions of statutes governing offenses of possession of an unregistered firearm (UF) and unlawful possession of ammunition (UA) are "police or municipal ordinances or regulations," prosecutorial authority lies with the Office of the Attorney General of the District of Columbia (OAG), rather than Office of the United States Attorney (USAO), irrespective of the fact that a violation of these provisions carries a maximum penalty of both a fine and imprisonment. *In re Hall*, 31 A.3d 453 (D.C. 2011).

[32] Although diversion would be permissible without this statutory language, codifying the Council's intent to afford a noncriminal negotiated resolution to many (or most) people charged with this offense provides better notice to the public and criminal justice system actors.

Relation to Current District Law. *The revised possession of an unregistered firearm, destructive device, or ammunition offense changes current District law in eight main ways.*

First, the revised statute treats repeat offender penalty enhancements consistent with other revised offenses. Current D.C. Code § 7-2507.06 provides two different penalties for an unregistered firearm. Subsection (a) specifies a maximum penalty of one year of incarceration, a fine of $2,500, or both.[33] Paragraph (a)(2) of D.C. Code § 7-2507.06 specifies that a second offense is punishable by a maximum penalty of five years of incarceration, a fine of $12,500, or both, unless the person is in their dwelling place, place of business, or on their land and possesses a firearm that could otherwise be registered.[34] (Subparagraph (b)(1)(A) of D.C. Code § 7-2507.06 specifically authorizes the Attorney General to offer an alternative administrative disposition without conviction, but this provision is superfluous because general authority to offer such a disposition exists in D.C. Code § 5-335.01.) In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. Repeat violations of an unregistered firearm, destructive device, or ammunition offense may be subject to a general repeat offender penalty enhancement just as other offenses.[35] This change improves the consistency and proportionality of the revised statute.

Second, the revised offense does not include liability for possession of a frame, receiver, muffler, silencer, lacrimator or sternutator. Current D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers and defines "destructive device" to include any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known. Unlike firearms, the United States Supreme Court has not yet considered whether these parts and accessories are "bearable arms" protected by the Second Amendment.[36] With limited exceptions for military and law enforcement,[37] the RCC criminalizes mere possession of a silencer as contraband *per se*[38] and, because any possession is illegal, does not regulate their registration, storage, or carrying. The RCC does not criminalize possession of self defense sprays.[39] This change improves the proportionality and logically reorganizes the revised offenses.

Third, the revised statute punishes possession of a restricted pistol bullet as possession of an unregistered firearm, destructive device, or ammunition[40] only. Current 24 DCMR § 2343.2 states, "A person issued a concealed carry license by the Chief may not carry any restricted pistol bullet as that term is defined in the Act." However, mere possession—much less actual possession or carrying—of a restricted pistol bullet by any person, including the holder of a carry license, is prohibited under other provisions in

[33] D.C. Code § 22-3571.01.
[34] D.C. Code § 22-3571.01.
[35] RCC §§ 22E-606(a) and (b).
[36] *See United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), *cert. denied*, 2019 WL 235139, U.S. (June 10, 2019).
[37] RCC § 22E-4118.
[38] RCC § 22E-4101, possession of a prohibited weapon or accessory.
[39] See First Draft of Report #40.
[40] RCC § 7-2502.01(b)(2).

current law.[41] In contrast, the revised code effectively repeals 23 DCMR § 2343.2 as duplicative of the prohibition on restricted pistol bullets in the revised possession of a prohibited weapon or accessory offense.[42] This change improves the logical organization of the revised code and reduces unnecessary overlap between District offenses.

Fourth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of an unregistered firearm, destructive device, or ammunition offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Fifth, the revised statute's Administrative Disposition[43] provision does not specify the factors the Attorney General must consider before offering diversion. Current D.C. Code § 7-2506.07(b) narrows prosecutorial discretion in at least one way. Paragraph (b)(1) permits an administrative disposition only, "provided, that the person is not concurrently charged with another criminal offense arising from the same event, other than an offense pursuant to § 7-2502.01 or § 7-2506.01." Paragraph (b)(2) states, "the prosecution, in the operation of its discretion, may consider, among other factors, whether at the time of his or her arrest, the person was a resident of the District of Columbia and whether the person had knowledge of § 7-2502.01, § 7-2506.01, or § 7-2507.06(a)(3)(B)." And, paragraph (b)(5) states, "The Mayor…may provide procedures and criteria to be used in determining when the prosecution, in the operation of its discretion, may offer the option of an administrative disposition pursuant to this subsection." While the provisions in paragraphs (b)(2) and (b)(5) appear to be discretionary, the provision in paragraph (b)(1) of D.C. Code § 7-2506.07 is a requirement. In contrast, the RCC does not codify the criteria to be considered for initially charging[44] any particular offense and instead leaves the factors to be weighed in charging decisions to the discretion of the prosecutor.[45] This change improves the clarity and consistency of the revised offenses.

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[41] With limited exceptions, a person who has any ammunition (defined in D.C. Code § 7-2501.01 to include restricted pistol bullets) without having a registered firearm of the same caliber, may be prosecuted under D.C. Code § 7-2506.01. A person who has a registered firearm is nevertheless prohibited from having one or more restricted pistol bullets under D.C. Code § 7-2506.01(a)(3).

[42] RCC § 22E-4101(a)(2)(F).

[43] The Administrative Disposition referenced is the post-and-forfeit procedure described in D.C. Code § 5-335.01. No separate rules are intended to apply to possession of a stun gun as opposed to other post-and-forfeit eligible offenses.

[44] [The Commission's recommendations for penalties are forthcoming and may include eligibility criteria for certain diversion programs.]

[45] *See* American Bar Association, Criminal Justice Standards for the Prosecution Function Fourth Addition Standard 3-4.2(b), 3-4.3(a), and 3-4.4 (February 13, 2015).

Sixth, the revised offense punishes possession of one restricted bullet as severely as possession of two or more. Current D.C. Code § 7-2507.06(a) provides a maximum penalty of one year in jail for possession of a single restricted pistol bullet and a maximum of 10 years in prison for possession of two or more. D.C. Code § 7-2507.06(b)(1)(B) authorizes the Attorney General to offer an alternative administrative disposition without conviction for possession a single restricted pistol bullet but not for possession of two or more.[46] In contrast, the revised offense provides a single penalty gradation for possession of restricted ammunition. It is unclear why such a sharp difference in penalty is supported by possessing one bullet versus possessing two or more bullets.[47] This change improves the proportionality of the revised offense.

Seventh, the RCC codifies a single list of exclusions from liability for possessory weapons offenses that are incorporated into the revised possession of an unregistered firearm, destructive device, or ammunition offense by reference.[48] The current D.C. Code provisions list incongruent exceptions for law enforcement officers, weapons dealers, government employees, and nonresidents who possess an unregistered firearm, destructive device, or ammunition.[49] In contrast, RCC § 22E-4118 provides a single, comprehensive list of exclusions from liability, reconciling the exclusion circumstances described in current law. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for law enforcement authorities.[50] This change improves the clarity, consistency, and completeness of the revised code.

Eighth, the revised offense codifies a voluntary surrender affirmative defense. D.C. Code §§ 7-2507.05 and 7-2510.07(f)(1) preclude prosecution for certain possessory weapons offenses where the person is voluntarily surrendering the weapon to law enforcement. The statutes do not address the elements or burden of proof for a defense based on one of these provisions, however District case law has explained the showing that must be made by the defense.[51] The revised statute specifies that any voluntary surrender that is made pursuant to District or federal law is an affirmative defense that

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[46] This provision is technically superfluous since general authority to offer such a disposition exists in D.C. Code § 5-335.01.

[47] Firearms frequently hold six rounds of ammunition or more. Ammunition is often sold in boxes of 50 rounds or more.

[48] RCC § 22E-4118.

[49] The following three examples provide an illustrative, though inexhaustive, list. First, a person who participates in a firearms training and safety class is not liable for transporting a registered firearm to or from the class and is not liable for possessing ammunition during the class, however, there is no exception in current law for possessing a firearm during a firearm training and safety class. *See, e.g.*, D.C. Code § 22-4504.02(a); 22-4505(c); 7-2506.01(a)(5). Second, a member of the military avoids prosecution for possession of an assault weapon, machine gun, or sawed-off shotgun, however, there is no military exception for possession of a large-capacity ammunition feeding device. D.C. Code § 22-4514(a); 7-2506.01(b). Third, consistent with 18 U.S.C. 926C, D.C. Code § 22-4505(b) provides that a retired Metropolitan Police Officer who carries a registered firearm is not liable for carrying a dangerous weapon, however, D.C. Code § 22-4514(a) does not include a similar exception for possession of a prohibited weapon.

[50] [The Commission's recommendations for general defenses are forthcoming.]

[51] *See Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991).

must be proven by the defense by a preponderance of the evidence.[52] This change improves the clarity, consistency, and proportionality of the revised offense.

Beyond these changes, three other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute holds an actor strictly liable as to the existence of a firearm registration certificate. Current D.C. Code §§ 22-4502.01, 22-4506.01, and 22-4507.06 do not specify a culpable mental state for any element of the unregistered firearm, destructive device, or ammunition offenses.[53] District case law has not addressed whether a reasonable or unreasonable mistake of fact as to having validly registered a firearm is a defense.[54] The revised offense makes no allowance for such a defense. A firearm owner is required to comply with all District regulations, including receiving training on the responsibilities of ownership.[55] This change clarifies the revised offense.

Second, the RCC's exclusion for nonresidents traveling through the District, in paragraph (c)(3) of the revised offense, requires that the person exhibit proof that they meet the exclusion criteria to any "law enforcement officer" who demands it. D.C. Code § 7-2502.01(b)(3) requires that a nonresident in these circumstances comply with such a request made by a Metropolitan Police Officer "or other bona fide law enforcement officer." The term "bona fide law enforcement officer" is not defined in the statute and District case law has not interpreted its meaning. In contrast, the revised offense uses the standardized definition of "law enforcement officer" that is employed throughout the RCC.[56] The RCC definition of "law enforcement officer" includes special police officers, corrections officers, and other government actors who do not have arrest powers, which may be broader than the phrase "bona fide law enforcement officer" in current law. This change improves the clarity and consistency of the revised offense and may eliminate an unnecessary gap in liability.

Third, the revised statute refers to "possession" and does not include explicit references to transferring, offering for sale, selling, giving, or delivering a destructive device. D.C. Code § 7-2502.01(a) makes it unlawful to receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device. Such conduct is also prohibited by D.C. Code §§ 7-2504.01(b) and 7-2505.01. In contrast, the RCC's definition of possess[57] includes both actual possession and constructive possession. A person who knowingly transfers, offers, sells, gives, or delivers a destructive device

[52] *See* RCC § 22E-201(b). [The Commission's recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming.]

[53] District case law requires knowledge for actual or constructive possession of any item. *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

[54] Consider, for example, a person who mistakenly believes their registration expires in July instead of June. Consider also a person who inherits a firearm believing the registration certificate was transferred to them in probate.

[55] *See* D.C. Code § 7-2502.03(a)(10).

[56] RCC § 22E-701.

[57] RCC § 22E-701.

appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.[58] This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

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

First, the revised statute applies a standardized definition for the "knowingly" culpable mental state required for possession of an unregistered firearm, destructive device, or ammunition liability. The current statutes do not specify a requisite mental state,[59] however, District case law requires knowledge for actual or constructive possession of any item.[60] The revised statute uses the RCC's general provisions that define "knowingly" and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[61] These changes clarify and improve the consistency of District statutes.

Second, the revised code defines "possession" in its general part.[62] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[63] The RCC definition of "possession,"[64] with the requirement in the offense that the possession be "knowing,"[65] matches the meaning of possession in current DCCA case law.[66] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[58] *See* D.C. Code § 22-1511 (Fraudulent advertising).
[59] D.C. Code §§ 7-2502.01; 7-2506.01.
[60] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).
[61] RCC § 22E-207.
[62] RCC § 22E-202.
[63] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[64] RCC § 22E-701.
[65] RCC § 22E-206.
[66] *See United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

Third, the revised offense does not specifically include a self-defense provision. Current D.C. Code § 7-2502.01(b)(4) specifies that a person will not be subject to prosecution "who temporarily possesses a firearm…while in the home or place of business of the registrant…[if] the person reasonably believes that possession of the firearm is necessary to prevent imminent death or great bodily harm to himself or herself." An offense-specific self-defense provision is duplicative in the RCC. Per subsection (h) of the revised statute, the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense, including general provisions that preclude liability where a person acts in defense of one's self, a third person, or property.[67] This change improves the consistency of the revised offenses.

Fourth, the revised statute requires the government prove that a person who possesses ammunition does not have a registered firearm of the same caliber. Current D.C. Code § 7-2506.01(a) states that no person shall possess ammunition unless one of five circumstances is present. The statute does not specify whether the government has the burden of proving the absence of these circumstances or whether the defense must affirmatively raise any of the circumstances as a defense. However, the District of Columbia Court of Appeals ("DCCA") has required the government to prove the circumstance described in D.C. Code § 7-2506.01(a)(3): the absence of a firearm registration certificate.[68] The revised offense clarifies that the absence of a firearm registration certificate is an element that must be proven beyond a reasonable doubt, whereas the other exceptions[69] must be proven by the defense by a preponderance of the evidence.[70] This change improves the clarity and consistency of the revised offense.

[67] [The Commission's recommendations for general defenses are forthcoming.]

[68] In *Logan v. United States*, the District of Columbia Court of Appeals ("DCCA") construed the statute to mean that possession of ammunition is presumptively unlawful and, thus, the government does not have the burden of proving that a defendant is not a licensee, an authorized government officer, agent or employee, a registrant of firearms of the same caliber as the ammunition possessed, or a certified dealer. 489 A.2d 485, 492-93 (D.C. 1985). However, in *Herrington v. United States*, the DCCA held that *Logan* was unconstitutional as applied to a person who possesses ammunition in their own home. 6 A.3d 1237, 1241-45 (D.C. 2010). The court reasoned that, where the Second Amendment imposes substantive limits on what conduct may be defined as a crime, a legislature may not "circumvent those limits by enacting a statute that presumes criminality from constitutionally-protected conduct and puts the burden of persuasion on the accused to prove facts necessary to establish innocence." *Id.* at 1244. The court did not reach the question of whether the holding in *Logan* would be unconstitutional as applied to a person outside the home. The revised offense resolves this ambiguity.

[69] RCC §§ 7-2502.01(c)(1); 22E-4118.

[70] *Herrington v. United States*, 6 A.3d 1237, n. 31 (D.C. 2010).

RCC § 7-2502.15. Possession of a Stun Gun.

Explanatory Note. *This section establishes the possession of a stun gun offense for the Revised Criminal Code (RCC). The offense proscribes possession of a stun gun by persons under 18 and possession of a stun gun in a prohibited location. The revised offense replaces D.C. Code §§ 7-2502.15 (Possession of stun guns) and 7-2507.06(b)(1)(E) (Penalties).*

Subsection (a) specifies that to commit possession of a stun gun, a person must knowingly[1] possess a stun gun. "Stun gun" is a defined term and includes weapons that inflict injury by direct contact (commonly referred to as "stun guns") and weapons that can be fired from a distance (e.g., TASERs). "Possession" is also a defined term and includes both actual and constructive possession.[2] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[3]

Paragraph (a)(1) prohibits knowing possession of a stun gun by any person who is under 18 years of age. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is under 18 years of age.

Paragraph (a)(2) prohibits possession of a stun gun by any person in a specified location. Subparagraph (a)(2)(A) specifies that the first type of location where stun guns are prohibited is a District government-occupied building, building grounds, or part of a building. The term "building" is defined in RCC § 22E-701. "Building grounds" refers to the area of land occupied by the facility and its yard and outbuildings, with a clearly identified perimeter. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a location that is occupied by the District of Columbia.

Subparagraph (a)(2)(B) specifies that the second type of location that may ban stun guns under penalty of criminal prosecution under this section is a location that is a building, building grounds, or part of a building that is occupied by a preschool, primary or secondary school, public youth center, or a children's day care center.[4] The term "building" is defined in RCC § 22E-701 and does not include open campus space. "Building grounds" refers to the area of land occupied by the facility and its yard and outbuildings, with a clearly identified perimeter. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a specified location.

Subparagraph (a)(2)(C) specifies that the third type of location that may ban stun guns under penalty of criminal prosecution under this section is one that displays signage that clearly and conspicuously indicates stun guns are not permitted there. Whether a sign is clear and conspicuous may depend on facts such as its placement, legibility, and word choice.[5] Per the rules of interpretation in RCC § 22E-207, the person must know—

[1] "Knowingly" is defined in RCC § 22E-206.
[2] RCC § 22E-701; *see also Rivas v. United States*, 783 A.2d 125, 128 (D.C. 2001).
[3] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[4] These locations include buildings that are being used for the specified purpose. They do not include, for example, an address that is used only to receive mail for an online education program.
[5] This is a more flexible standard than provided in the District's current municipal regulation of signage preventing entry onto private property with a concealed firearm. 24 DCMR § 2346 (requiring a sign at the

that is, be practically certain—that he or she is in a location where such signage is displayed.

Subsection (b) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (c) codifies an effective consent affirmative defense to the possession of a stun gun offense.[6] Subsection (c) specifies that the effective consent defense is in addition to any defenses otherwise applicable to the actor's conduct under District law. The effective consent defense requires either the complainant's "effective consent" to the actor's conduct or the actor's reasonable belief that the complainant gave "effective consent" to the actor's conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." The burden is on the defendant to raise and prove the effective consent defense by a preponderance of the evidence.

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 the revised offense. [*See* Second Draft of Report #41.] Paragraph (c)(2) provides that the Attorney General may allow a person charged with possession of a stun gun to resolve the charge using the District's post-and-forfeit procedure.[7]

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

Subsection (g) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised possession of a stun gun offense changes current District law in five main ways.*

First, the revised offense does not separately prohibit using a stun gun. Current law provides, "No person who possesses a stun gun shall use that weapon except in the exercise of reasonable force in defense of person or property"[8] and that "brief possession [by a person under 18 years of age] for self-defense in response to an immediate threat of harm shall not be a violation of this subsection."[9] In contrast, the RCC punishes using a dangerous weapon (a defined term that includes a stun gun[10]) unlawfully against another person in a wide array of offenses against persons, such as assault,[11] or menacing.[12] Where a person acts in defense of one's self, a third person, or property, a general defense may apply.[13] The revised code does not criminalize using a stun gun in any other

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that is at least eight (8) inches by ten (10) inches in size and contains writing in contrasting ink using not less than thirty-six (36) point type).

[6] *See* D.C. Code § 7-2502.15(c) ("Unless permission specific to the individual and occasion is given…").

[7] Although diversion would be permissible without this statutory language, codifying the Council's intent to afford a noncriminal negotiated resolution to many (or most) people charged with this offense provides better notice to the public and criminal justice system actors.

[8] D.C. Code § 7-2502.15(b).

[9] D.C. Code § 7-2502.15(a).

[10] RCC § 22E-701.

[11] RCC § 22E-1202.

[12] RCC § 22E-1203.

[13] [The Commission's recommendations for general defenses are forthcoming.]

manner.[14] This change eliminates unnecessary overlap between revised offenses and improves the consistency of the revised offenses.

Second, the revised code does not specifically criminalize possession of a stun gun in a correctional facility as a weapons offense. Current law prohibits possession of a stun gun in a "penal institution, secure juvenile residential facility, or halfway house" as both possession of a stun gun[15] and as unlawful possession of contraband.[16] In contrast, the revised offense applies generally to buildings, grounds, or parts thereof occupied by the District of Columbia, which effectively reaches many correctional facilities in the District. For both District and non-District occupied correctional facilities, the RCC first degree correctional facility contraband offense[17] punishes possession of a dangerous weapon (a defined term that includes a stun gun[18]) by a person who is confined to a correctional facility or secure juvenile detention facility and also punishes bringing a dangerous weapon to a person who is confined in such a facility.[19] The RCC does not separately criminalize possession of a stun gun in a halfway house, however the Director of the Department of Corrections may suspend or revoke work release for any breach of discipline or infraction of institution regulations.[20] This change eliminates unnecessary overlap between revised offenses and improves the consistency of the revised code.

Third, the RCC separately codifies a standard list of exclusions from liability for possessory weapons offenses.[21] Current D.C. Code § 7-2502.15(c), by cross-reference to § 7-2509.01, provides an exception for police officers, special police officers, and campus police officers who carry stun guns. In contrast, RCC § 22E-4118 provides an exception for all military, law enforcement, and government employees who handle weapons, as well as civilians who are authorized to manufacture, sell, or repair weapons. Moreover, legitimate use of weapons by law enforcement falls under the general provisions' justification defense for law enforcement authorities.[22] This change improves the clarity, consistency, and completeness of the revised code.

Fourth, the revised statute's Administrative Disposition[23] provision does not specify the factors the Attorney General must consider before offering diversion. Current D.C. Code § 7-2506.07(b) narrows prosecutorial discretion in at least one way. Paragraph (b)(1) permits an administrative disposition only, "provided, that the person is not concurrently charged with another criminal offense arising from the same event, other

[14] Consider, for example, a person who uses a stun gun to see test its operation or to inflict an injury to one's self.
[15] D.C. Code § 7-2502.15(c)(2).
[16] D.C. Code § 22-2603.02.
[17] RCC § 22E-3403(a).
[18] RCC § 22E-701.
[19] Notably, the correctional facility contraband offense does not reach persons who bring a dangerous weapon to a facility without intent to give it to someone who is confined. If a person brings a dangerous weapon to a facility with intent to use it unlawfully, that conduct is punished as possession of a dangerous weapon during a crime, under RCC § 22E-4104.
[20] D.C. Code § 24-241.05(a).
[21] RCC § 22E-4118.
[22] [The Commission's recommendations for general defenses are forthcoming.]
[23] The Administrative Disposition referenced is the post-and-forfeit procedure described in D.C. Code § 5-335.01. No separate rules are intended to apply to possession of a stun gun as opposed to other post-and-forfeit eligible offenses.

than an offense pursuant to § 7-2502.01 or § 7-2506.01." Paragraph (b)(2) states, "the prosecution, in the operation of its discretion, may consider, among other factors, whether at the time of his or her arrest, the person was a resident of the District of Columbia and whether the person had knowledge of § 7-2502.01, § 7-2506.01, or § 7-2507.06(a)(3)(B)." And, paragraph (b)(5) states, "The Mayor…may provide procedures and criteria to be used in determining when the prosecution, in the operation of its discretion, may offer the option of an administrative disposition pursuant to this subsection." While the provisions in paragraphs (b)(2) and (b)(5) appear to be discretionary, the provision in paragraph (b)(1) of D.C. Code § 7-2506.07 is a requirement. In contrast, the RCC does not codify the criteria to be considered for initially charging[24] any particular offense and instead leaves the factors to be weighed in charging decisions to the discretion of the prosecutor.[25] This change improves the clarity and consistency of the revised offenses.

Fifth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a stun gun offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Beyond these changes, two other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute specifies that knowledge the culpable mental states required for each element of the revised possession of a stun gun offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[26] The revised statute requires that a person know that they possess a stun gun and that they know the nature of their location. A reading of the

[24] [The Commission's recommendations for penalties are forthcoming and may include eligibility criteria for certain diversion programs.]

[25] *See* American Bar Association, Criminal Justice Standards for the Prosecution Function Fourth Addition Standard 3-4.2(b), 3-4.3(a), and 3-4.4 (February 13, 2015).

[26] 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)).

statute that makes a person strictly liable for would leave no margin for a reasonable mistake of fact or law by someone otherwise engaged in legal activity.[27] The revised statute does not impose criminal liability where a person exercises their constitutionally protected right to carry a stun gun[28] in a reasonably responsible manner. The revised offense applies a standardized definition for the "knowingly" culpable mental state required for possession of stun gun liability. This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute codifies an effective consent affirmative defense. Current law prohibits possession of a stun gun in specified locations "Unless permission specific to the individual and occasion is given."[29] The statute does not address who must provide permission, whether permission must be freely given, whether the accused must be aware or certain of the permission, or which party has the burden of proving permission or lack of permission. Case law has not addressed these issues. To resolve these ambiguities, the revised possession of a stun gun statute details the meaning, burden of proof, and limitations of an effective consent defense to the revised possession of a stun gun offense. 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, the revised statute requires signage that clearly and conspicuously indicates stun guns are not permitted. Current law criminalizes possession of a stun gun in "Any building or grounds clearly posted by the owner or occupant to prohibit the carrying of a stun gun." [30] The revised statute's language is substantively the same as the current statute, but phrased so as to be consistent with other RCC offenses. This change improves the consistency and proportionality of the revised offenses.

Second, the revised code defines "possession" in its general part.[31] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[32] The RCC definition of "possession,"[33] with the requirement in the offense that the possession be "knowing,"[34] matches the meaning of possession in current DCCA case law.[35] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[27] Consider, for example, a person who carries a stun gun for self-defense and enters a coffeehouse in a government building that they mistakenly—but understandably—believe to be a private office building. Consider also, a person who cannot read English, who brushes past a large sign stating, "No stun guns allowed," to ask a security staff person whether stun guns are permitted.
[28] *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).
[29] D.C. Code § 7-2502.15(c).
[30] D.C. Code § 7-2502.15(c)(4).
[31] RCC § 22E-202.
[32] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[33] RCC § 22E-701.
[34] RCC § 22E-206.
[35] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in

Third, the revised statute replaces the phrase "A building or office occupied by the District of Columbia, its agencies, or instrumentalities"[36] with the simpler "A building, building grounds, or part of a building, occupied by the District of Columbia" in subparagraph (a)(1)(A). The word "instrumentalities" as used in D.C. Code § 7-2502.15 is not defined in the statute and case law has not interpreted its meaning. Broadly construed, "instrumentalities" may include every person and business contracted to work on behalf of the District government, which would capture many locations that do not have heightened security concerns.[37]

Fourth, the revised statute clarifies the list of prohibited locations related to children. Current D.C. Code § 7-2502.15(c)(3) disallows stun guns in "[a] building or portion thereof, occupied by a children's facility, preschool, or public or private elementary or secondary school." The revised offense eliminates the superfluous reference to "public or private" and substitutes for the vague reference to "children's facility" the terms "public recreation center" and "children's day care center." The latter terms are locations similarly protected from firearms[38] and drug activity[39] under the revised code.

Fifth, the revised statute replaces the phrases "A building or office occupied by…" and "A building or portion thereof, occupied by"[40] with the simpler "A building, building grounds, or part of a building…" This clarifies that a person does not commit an offense by entering another part of the building that is not occupied by a District government office or children's facility and improves the consistency of the revised offense.[41]

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question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

[36] D.C. Code § 7-2502.15(c)(1).

[37] Consider, for example, a restaurant that provides catering services to a District government event.

[38] RCC § 22E-4102.

[39] *See* RCC § 48-904.01b(g)(7)(C)(i).

[40] D.C. Code § 7-2502.15(c)(3).

[41] Consider, for example, two locations of the same chain of grocery stores, one occupying the ground floor of a District office building and the other occupying the ground floor of a privately-owned building. Each store has its own private entrance. In such an instance, the revised offense treats these locations alike and prohibits possession of a stun gun only if the store displays clear and conspicuous signage.

RCC § 7-2502.17. Carrying an Air or Spring Gun.

Explanatory Note. *This section establishes the carrying an air or spring gun offense for the Revised Criminal Code (RCC). The offense proscribes carrying an air- or spring-operated gun outside. The revised offense replaces 24 DCMR § 2301 (Possession of Weapons).*

Paragraph (a)(1) specifies that to commit carrying an air or spring gun, a person must knowingly[42] possess an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, or bowgun. "Possesses" is a defined term and includes both actual and constructive possession.[43] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[44]

Paragraph (a)(2) specifies that a person must carry the air or spring gun outside a building. The term "building" is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not inside a building.

Paragraph (a)(3) specifies that a person must carry the air or spring gun in a manner that it is both conveniently accessible and within reach.[45] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the air or spring gun is conveniently accessible and within reach.

Paragraph (b)(1) excludes three categories of conduct from criminal liability under this section. First, a person is not liable under this statute[46] for using an air or spring gun outside as part of a lawful[47] theatrical performance,[48] athletic contest,[49] or athletic or cultural presentation.[50] Second, a person is not liable for using an air or spring gun in a licensed firing range.[51] Third, a person is not liable for using an air or spring gun in a location where use of the gun is permitted by the Metropolitan Police Department ("MPD"). MPD may permit the use of an air or spring gun in a particular location at a specified time or at all times.

Paragraph (b)(2) provides an exception for responsibly transporting an air or spring gun. Subparagraph (b)(2)(A) limits the exception to persons over 18 years of age.

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

[43] RCC § 22E-701.

[44] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[45] For example, where there is an obstacle to a person's access to a weapon, such as a locked trunk, the person has not carried a weapon under the revised statute. *See, e.g., Henderson v. United States*, 687 A.2d 918, 922 (D.C. 1996); *Porter v. United States*, 282 A.2d 559, 560 (D.C. 1971).

[46] However, if the use of the air or spring gun in a public place causes any person present to reasonably believe that he or she is likely to suffer immediate criminal harm involving bodily injury, taking of property, or damage to property, it may amount to disorderly conduct per RCC § 22E-4201.

[47] For example, a person who orchestrates a B-B gun shooting contest on public property or private property without permission may commit a Trespass. *See* RCC § 22E-2601.

[48] For example, an actor in a play may use an air or spring gun to simulate a firearm in a shooting scene.

[49] For example, a referee may use an air or spring gun to signal the start of a race.

[50] For example, a person may have a blowgun while giving an educational presentation at the National Museum of the American Indian.

[51] Notably, although training at a firearms range is required to obtain and maintain a license to carry a pistol, the District does not currently have any firing ranges or a process to apply to open one.

Subparagraph (b)(2)(B) requires that the air or spring gun be both unloaded and securely wrapped.

Paragraph (b)(3) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

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

Subsection (f) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised carrying an air or spring gun offense changes current District law in three main ways.*

First, the revised statute does not specifically criminalize possession by a person under 18 of a "bean shooter, sling, projectile, [or] dart" in a public place. Current 24 DCMR § 2301.1 prohibits any person under 18 years of age from carrying in public "any gun, pistol, rifle, bean shooter, sling, projectile, dart, or other dangerous weapon of any character." The terms "bean shooter," "sling," "projectile," and "dart" are not defined in the DCMR or in District case law. It is unclear whether these terms would reach objects with commonplace recreational uses, such as a ball, a frisbee, or toys that launch foam or plastic rockets or other objects.[52] In contrast, the revised carrying an air or spring gun statute does not cover a "bean shooter, sling, projectile, [or] dart" by a person under 18 in public. Such behavior may, in some instances be punishable in the RCC as carrying a dangerous weapon[53] or possession of a dangerous weapon with intent to commit crime.[54] This change improves the clarity, consistency, and proportionality of the revised offenses and reduces unnecessary overlap.

Second, the RCC separately codifies a list of exclusions from liability for possessory weapons offenses.[55] Current 24 DCMR § 2301.2 states, "Nothing in this section shall be construed as to prohibit a member of a duly authorized military organization from the proper use of the guns and other equipment used as a member of the organization." In contrast, RCC § 22E-4118 provides an exception for all military, law enforcement, and government employees who handle weapons, as well as civilians who are authorized to manufacture, sell, or repair weapons. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for law enforcement authorities.[56] This change improves the clarity, consistency, and completeness of the revised code.

Third, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current

[52] Notably, the D.C. Code separately regulates the any projectile or dart that is explosive, incendiary, or poisonous. *See* D.C. Code §§ 7-2501.01 and 7-2502.01.
[53] RCC § 22E-4102.
[54] RCC § 22E-4103.
[55] RCC § 22E-4118.
[56] [The Commission's recommendations for general defenses are forthcoming.]

D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the carrying an air or spring gun offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Beyond these changes, three other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires that the accused act knowingly with respect to each element of the offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[57] This change clarifies the revised statute.

Second, the revised offense requires that the air or spring gun be "conveniently accessible and within reach" and "outside a building." Current 24 DCMR § 2301.3 makes it unlawful for a person to "to carry or have in his or her possession outside any building…an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, bowgun, or any similar type gun." It is unclear whether the phrase "outside any building" applies to both carrying and possessing or to possession only. District case law has not interpreted its meaning. To resolve this ambiguity, the revised offense criminalizes possession only if the weapon is conveniently accessible and within reach and outside a building.[58] This change aligns the elements of the revised offense with the elements of other carrying offenses, such as carrying a dangerous weapon,[59] which improves the consistency of the revised code.

Third, the revised offense excludes from liability possession of an air or spring gun if it occurs with the permission of the Metropolitan Police Department ("MPD"). Current 24 DCMR § 2301.5(c) permits the use of an air or spring gun "at other locations where the *use* of the guns is authorized by the Chief of Police" (emphasis added). The

[57] 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)).

[58] For example, a person does not commit carrying an air or spring gun by constructively possessing a B-B gun that is not nearby or carrying a B-B gun in his or her own home.

[59] RCC § 22E-4102; *see also Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (explaining the phrase "on or about their person," in current law, is intended to mean "in such proximity to the person as to be convenient of access and within reach").

word "use" is not defined in the statute and District case law has not clarified whether MPD must authorize both the possession and the firing of air and spring guns. In contrast, the revised statute clarifies that MPD has the flexibility to authorize possession of an air or spring gun in a specific area, without permitting shooting in the same location.

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

First, the revised code defines "possession" in its general part.[60] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[61] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Second, the revised code uses a consistent definition for the term "building," which appears in multiple offenses. The term building is not defined in Title 24, Chapter 23 of the DCMR. In contrast, the RCC codifies a definition to be used uniformly throughout the code.

Third, the revised offense uses the phrase "firing range" instead of "shooting gallery." Current 24 DCMR § 2301.5(b) permits adults to use an air or spring gun at "a licensed shooting gallery." This term is not defined in the DCMR or in District case law. The firearms regulations in the D.C. Code do not refer to "shooting galleries," but do refer to "firing ranges."[62] The revised offense uses the Title 7 terminology to avoid confusion.[63]

Fourth, the revised offense does not include the phrase "or similar type gun." The specified types of air and spring gun are already broad, undefined terms. The inclusion of a broader catchall is eliminated as duplicative and potentially confusing.

Fifth, the revised offense excludes liability for possession of an air or spring gun during an educational or cultural presentation. Current 24 DCMR 2301.5(a) excludes liability for possession during a "theatrical performance," however, the regulation does not define the term and District case law has not addressed its meaning. The revised statute clarifies that an educational or cultural presentation is included, even if it does not occur in a theater as part of dramatic performance.

[60] RCC § 22E-701.
[61] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[62] D.C. Code § 7-2507.03.
[63] Additionally, Merriam Webster defines "shooting gallery" to include "a building (usually abandoned) where drug addicts buy and use heroin." *See* Merriam-Webster Online Dictionary at https://www.webster-dictionary.org/definition/shooting%20gallery.

RCC § 7-2507.02. Unlawful Storage of a Firearm.

Explanatory Note. *This section establishes the unlawful storage of a firearm offense for the Revised Criminal Code (RCC). The offense requires firearm owners to store firearms securely and responsibly. The revised offense replaces D.C. Code §§ 7-2507.02(b)-(d) (Responsibilities regarding storage of firearms) and 24 DCMR § 2348.1 (Safe storage of firearms at a place of business).*

Paragraph (a)(1) specifies that to commit unlawful storage of a firearm, a person must knowingly possess a firearm. "Knowingly" is a defined term that here requires the person to be practically certain that they possess the firearm.[64] "Firearm" is a defined term,[65] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[66] but excludes antiques.[67]

Subparagraphs (a)(1)(A) – (C) specify three ways a firearm owner can store a firearm to avoid prosecution under this section. Subparagraph (a)(1)(A) provides that there is no liability if a person possesses the firearm in a place that is conveniently accessible and within reach. Subparagraphs (a)(1)(B) and (a)(1)(C) provide that there is no liability if a person stores a firearm in a securely locked container or in a location that a reasonable person would believe to be secure. The words "securely" and "secure" mean secure from access by people other than the firearm owner.

Paragraph (a)(2) specifies that to commit unlawful storage of a firearm, a registrant must act at least negligently with respect to who might access the firearm.[68] That is, the person should be aware of a substantial risk that that a minor or an unauthorized person will be able to access the firearm. Negligence also requires that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive that risk is clearly blameworthy.[69]

Paragraph (a)(2) specifies two impermissible risks that will trigger criminal liability.

Subparagraph (a)(2)(A) prohibits storage in a location where a minor is able to access the firearm without the permission of a parent or guardian. Per the rules of interpretation in RCC § 22E-207, the person must be negligent as to the other person being a minor and as to the minor being able to access the weapon without permission.

Subparagraph (a)(2)(B) prohibits storage in a location where a person who is barred under District law from having a firearm[70] is able to access the firearm. Per the rules of interpretation in RCC § 22E-207, the person must be negligent as to the other

[64] RCC § 22E-206.
[65] RCC § 22E-701.
[66] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[67] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[68] "Negligently" is defined in RCC § 22E-206.
[69] RCC § 22E-206.
[70] RCC § 22E-4105 bars several categories of people from having a firearm, including people with a recent conviction for a felony, weapons offense, or intrafamily offense, as well as people who are fugitives from justice or subject to a court order prohibiting possession of firearms.

person being unauthorized to possess a firearm under District law and as to the other person being able to access the weapon.

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. [*See* Second Draft of Report #41.] Paragraph (c)(2) allows a sentence increase if it is a proven beyond a reasonable doubt that a person under 18 years of age used the firearm to cause a bodily injury to himself or herself or to cause a criminal harm[71] involving a bodily injury. The term "bodily injury" is defined in RCC § 22E-701 to mean physical pain, illness, or any impairment of physical condition.

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

Subsection (e) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised unlawful storage of a firearm offense changes current District law in eight main ways.*

First, the revised statute includes two penalty gradations for unlawful storage of a firearm. Current D.C. Code § 7-2507.02 paragraph (c)(1) specifies a maximum penalty of 180 days of incarceration and fine of $1,000. Paragraph (c)(2) allows a maximum penalty of 5 years of incarceration and fine of $5,000, if the negligence results in a minor causing an injury to any person. A violation of 24 DCMR § 2348.1 is subject to a fine of $300 and is not punishable by jail time.[72] In contrast, the revised statute provides a single offense gradation plus an enhancement of one penalty class if a minor causes an injury. This change logically reorders and improves the consistency and proportionality of the revised statutes.

Second, the revised statute makes a possible basis of liability negligence that a person prohibited from possessing a firearm under District law, generally, is able to access the firearm.[73] Current 24 DCMR § 2348.1 prohibits storing a firearm where a person "reasonably should know that…a person prohibited from possessing a firearm under D.C. Official Code § 22-4503 can gain access to the firearm." In contrast, the revised statute refers broadly to persons prohibited from possessing a firearm under District law generally (not just persons referred to in D.C. Code § 22-4503). However, given other changes to firearm possession offenses in the RCC, the revised offense is in some ways broader[74] and in other ways narrower[75] than current law. This change improves the consistency and proportionality of the revised offenses.

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[71] The penalty enhancement does not apply where a minor's use of a firearm is legally justified or excused. [The Commission's recommendations for general defenses are forthcoming.]

[72] 24 DCMR § 100.6.

[73] RCC § 22E-4105.

[74] For example, RCC § 22-4105 (Possession of a Firearm by an Unauthorized Person) replaces D.C. Code § 22-4503 (Unlawful possession of a firearm) and bars people with a conviction for a violent intrafamily offense within the last 10 years, as compared to a 5-year ban under current law.

[75] For example, RCC § 22-4105 (Possession of a Firearm by an Unauthorized Person) replaces D.C. Code § 22-4503 (Unlawful possession of a firearm) and limits prior convictions incurred in another jurisdiction to offenses that are comparable to a felony, weapons offense, or violent intrafamily offense under District law.

Third, the revised offense requires that a minor or an unauthorized person is able to access the firearm. Current D.C. Code § 7-2507.02(b) requires a risk that a minor is *likely* to gain access to the firearm. Current 24 DCMR § 2348.1 requires only a risk that a minor or unauthorized person can gain access to the firearm. The revised statute incorporates the marginally broader language in Title 7. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised offense specifies that storage in a manner permitting access by a minor is unlawful only if the minor lacks permission from a parent or guardian to access the weapon. Current D.C. Code § 7-2507.02(b) requires that a person "reasonably should know that a minor is likely to gain access to the firearm *without the permission of the parent or guardian*" (emphasis added). However, current 24 DCMR § 2348.1 includes no such qualifying language. The revised statute incorporates the marginally narrower language in Title 7. This change improves the consistency and proportionality of the revised offense.

Fifth, the revised offense specifies that a person does not commit unlawful storage of a firearm if the weapon is in a secure container or other reasonably secure location. Current D.C. Code § 7-2507.02(b)(1) provides an exception where a person "[k]eeps the firearm in a securely locked box, secured container, or in a location which a reasonable person would believe to be secure." However, current 24 DCMR § 2348.1 includes no such qualifying language. The revised statute incorporates the marginally narrower language in Title 7. This change improves the consistency and proportionality of the revised offense.

Sixth, the revised offense is not limited to lawful registrants. D.C. Code § 7-2507.02(b) provides that "[n]o person" shall store a firearm irresponsibly,[76] whereas 24 DCMR § 2348.1 states "[n]o registrant." The revised statute incorporates the broader language in Title 7. This change reduces an unnecessary gap in liability.

Seventh, the revised statute does not regulate storage of a muffler or silencer but does regulate the storage of an antique pistol. Current D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers, and consequently the storage of these items is within the scope of D.C. Code § 7-2507.02(b). Unlike firearms, the United States Supreme Court has not yet considered whether these parts and accessories are "bearable arms" protected by the Second Amendment.[77] In contrast, the revised unlawful storage of a firearm statute, by use of the definition of "firearm" in RCC § 22E-701, does not cover frames, receivers, mufflers, or silencers, but does cover antique pistols.[78] With limited exceptions for military and law enforcement,[79] the RCC criminalizes mere possession of a silencer as contraband *per se*[80] and, because any

[76] This section was enacted shortly after the United States Supreme Court held the District's prohibition against rendering any lawful firearm in the home operable for purpose of immediate self-defense violated the Second Amendment to the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[77] *See United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), *cert. denied*, 2019 WL 235139, U.S. (June 10, 2019).
[78] The definition of "firearm" in D.C. Code § 7-2501.01 excludes antique pistols.
[79] RCC § 22E-4118.
[80] RCC § 22E-4101, possession of a prohibited weapon or accessory.

possession is illegal, does not regulate their registration, storage, or carrying. This change improves the proportionality and logically reorganizes the revised offenses.

Eighth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the unlawful storage of a firearm offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Beyond these changes, three other aspects of the revised offense may constitute substantive changes to District law.

First, the revised offense specifies that a person does not commit unlawful storage of a firearm if the weapon is "conveniently accessible and within reach." Current D.C. Code § 7-2507.02(b)(2) provides an exception where a person "[c]arries the firearm on his person or within such close proximity that he can readily retrieve and use it as if he carried it on his person." However, current 24 DCMR § 2348.1 includes no such qualifying language. It is not immediately clear how a person can both "store" a firearm and "carry" it and District case law has not addressed the issue. In contrast, the revised offense specifies that there is no unlawful storage liability if the weapon is conveniently accessible and within reach. This change aligns the elements of the revised offense with the elements of other carrying offenses, such as carrying a dangerous weapon,[81] and improves the consistency of the revised code.

Second, the revised offense authorizes a distinct penalty enhancement if a person under age 18 uses the firearm to cause a criminal harm involving bodily injury or to cause a bodily injury to himself or herself. Current D.C. Code § 7-2507.02(c)(2) provides that if "the minor causes injury or death to himself or another" the maximum penalty increases from 180 days of incarceration and a $1,000 fine to 5 years of incarceration and a $5,000 fine. D.C. Code § 7-2507.02(c)(3) provides that the penalty enhancement does not apply "if the minor obtains the firearm as a result of an unlawful entry or burglary to any premises by any person." Neither statute explicitly provides for general justification defenses that may nevertheless exist at common law. There is no District case law on point, and no relevant legislative history on the meaning of the exception for burglary or unlawful entry. In contrast, the revised offense authorizes a penalty enhancement only if the use of the firearm causes a criminal harm involving bodily injury or results in an intentional or accidental self-inflicted bodily injury to the minor, and no special exceptions for unlawful entry or burglary apply. "Bodily injury" is a defined term in the RCC.[82] The degree of the enhancement corresponds to the classification schedule in

[81] RCC § 22E-4102.
[82] RCC § 22E-701.

RCC § 22E-601 and, like other revised offenses,[83] is limited to a severity increase of one class. No special exception for unlawful entry or burglary is provided as such a provision is either unnecessary given the offense elements or irrelevant to the harm of negligent storage.[84] This change improves the consistency and proportionality of District statutes.

Third, the revised code applies a "knowingly" culpable mental state to most offense elements and defines knowledge and negligence consistent with other revised offenses. The current statutes require that a person "knows or reasonably should know" of a risk that an unauthorized person will be able to access the firearm.[85] The current statutes do not specify a culpable mental state for other elements, such as the weapon being a firearm. However, the revised statute applies the standard culpable mental state definitions used throughout the RCC.[86] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[87] 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, the revised code defines "possession" in its general part.[88] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[89] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

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[83] E.g., RCC §§ 22E-1101 (Murder); 22E-1206 (Stalking); 22E-1301 (Sexual Assault); 22E-1602 (Forced Commercial Sex); 22E-1603 (Trafficking in Labor or Services); 22E-1604 (Trafficking in Commercial Sex); 22E-1605 (Sex Trafficking of Minors).

[84] The meaning of the current D.C. Code § 7-2507.02(c)(3) exception "if the minor obtains the firearm as a result of an unlawful entry or burglary to any premises by any person" is unclear. If the exception is meant to exclude liability for minors who gain access to the firearm by unlawful entry or burglary, such an exception is unnecessary as a firearm possessor would not be negligent as to the possibility that a minor would gain access by such criminal acts. If the exception is meant to exclude liability for minors who gain access to the firearm for use in self-defense while experiencing a burglary or unlawful entry, such an exception is irrelevant to the fact that there was negligent storage (e.g. a parent left the weapon on a table).

[85] D.C. Code § 7-2507.02 and 24 DCMR § 2348.1.

[86] RCC § 22E-206.

[87] 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)).

[88] RCC § 22E-202.

[89] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

Second, the revised statute does not specially codify a policy statement for the unlawful storage of a firearm offense. Current D.C. Code § 7-2507.02(a) states, "It shall be the policy of the District of Columbia that each registrant should keep any firearm in his or her possession unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device." However, the remainder of the statute does not require that a firearm be unloaded or disassembled. Nor does the statute require that a firearm be locked away or secured, unless it is readily apparent that an unauthorized person is likely to be able to access the weapon. The policy statement also is not referenced elsewhere in the D.C. Code. The revised unlawful storage of a firearm statute eliminates this language as potentially confusing or misleading as to the extent of criminal liability.[90] This change improves the clarity and consistency of the revised statutes.

[90] The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.1.1 specifies that "findings" and "purposes" sections are strongly discouraged because they may create confusion or ambiguity in the law.

RCC § 7-2509.06. Carrying a Pistol in an Unlawful Manner.

Explanatory Note. *This section establishes the carrying a pistol in an unlawful manner offense for the Revised Criminal Code (RCC). The offense prohibits ways of carrying a pistol that may result in an accidentally discharge, pose a risk to public safety, or cause a breach of peace. The revised offense replaces 24 DCMR §§ 2343.1 (Ammunition carried by licensee) and 2344 (Pistol carry methods).*

Paragraph (a)(1) specifies that to commit carrying a pistol in an unlawful manner, a person must knowingly[1] possess a pistol. "Pistol" is a defined term,[2] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[3] but excludes antiques.[4] "Possesses" is a defined term and includes both actual and constructive possession.[5] However, paragraphs (a)(2) and (a)(3) limit the offense applies to places outside the person's home or place of business and require that the pistol is conveniently accessible and within reach. Per the rules of interpretation in RCC § 22E-207, the actor must know—that is, be practically certain—that he or she possesses a pistol in such a location.[6]

Paragraph (a)(2) establishes four means of carrying a pistol unlawfully. A person carries a pistol unlawfully if they are outside their home or business and have conveniently accessible and within reach more ammunition than will fully load the pistol twice[7] or if they have more than 20 rounds of ammunition,[8] whichever is least.[9] A person also carries a pistol unlawfully if they know that any part of it is visible to the public.[10] This provision applies equally to a person who is in a public place or inside a motor vehicle.[11] Lastly, a person carries a pistol unlawfully if they know that they have failed to use a holster to firmly secure it.[12] The firearm must be holstered so as to reasonably prevent loss, theft, or accidentally discharge.[13] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they have excess ammunition, the pistol isn't entirely hidden from public view, or the pistol is not holstered.

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[1] RCC § 22E-206.
[2] RCC § 22E-701.
[3] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[4] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[5] RCC § 22E-701 (stating that: "'Possess,' and other parts of speech, including 'possesses,' 'possessing,' and 'possession' means: (A) Hold or carry on one's person; or (B) Have the ability and desire to exercise control over.").
[6] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).
[7] RCC § 7-2509.06(a)(1).
[8] RCC § 7-2509.06(a)(2).
[9] *See* 24 DCMR § 2343.1.
[10] RCC § 7-2509.06(a)(3).
[11] *See* 24 DCMR § 2344.1.
[12] RCC § 7-2509.06(a)(4).
[13] *See* 24 DCMR § 2344.2.

Paragraph (b) cross-references applicable exclusions from liability for certain weapons offenses in the RCC.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

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

Subsection (f) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised carrying a pistol in an unlawful manner offense changes current District law in one main way.*

First, the revised offense is not limited to licensed pistols. 24 DCMR §§ 2343.1 and 2344 apply only to "[a] person issued a concealed carry license by the Chief" and "[a] licensee." The revised offense applies to people who possess a firearm without a license to carry. The unlawful carry method poses the same danger whether the person is licensed or not. This change reduces an unnecessary gap in liability.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the carrying a pistol in an unlawful manner offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Beyond these two changes, three other aspects of the revised offense may constitute substantive changes to District law.

First, the revised statute requires that the accused act knowingly with respect to each element of the offense. The current statutes[14] are silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] This change clarifies the revised statute.

[14] 24 DCMR §§ 2343 – 2344.

[15] 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

Second, the revised statute criminalizes possession of a pistol in a location that is conveniently accessible and within reach.[16] Current 24 DCMR § 2343.1 refers to conduct "while carrying the pistol," 24 DCMR § 2344.1 refers to "carry any pistol in a manner that it is entirely hidden from view of the public when carried on or about a person, or when in a vehicle," and 24 DCMR § 2344.2 refers to "carry any pistol." The term "carry" in these regulations is not defined by the DCMR and there is no District case law on point. To resolve this ambiguity as to the meaning of "carry," the revised statute requires that the pistol be "in a location that is accessible and within reach." This plain language formulation is consistent with the definition of "carrying" as construed by the DCCA for other offenses. This change improves the clarity and consistency of the revised offense.

Third, the RCC codifies a list of exclusions from liability for possessory weapons offenses.[17] Current 24 DCMR §§ 2343 – 2344 do not include any exceptions for law enforcement officers, weapons dealers, or others who routinely need to carry a firearm outside of a holster or in public view. Likewise, current 24 DCMR §§ 2343 – 2344 do not exclude from liability methods of carrying or storing a pistol in one's home or place of business.[18] In contrast, RCC § 22E-4118 provides a comprehensive list of exclusions from liability, accounting for these and other legitimate circumstances. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for law enforcement authorities.[19] This change improves the clarity, consistency, and completeness of the revised code.

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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)).

[16] RCC § 22E-202.

[17] RCC § 22E-4118.

[18] The lack of any exception for homes or businesses may lead to some absurd consequences, such as providing liability for any transfer, storage, cleaning, etc. of a firearm in a home or business because such activities would necessarily involve unholstering the weapon (contra 24 DCMR § 2344.2).

[19] [The Commission's recommendations for general defenses are forthcoming.]

RCC § 16-1021. Parental Kidnapping Definitions.

Explanatory Note. *This section defines relevant terms for Subchapter II of Chapter 10 of Title 16. This section replaces current D.C. Code § 16-1021.*

The revised section defines terms as used in Subchapter II of Chapter 10 of Title 16. Paragraph (1) defines the term "child" as a person under the age of 16. Paragraph (2) defines the term "lawful custodian" to mean a person who is authorized to have custody under District law, or by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child. This term is intended to include persons who are authorized to have custody under District law, whether or not that authority is pursuant to a court order. Paragraph (3) defines the term "relative" to mean a parent, other ancestor, brother, sister, uncle, or aunt, or one who has been lawful custodian at some prior time.

Relation to Current District Law. *The revised statute makes one change that constitutes a substantive change to current District law.*

The revised definition of "lawful custodian" includes any person who is authorized to have custody over a child *under District law*. Under the current D.C. Code definition, "lawful custodian" only includes persons who have custody "by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child."[1] Under the plain language of the current definition, parents who have lawful custody of their children other than pursuant to a court order[2] are not "lawful custodians," so taking a child from such a parent would not constitute parental kidnapping under current law. There is no case law on point. By contrast, under the revised definition of "lawful custodian," any parent who has custodial rights under District law constitutes is included in the definition of "lawful custodian." This change improves eliminates a gap in liability and improves the proportionality of the revised offense.

One other change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The revised definition section does not define the term "District." Omitting this term is not intended to change current District law. The term "District" as used in this subchapter is still intended to refer to the District of Columbia.

[1] D.C. Code § 16-1021(3).
[2] For example, children with their birth parents who have not been through court proceedings.

RCC § 16-1022. Parental Kidnapping Criminal Offense.

Explanatory Note. *This section establishes the parental kidnapping offense, and replaces the current parental kidnapping statute in the D.C. Code. The offense criminalizes taking, concealing, or detaining a child who has another lawful custodian, with intent to prevent a lawful custodian from exercising rights to custody. The offense only applies to relatives of the child or persons acting at the direction of a relative of the child. The revised statute also incorporates statutes that define relevant terms; establish defenses to prosecution; specify that the offense is continuous; specify payment of expenses; specify prosecutorial authority; and establish procedures for expungement. This revised parental kidnapping statute replaces current D.C. Code §§ 16-1022, 1024, and 1025; and portions of D.C. Code § 16-1023 relating to defenses, parental kidnapping as a continuous offense, and reimbursement of expenses.*

Subsection (a) specifies the elements of first degree parental kidnapping. Paragraph (a)(1) requires that the actor must have committed fourth degree parental kidnapping. Paragraph (a)(2) requires that the actor knowingly takes, conceals, or detains the child outside of the District for more than 24 hours. This paragraph specifies that a "knowingly" culpable mental state applies, a term defined at RCC § 22E-206 to mean that the actor must have been practically certain that he would take, conceal, or detain the child outside of the District for more than 24 hours. Paragraph (a)(3) requires that the child was, in fact, outside the custody of the lawful custodian for more than 30 days. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the child was outside of the custody of a lawful custodian for more than 30 days.

Subsection (b) specifies the elements of second degree parental kidnapping. Paragraph (b)(1) requires that the actor must have committed fourth degree parental kidnapping. Paragraph (b)(2) requires that the actor knowingly takes, conceals, or detains the child outside of the District for more than 24 hours. This paragraph specifies that a "knowingly" culpable mental state applies, a term defined at RCC § 22E-206 to mean that the actor must have been practically certain that he would take, conceal, or detain the child outside of the District for more than 24 hours. Paragraph (b)(3) requires that the actor did not release the child without injury in a safe place prior to arrest. This element is satisfied if the child is not released at all prior to arrest, or if the child is released prior to arrest in a place that creates a risk of harm or injury.

Subsection (c) specifies the elements of third degree parental kidnapping. Paragraph (c)(1) requires that the actor must have committed fourth degree parental kidnapping. Paragraph (c)(2) requires that the actor knowingly takes, conceals, or detains the child outside of the District for more than 24 hours. This paragraph also specifies that a "knowingly" culpable mental state applies, a term defined at RCC § 22E-206 to mean that the actor must have been practically certain that he would take, conceal, or detain the child outside of the District.

Subsection (d) specifies the elements of fourth degree parental kidnapping. Paragraph (d)(1) requires that the actor knowingly takes, conceals, or detains a person who has another lawful custodian. The term "lawful custodian" is defined D.C. Code § 16-1021. Paragraph (d)(1) specifies a culpable mental state of "knowledge," a term defined in RCC § 22E-206 to mean the actor must be practically certainty that he would

take, conceal, or detain a person. The actor must also be practically certain the person has another lawful custodian.

Paragraph (d)(2) requires that the actor takes, conceals, or detains a person with intent to prevent a lawful custodian from exercising rights to custody of the child. "Intent" is a term defined in RCC § 22E-206 that here means that the actor was practically certain that he would prevent a lawful custodian from exercising rights to custody of the child. 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 actor actually interfered with another lawful custodian's right to custody, only that the actor believed to a practical certainty that he would interfere with a right to custody. A right to custody need not be permanent; intent to interfere with limited rights to custody or temporary visitation rights would suffice under this subparagraph.

Paragraph (d)(3) requires that the person taken, concealed, or detained, in fact, is under the age of 16. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state as to the person's age.

Paragraph (d)(4) requires that the actor is a relative of the child, or a person who believes he or she is acting pursuant to direction of a relative of the child. This element may be satisfied even if the actor unreasonably believes that he or she is acting that direction of a relative. Per the rule of interpretation in RCC § 22E-207, the term "in fact" in paragraph (d)(4) also applies to this paragraph. There is no culpable mental state required as to whether the actor is a relative of the child, or person who believes he or she is acting pursuant to direction of a relative of the child.[3]

The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state as to whether the actor is a relative of the child, or believes he or she is acting pursuant to direction of a relative.

Subsection (e) establishes three exclusions to liability. Paragraph (e)(1) establishes that an actor is not liable under this section if he or she was a parent fleeing from imminent physical harm to the parent. Paragraph (e)(2) establishes that an actor is not liable under this section if the other parent effectively consented to the act constituting the offense. The term "effective consent" is defined in RCC § 22E-701, and requires that the consent was obtained other than by deception or coercive threat. Paragraph (e)(3) establishes that an actor is not liable under this section if he or she acted to protect the child from imminent physical harm.

Subsection (f) establishes a defense to prosecution under this section. Under paragraph (f)(1), the actor may file a petition that states that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child; and seeks to establish custody, to transfer custody, or to revise or to clarify an existing custody order. If the actor files a petition with the Superior Court of the District of Columbia within 5 business days of the acts constituting the offense, a court finding that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child shall be a defense to prosecution under this section.

[3] Although no culpable mental state as defined in RCC § 22E-205 is required, paragraph (d)(4) still requires that the actor subjectively believed that he or she was acting at the direction of a relative.

Subsection (g) specifies that parental kidnapping is a continuous offense that continues long as the child is concealed, detained, or otherwise unlawfully physically removed from the lawful custodian.

Subsection (h) specifies relevant penalties for parental kidnapping. Paragraph (h)(5) specifies that expenses incurred by the District in returning the child shall be reimbursed to the District by any person convicted of a violation of this section, and reasonable costs incurred by the lawful custodian or child victim shall be reimbursed to the lawful custodian. Paragraph (h)(6) specifies that notwithstanding the authorized maximum penalties, first and second degree parental kidnapping are designated as felonies for purposes of D.C. Code 23-563.[4]

Subsection (i) cross references terms defined elsewhere in the subchapter, and in the RCC.

Subsection (j) specifies that that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised parental kidnapping statute makes three substantive changes to current District law.*

First**,** the revised parental kidnapping offense no longer provides liability for a parent concealing the child from another parent, absent additional intent. Under the current statute, parental kidnapping includes a parent concealing a child from the child's other parent, even if there is no additional intent to interfere with the other parent's custodial rights. The plain language would appear to criminalize a parent with custody at a given time refusing to give the child's whereabouts to another parent who does not have custody at that time. There is no case law on point. By contrast, the revised parental kidnapping statute requires that the actor had intent to interfere with a lawful custodian's custodial rights. This change improves the proportionality of the revised offense.

Second, the revised definition of "lawful custodian" under D.C. Code § 16-1021 includes any parent who is authorized to have custody over a child *under District law*. Under the current definition, "lawful custodian" only includes persons who have custody "by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child."[5] Under the plain language of the current definition, parents who have lawful custody of their children other than pursuant to a court order[6] are not "lawful custodians," so taking a child from such a parent would not constitute parental kidnapping under current law. There is no case law on point. By contrast, under the revised definition of "lawful custodian," taking a child from any parent who has custodial rights under District law constitutes parental kidnapping, even if the custodial rights are not pursuant to a court order. This change improves eliminates a gap in liability and improves the proportionality of the revised offense.

Third, the revised parental kidnapping statute's penalty grades that are predicated on taking, concealing, or detaining a person outside of the District require that the actor

[4] D.C. Code § 23-563 states that a warrant or summons for a felony under § 16-1022 issued by the Superior Court of the District of Columbia may be served at any place within the jurisdiction of the United States.
[5] D.C. Code § 16-1021 (3).
[6] For example, children with their birth parents who have not been through court proceedings.

did so for more than 24 hours. Under current law, penalty gradations based on taking, concealing, or detaining a child outside of the District does not include any minimum time duration.[7] By contrast, first, second, and third degree parental kidnapping require that the person was taken, concealed, or detained outside of the District for more than 24 hours. This revision prevents disproportionately severe penalties when an actor briefly takes a child over the border. This change improves the proportionality of the revised offense.

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

First, the revised statute requires that the actor "knowingly" takes, conceals, or detains the complainant. The current parental kidnapping statute does not specify a culpable mental state. The current parental kidnapping statute references acting "with the intent to prevent a lawful custodian from exercising rights to custody," "with intent to harbor, secrete, detain, or conceal the child" or "with intent to deprive the other person of the right of limited custody or visitation,"[8] but it is not clear whether these culpable mental states apply to other elements of the offense, and the phrases "with intent" and "with the intent" are not defined in the statute. There is no case law on point. Resolving this ambiguity, the revised parental kidnapping statute specifies that a "knowingly" culpable mental state applies to the element of taking, concealing, or detaining the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[9] Specifying a culpable mental state for the offense improves the clarity of the revised offense and is consistent with requirements for most other offenses.

Second, the revised statute does not explicitly include taking a child outside of the District for the purpose of depriving a lawful custodian of physical custody of the child after having been served with process in an action affecting the family but prior to the issuance of a temporary or final order determining custody rights. It is unclear whether this prong of parental kidnapping includes taking a child who does not yet have another lawful custodian, in expectation that another person *may* obtain custodial rights to the child, or whether this prong of the current statute requires that the child has another "lawful custodian" who already has custodial rights. There is no DCCA case law on point. Resolving this ambiguity, the revised parental kidnapping offense requires that the actor intended to interfere with a lawful custodian's pre-existing right to custody. This change improves the clarity of the revised offense.

Third, the revised statute specifies that the actor must take the child "to another location." The current statute merely states that the actor must "take" a child, but does not define the term, and there is no relevant DCCA case law. Resolving this ambiguity, the revised statute specifies that the child must be moved to a different location. Merely

[7] D.C. Code § 16-1024.
[8] D.C. Code § 16-1022.
[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)")

seizing a child without any movement is insufficient under the revised statute.[10] This change improves the clarity of the revised offense.

Fourth, the revised statute specifies that there is no culpable mental state as to the age of the complainant. The current statute requires that the complaining witness is a "child," which is defined as a "person under the age 16 years of age."[11] The current statute does not specify whether the actor must be aware that the complainant is under 16 years of age. There is no DCCA case law on point. Resolving this ambiguity, the revised statute specifies that there is no culpable mental state requirement as to the age of the complainant. This change improves the clarity of the revised offense.

Fifth, the offense requires that the actor is either a relative or a person who believes he or she is acting pursuant to directions of a relative. The current statute requires that the actor is either a relative of the complainant, or is acting pursuant to directions of a relative. However, the current statute does not specify whether the offense includes a person who incorrectly believes he or she is acting at the direction of a relative. There is no DCCA case law on point. Resolving this ambiguity, the revised statute requires that the actor believed he or she was acting at the direction of a relative. This change improves the clarity of the revised offense.

Sixth, the exclusion to liability under paragraph (e)(2) requires that the other parent gave effective consent to the conduct constituting the offense. Under current law, it is a defense to prosecution that the action constituting the offense was "consented to by the other parent[.]"[12] The term "consent" is not defined in the statute, and there is no relevant DCCA case law. It is unclear if the defense would apply if the consent were induced by physical force, coercive threats, or deception. Resolving this ambiguity, the revised statute provides the defense only if the other parent gave "effective consent," as defined in RCC § 22E-701[13] to the conduct constituting the offense. This requires that the consent was not obtained by physical force, coercive threat, or deception. This change improves the clarity and proportionality of the revised statute.

Seventh, the jurisdiction provision in current D.C. Code § 16-1023 (h) is omitted. The current statute states that "Any violation of this subchapter is punishable in the District, whether the intent to commit the offense is formed within or without the District, if the child was a resident of the District, present in the District at the time of the taking, or is later found in the District." This language apparently is intended to ensure that District courts have jurisdiction over parental kidnappings that do not entirely occur within the District of Columbia. However, the DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[14] Consequently, although the DCCA has not applied this rule to parental kidnapping cases, it appears that even without any statutory language

[10] Attempt liability may still apply in these cases, provided the requirements for attempt liability under RCC § 22E-301 are satisfied.
[11] D.C. Code § 16-1021 (1).
[12] D.C. Code § 16-1023 (a)(4).
[13] "Effective consent means consent other than consent induced by physical force, a coercive threat, or deception."
[14] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

in the revised statute on jurisdiction District courts would have jurisdiction over any case in which a child was present in the District at the time of the taking, or was later found in the District. It is unclear, however, whether the current jurisdiction provision would extend jurisdiction to cases where the child is a District resident, but none of the acts constituting the offense occurs within the District. There is no relevant DCCA case law. Resolving this ambiguity, the revised statute applies jurisdictional principles the same as for other crimes, eliminating the offense-specific jurisdiction provision. This change improves the clarity and consistency of the revised offense.

Eighth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the parental kidnaping offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Ninth, the revised statute does not specifically include liability for acting as an aider and abettor, conspirator, or accessory to any of the conduct proscribed by the offense. The current statute prohibits "Act[ing] as an aider and abettor, conspirator, or accessory to any of the actions forbidden by this section[.]"[15] There is no case law on point. By contrast, under the revised parental kidnapping statute, accessory and conspiracy liability for parental kidnapping is subject to the RCC's general accomplice liability[16] and conspiracy[17] statutes. The RCC's general accomplice and conspiracy statutes detail the culpable mental state and other requirements of accomplice and conspiracy liability in a manner consistent with other criminal offenses. To the extent that the RCC's general conspiracy and accomplice provisions differ from the law on conspiracy and accomplice liability as applied to the current parental kidnapping statute,[18] relying on the RCC's general provisions may constitute a change in current law.[19] This change improves the clarity and consistency of the revised offense.

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

First, the revised parental kidnapping statute specifically refers to an actor who "takes, conceals, or detains" a child, but does not specifically include "abducting," "harboring," or "secreting" a child. However, omitting these terms is not intended to

[15] D.C. Code § 16-1022 (b)(6).
[16] RCC § 22E-210.
[17] RCC § 22E-303.
[18] [The Commission plans to address liability for conduct constituting being an accessory after the fact with recommendations for reform to the District's obstruction of justice statutes.]
[19] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy. For discussion on the RCC's accomplice liability statute's possible changes to current District law, see First Draft of Report #22, Accomplice Liability and Related Provisions.

change current District law. The term "taking," "detaining," and "concealing" cover all of the conduct covered by "abducting" or "secreting." Although "harboring" may be broader and include conduct that does not constituting "taking," "detaining," or "concealing," omitting this term does not change current District law. The current penalty provision for parental kidnapping determines penalties based on whether the actor "takes," "detains," or "conceals" a child inside or outside the District[20] and there is no penalty specified for merely "harboring" a child under the current statute. Omitting the word "harboring" does not change current District law, and improves the clarity of the revised offense.

Second, the revised statute omits several versions of the offense specified under current law.[21] Omitting these specific versions of parental kidnapping is not intended to change current District law. Each of these versions of parental kidnapping still satisfies the elements of the offense specified in the revised statute. These versions of parental kidnapping all require taking, concealing, or detaining a child, with intent to interfere with a lawful custodian's rights to custody over the child. Omitting these versions of parental kidnapping improves the clarity of the revised statute.

[20] D.C. Code § 16-1024.

[21] The current statute specifically criminalizes: 1) abducting, taking, or carrying away a child from a person with whom the relative has joint custody pursuant to an order, judgment, or decree of any court, with the intent to prevent a lawful custodian from exercising rights to custody to the child; 2) having obtained physical control of a child for a limited period of time in the exercise of the right to visit with or to be visited by the child or the right of limited custody of the child, pursuant to an order, judgment, or decree of any court, which grants custody of the child to another or jointly with the relative, with intent to harbor, secrete, detain, or conceal the child or to deprive a lawful custodian of the physical custody of the child, keep the child for more than 48 hours after a lawful custodian demands that the child be returned or makes all reasonable efforts to communicate a demand for the child's return; 3) Having custody of a child pursuant to an order, judgment, or decree of any court, which grants another person limited rights to custody of the child or the right to visit with or to be visited by the child, conceal, harbor, secrete, or detain the child with intent to deprive the other person of the right of limited custody or visitation; 4) Concealing, harboring, secreting, or detaining the child knowing that physical custody of the child was obtained or retained by another in violation of this subsection with the intent to prevent a lawful custodian from exercising rights to custody to the child; and 5) After issuance of a temporary or final order specifying joint custody rights, taking or enticing a child from the other joint custodian in violation of the custody order.

RCC § 16-1023. Protective Custody and Return of Child.

Explanatory Note. *This section specifies when a law enforcement officer may take a child into protective custody, and establishes a duty to return a child to a lawful custodian or other entity authorized by law. This section replaces portions of D.C. Code § 16-1023 relating to law enforcement officers' authority to take a child into protective custody, and duty to return the child.*

Subsection (a) specifies that a law enforcement officer may take a child into protective custody when the officer reasonably believes that a person has committed an offense under this subchapter, and unlawfully will flee the District with the child.

Subsection (b) specifies that a law enforcement officer shall return a child who has been detained or conceals to the child's lawful custodian or place the child in custody with another entity authorized by law.

Relation to Current District Law. *This section does not change current District law. This statute is taken verbatim from current D.C. Code § 16-1023 (d) and (e).*

RCC § 16-1024. Expungement of Parental Kidnapping Conviction.

Explanatory Note. *This section specifies procedures for expunging record of convictions for parental kidnapping. This section replaces current D.C. Code § 16-1026.*

This section provides that a person convicted of parental kidnapping under D.C. Code § 16-1022 may have all records of the conviction expunged. A person who commits parental kidnapping with respect to his or her own child may apply for expungement when the person's youngest child reaches the age of 18, provided that the person has no more than one conviction for parental kidnapping. A person who commits parental kidnapping with respect to a person who is not his or her child may apply for expungement five years after the conviction, or after the child has reached 18 years of age, whichever occurs later, provided that the person has no more than one conviction for parental kidnapping.

Relation to Current District Law. *This section does not change current District law. This statute is taken verbatim from current D.C. Code § 16-1026.*

RCC § 25-1001. Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle.

Explanatory Note. *This section establishes the possession of an open container or consumption of alcohol in a motor vehicle offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 25-1001 (Drinking of alcoholic beverage in public place prohibited; intoxication prohibited).*

Paragraph (a)(1) specifies that a person must act at least knowingly. "Knowingly" is a defined term[1] and applied here means that the person must be practically certain that they are consuming or possessing an alcoholic beverage. The term "alcoholic beverage" is defined[2] and means a liquid or solid containing alcohol capable of being consumed by a human being. It does not include a liquid or solid containing less than one-half of 1% of alcohol by volume.[3]

Subparagraph (a)(2)(A) specifies that the first way of committing the offense is by consuming an alcoholic beverage. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they are consuming an alcoholic beverage.[4]

Subparagraph (a)(2)(B) specifies that the second way of committing the offense is by possessing an alcoholic beverage in an open container.[5] "Possesses" is a defined term and includes both actual and constructive possession.[6] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[7] The term "open container" is defined and means "a bottle, can, or other container that is open or from which the top, cap, cork, seal, or tab seal has at some time been removed."[8] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that the container contains an alcoholic beverage[9] and that the container is unsealed.[10]

Paragraph (a)(2) specifies that the possession or consumption of alcohol must occur in the passenger area of a motor vehicle on a public highway, or the right-of-way of a public highway. The term "passenger area" is undefined but is intended to have a meaning that is consistent with federal regulations.[11] The term "motor vehicle" is

[1] "Knowingly" is defined in RCC § 22E-206.
[2] RCC § 22E-701.
[3] RCC § 22E-701; D.C. Code § 25-101(5); *Reid v. District of Columbia*, 980 A.2d 1131, 1133 (2009).
[4] For example, if a passenger surreptitiously spikes a driver's drink, the unknowing driver does not commit an offense.
[5] Possessing one or more open beverages on a single occasion constitutes a single offense.
[6] RCC § 22E-701.
[7] *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[8] D.C. Code § 25-101(35); *see also Bean v. United States*, 17 A.3d 635, 637 (D.C. 2011) (holding the definition is not unconstitutionally vague); *but see* D.C. Code § 25-113(b)(5) (permitting a licensed restaurant to reseal one bottle of wine per patron in a manner that it is visibly apparent if the container has been subsequently opened).
[9] There must be evidence that the alcohol bottle contains some liquid. *See Workman v. United States*, 96 A.3d 678, 681-82 (2014).
[10] *See Robinson v. Gov't of the Dist. of Columbia*, 234 F. Supp. 3d 14, 26 (D.D.C. 2017).
[11] *See* 23 U.S.C. § 154(a)(4). Under the Transportation Equity Act for the 21st Century (TEA-21), "Passenger area" is currently defined as the area designed to seat the driver and passengers while the motor

defined in RCC § 22E-701 and the term "highway" is defined in 23 U.S.C. § 101(a). Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that the beverage is in the passenger area of the vehicle and that they are in the prohibited location.

Subsection (b) excludes liability for passengers in motor vehicles designed for commercial transportation of many passengers, such as a limousine, or a recreational vehicle.[12] This exclusion does not apply to passengers in other vehicles or to drivers.

Subsection (c) specifies that attempted possession of an open container or consumption of alcohol in a motor vehicle is not an offense.

Subsection (d) provides the penalty for the revised offense. [*See* Second Draft of Report #41.]

Subsection (e) cross-references applicable definitions in the RCC, the D.C. Code, and the United States Code.

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised possession of an open container or consumption of alcohol in a motor vehicle offense changes current District law in four main ways.*

First, the revised statute does not criminalize possession of an open container outside of a motor vehicle. Current D.C. Code § 25-1001(4) makes it unlawful to possess an open container of alcohol in "[a]ny place to which the public is invited and for which a license to sell alcoholic beverages has not been issued…" The current statute provides exceptions for private residences and special events.[13] In *Robinson v. Gov't of the Dist. of Columbia*,[14] the court explained that the statute furthers a legitimate interest in proscribing public consumption of alcohol and public intoxication. However, the scope of the statutory language is not limited to possessing an open container with intent to consume its contents in public or with intent to become intoxicated in public. Rather, the language more broadly criminalizes any possession of an open container, including some conduct not commonly considered criminal.[15] In contrast, the revised statute offense is limited to motor vehicles, where the danger of intoxication is so grave that mere access to alcohol warrants criminal punishment. Civil penalties may be warranted for individuals

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vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment. Vehicles without trunks may have an open alcoholic beverage container behind the last upright seat or in an area not normally occupied by the driver or passengers. A law that permits the possession of open alcoholic beverage containers in an unlocked glove compartment, however, will not conform to the requirements. An unlocked glove compartment is within the scope of the revised statute.

[12] *See* 23 U.S.C. § 154(b)(2).

[13] D.C. Code § 25-1001(b).

[14] 234 F. Supp. 3d 14, 26 (D.D.C. 2017).

[15] For example, carrying a bag full of half empty beers to a recycling bin in an alleyway or carrying a bottle of homemade sangria to a gathering at a friend's home. In contrast, the District does not arrest for public smoking of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, WASHINGTON POST (September 21, 2018).

who possess an open container of alcohol in other locations.[16] Businesses that provide alcohol in open containers to a customer risk losing their license to sell or serve alcohol.[17] This change improves the proportionality[18] of the revised offenses.

Second, the revised code does not criminalize public intoxication.[19] Current D.C. Code § 25-1001(c) provides: "No person, whether in or on public or private property, shall be intoxicated and endanger the safety of himself, herself, or any other person or property." The term "intoxicated" is undefined in the current statute and District case law has not interpreted its meaning.[20] District case law has held that chronic alcoholism is a defense to public intoxication,[21] but has not defined the meaning of the phrase

[16] In contrast to cities that have fully legalized public drinking (e.g., Las Vegas, NV; New Orleans, LA; Sonoma, CA; Fort Worth, TX; Savannah, GA; Indianapolis, IN; Erie, PA; Butte, MT; Hood River, OR; Gulfport, MS), the revised code decriminalizes public possession of an open container of alcohol and intoxication without making any recommendation as to whether and what civil remedies should be promulgated and enforced.

[17] D.C. Code § 25-741.

[18] Drinking in a public place is a public order crime that carries significant collateral consequences and may disproportionately impact persons of color. An arrest for POCA, similar to the effects of possession of marijuana, may lead to discrimination in employment, housing, and education. *See* Report on Bill 20-409, the "Marijuana Possession Decriminalization Amendment Act of 2014," Council of the District of Columbia Committee on the Judiciary and Public Safety (January 15, 2014) at Page 5. It also may divert police resources away from investigating serious crime. *Id*. at Page 7. The direct and collateral consequences disproportionately impact low-income people and people of color. *Racial Disparities in D.C. Policing: Descriptive Evidence From 2013-2017*, American Civil Liberties Union of the District of Columbia (May 13, 2019) ("Because people in poverty are less likely to own property than wealthier individuals, they have fewer private places to congregate with friends. That makes members of low-income communities more likely to gather in public—and commit open container violations if they drink alcohol while doing so."); *see also* Joseph Goldstein, *Sniff Test Does Not Prove Public Drinking, a Judge Rules*, NEW YORK TIMES (June 14, 2012) (noting one study determined 85% of open-container charges were given to Black and Latino people and 4% given to White people in Brooklyn, NY). By comparison, 87% of POCA charges in D.C. Superior Court adult charges for POCA from 2009-2019 were for Black and 5% to white people. CCRC Advisory Group Memorandum #28, Statistics on District Adult Criminal Charges and Convictions, Appendix D (10-21-19).

[19] *But see* RCC § 22E-4201 (Disorderly Conduct), which punishes recklessly causing another person to reasonably believe that he or she is likely to suffer bodily injury, taking of property, or damage to property in a public place. The revised disorderly conduct statute does not reach conduct that occurs in private or behavior that only endangers a person's own bodily integrity or property. *See also* 36 CFR § 2.35(c) (prohibiting presence in a federal park area when under the influence of alcohol or a controlled substance to a degree that may endanger oneself or another person, or damage property or park resources).

[20] Title 50, Chapter 22 of the D.C. Code, concerning impaired operating or driving defines "intoxicated" to mean a specific blood alcohol content for persons over 21 years of age and any measurable blood alcohol content for persons under 21 years of age. *See* D.C. Code § 50-2206.01.

[21] *Easter v. Dist. of Columbia*, 361 F.2d 50, 53-55 (D.C. Cir. 1966) (explaining, "One who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public…[A] chronic alcoholic is in fact a sick person who has lost control over his use of alcoholic beverages…[T]o convict such a person of that crime would also offend the Eighth Amendment."); *see also* Anne E. Marimow, *Court Strikes Down Virginia Law 'Criminalizing an Illness' In Targeting Homeless Alcoholics*, THE WASHINGTON POST (July 17, 2019); *compare Robinson v. California*, 370 U.S. 660, 660 (1962) (holding that criminalizing the status of narcotics *addiction* as cruel and unusual punishment) *with Powell v. State of Tex.*, 392 U.S. 514 (1968) (upholding a conviction for *public* drunkenness); *Hicks v. Dist. of Columbia*, 383 U.S. 252, 252 (1966) (J. Douglas, dissenting) (stating the District's vagrancy statute violates due process).

"chronic alcoholic." In contrast, the revised statute eliminates criminal liability for any form of public intoxication, whether or not a person is a "chronic alcoholic." The District has long recognized the need of addressing public health issues through means other than criminalization.[22] Separate from D.C. Code § 25-1001(c), D.C. Code § 24-604 already provides that any person who is intoxicated in public may be (1) taken or sent to his home or to a public or private health facility; or (2) taken to a detoxification center.[23] Moreover, under D.C. Code § 25-781, a business that sells to an intoxicated person or a person who appears to be intoxicated, risks losing its license to sell or serve alcohol. This change improves the proportionality of the revised offenses.

Third, the revised statute provides specific exclusions from liability for passengers in commercial and certain other recreational and mass transit vehicles. D.C. Code § 25-1001(a)(2) prohibits possession of an open container in a "vehicle in or upon any street, alley, park, or parking area," without exception. Under current District law, a person who commissions a limousine or an event bus faces the same penalty for possession of an open container in that vehicle as a person who drives their own vehicle while drinking. In contrast, the revised offense does not punish drinking as a passenger in a commercial, recreational, or mass transit vehicle. This change allows persons with an open container of alcohol to hire a driver potentially providing a safe alternative to driving under the influence of alcohol.[24] This change improves the proportionality of the revised offenses.

Fourth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of an open container or consumption of alcohol in a motor vehicle offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory

[22] *See, e.g.*, D.C. Code § 24-601 ("all public officials in the District of Columbia shall take cognizance of the fact that public intoxication shall be handled as a public health problem rather than as a criminal offense, and that a chronic alcoholic is a sick person who needs, is entitled to, and shall be provided appropriate medical, psychiatric, institutional, advisory, and rehabilitative treatment services of the highest caliber for his illness."); Report on Bill 21-360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," Council of the District of Columbia Committee on the Judiciary (January 28, 2016) at Page 4 ("There has been a growing consensus in recent years that violence is a public health problem that can be best prevented by identifying and addressing its root causes and by improving access to social services and supports."). In *Easter v. Dist. of Columbia*, the D.C. Circuit cited legislative history in which the Council noted, "[A]nything more futile than this process of getting drunk, being arrested, receiving 10, 15, or 30-day sentences, going to the Jail and to the Workhouse serving time, going out and getting drunk again, can scarcely be imagined." 361 F.2d 50, App. B (D.C. Cir. 1966) (noting "[T]he average person arrested for intoxication during that test period had a record of 12 prior arrests for the same offense…the best evidence that existing procedures are failing to rehabilitate the alcoholic.").

[23] D.C. Code § 25-1001(d) includes a cross-reference to this provision.

[24] Notably, nonprofit organization Mothers Against Drunk Driving has not actively supported public consumption laws, adding "We're concerned about [open-container laws] for vehicles." Emile Shire, Drunk on Power: It's Time to Ditch America's Idiotic Open-Container Laws, THE DAILY BEAST (April 14, 2017).

provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

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

The revised statute applies a standardized definition for the "knowingly" culpable mental state required for possession of an open container or consumption of alcohol in a motor vehicle liability. The current statute does not specify a requisite mental state,[25] however, the United States District Court for the District of Columbia has construed the law to require knowledge implicitly.[26] Furthermore, District case law generally requires knowledge for actual or constructive possession of any item.[27] The revised statute uses the RCC's general provisions that define "knowingly" and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[28] These changes clarify and improve the consistency of District statutes.

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

The revised code defines "possession" in its general part.[29] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[30] The RCC definition of "possession,"[31] with the requirement in the offense that the possession be "knowing,"[32] matches the meaning of possession in current DCCA case law.[33] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[25] D.C. Code § 25-1001.

[26] *Robinson v. Gov't of the Dist. of Columbia*, 234 F. Supp. 3d 14, 26 (D.D.C. 2017) (explaining the individual must know the container he possesses contains an alcoholic beverage, know the container is unsealed, and know he is standing in a public space while in possession of that container).

[27] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

[28] RCC § 22E-207.

[29] RCC § 22E-202.

[30] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

[31] RCC § 22E-701.

[32] RCC § 22E-206.

[33] *See United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears*, 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States*, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. United States*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and

that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195-1196 (D.C.1990).").

RCC §48-904.01a. Possession of a Controlled Substance.

Explanatory Note. *This section establishes the possession of a controlled substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly possessing a controlled substance. The offense is divided into two penalty gradations which are based on the type of controlled substance possessed by the actor. The revised possession of a controlled substance statute replaces D.C. Code § 48-904.01(d), the applicable language of the attempt and conspiracy penalty provision,*[1] *and the applicable language of the repeat offender penalty enhancement statute.*[2]

Subsection (a) specifies the elements of first degree possession of a controlled substance. Paragraph (a)(1) specifies that the person must knowingly possess a measurable quantity of a controlled substance. A measurable quantity is a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[3] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "controlled substance" is defined under D.C. Code § 48-901.02, and includes a broad array of substances organized into five different schedules. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which here requires that the accused was practically certain that he or she possessed a controlled substance. It is not required that the accused knew which specific controlled substance he or she possessed. This element may be satisfied by showing that the accused was practically certain that he or she possessed any controlled substance.

Paragraph (a)(2) requires that the controlled substance that the accused possessed was, in fact, one of the eight substances referenced in subparagraphs (a)(2)(A)-(H). Subparagraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state as to whether the substance was one of the substances referenced in (a)(2)(A)-(H).

Subsection (b) specifies the elements of second degree possession of a controlled substance. The elements of second degree possession of a controlled substance are identical to those for first degree possession of a controlled substance, except that it is not required that the person possessed one of the eight substances listed in subparagraphs (a)(2)(A)-(H). Second degree possession of a controlled substance only requires that the person knowingly possessed any controlled substance.

Subsection (c) provides two exclusions from liability under subsections (a) and (b). Paragraph (c)(1) specifies it is an exclusion to liability if a person possesses a controlled substance that was obtained directly from, or pursuant to, a valid prescription or order of a practitioner, or if the possession is otherwise authorized by Chapter 9 of Title 48 or Chapter 16B of Title 7. Paragraph (c)(2) specifies that it is an exclusion to liability that the actor satisfied the requirements under D.C. Code § 7-403.

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[1] D.C. Code § 48-904.09.
[2] D.C. Code § 48-904.08.
[3] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

Subsection (d) specifies relevant penalties for the offense.

Subsection (e) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (f) specifies that that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Subsection (g) specifies procedures by which a judge may dismiss or defer proceedings,

Relation to Current District Law. *The revised possession of a controlled substance offense changes current District law in four main ways.*

First, the revised possession of a controlled substance offense changes current District law by dividing the offense into two penalty grades based on whether the controlled substance is an abusive or narcotic drug. The current D.C. Code possession of controlled substance offense is divided into two penalty grades based on whether the controlled substance is phencyclidine (commonly known as "PCP") in liquid form[4] as compared to any other drug. In contrast, in the revised offense, first degree possession of a controlled substance requires possession of one of the substances enumerated in subparagraphs (a)(2)(A)-(H), and second degree possession of a controlled substance requires possession of any controlled substance. In the revised offense first degree possession of a controlled substance includes possession of phencyclidine, but does not provide any heightened penalty for possession of phencyclidine in liquid form. Grading possession based on whether the controlled substance is an abusive or narcotic drug uses the same standards (based on the potential harm of the drug) as in the current and RCC offenses of distribution and possession with intent to distribute. There is no clear rationale for why, at present, the *possession* of any quantity of liquid phencyclidine, alone, merits categorically more severe penalties[5] than all other controlled substances.[6] This change improves the proportionality and consistency of revised statutes.

Second, the RCC possession of a controlled substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the

[4] D.C. Code § 48-904.01(d)(2).

[5] Under current District law, possession of any quantity of liquid phencyclidine is subject to a 3 year imprisonment penalty as compared to a maximum of 180 days for all other controlled substances—a penalty six times as severe. D.C. Code § 48-904.01(d).

[6] The legislative history to the "Liquid PCP Possession Amendment Act" provides two rationales for the increased penalty for possession of phencyclidine in liquid form: 1) the Committee report says that PCP "more frequently engenders violent and bizarre behavior, combined with a sense of invulnerability, than happens with other drugs"; and 2) PCP in liquid form is the typical medium for distribution, even in small quantities. The report says that illegal drugs are usually distributed and consumed in similar form, but that is not the case with PCP which typically is distributed is a liquid but is not consumed in that form. The legislative history makes clear that the bill "should not be viewed as a bill to punish *users*" and that the enhanced penalty is that the enhanced penalty is intended to "address the fight against PCP . . . *by going after distributors.*" Committee on Public Safety and the Judiciary Report on the Liquid PCP Possession Amendment Act, April 13, 2010, at 5-6. However, to the extent that the intent of the bill was to punish distributors, and PCP is typically distributed, but not consumed, in liquid form, it is unclear why penalties for *possession* of liquid PCP should be increased. If PCP in liquid form is highly probative of intent to distribute, then the RCC trafficking of a controlled substance should adequately provide for heightened penalties above those applicable for simple possession.

elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[7] In contrast, under the RCC attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[8] and conspiracy[9] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statutes.

Third, the RCC possession of a controlled substance offense treats repeat offender penalty enhancements consistent with other revised offenses. Under the current D.C. Code, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[10] In contrast, the revised code omits a drug offense-specific repeat offender provision, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 to address any increase in penalties. There is no clear rationale for why, at present, repeat controlled substance offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised criminal code.

Fourth, subsection (g), which provides for a deferral or dismissal is adapted from current D.C. Code § 48-904.01 (e)(1), but makes two changes. Under current law, a judge may not defer or dismiss proceedings if the defendant previously had a case dismissed under § 48-904 (e)(1), or if the defendant has ever been convicted of an offense under Chapter 9 or Title 48, or of any offense under the law of the United States or any other state relating to narcotic or abusive drugs, or depressant or stimulant substances. By contrast, under RCC subsection (g), a judge may still defer and dismiss proceedings, even if the defendant has previously had a case dismissed, or if the defendant has prior convictions for controlled substance offenses in another jurisdiction. Due to the addictive nature of many controlled substances, persons may repeatedly be charged and convicted of possession of a controlled substance. This change will provide trial judges with broader discretion to dismiss proceedings when appropriate, even if the defendant has prior convictions, or has had other cases dismissed. This change improves the proportionality of the revised criminal code.

Beyond these four substantive changes to current District law, one other aspect of the revised possession of a controlled substance statute may be viewed as a substantive change of law.

[7] D.C. Code § 48-904.09.
[8] RCC § 22E-301.
[9] RCC 22E-303.
[10] D.C. Code § 48-904.08.

The revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Three other changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute requires that the accused possess a "measurable amount" of a controlled substance. Although the current statute does not specify that the accused must possess a measurable amount, the D.C. Court of Appeals (DCCA) has held that the offense requires possession of a "measurable amount" of a controlled substance.[11] This language is intended to codify current DCCA case law which requires that the accused possesses a measurable amount of a controlled substance.

Second, the exclusion to liability under subsection (c) does not reference D.C. Code § 48-1201. The current statutory provision criminalizing possession of a controlled substance refers to § 48-1201. However, omitting this reference is not intended to change current District law, or in any way change the applicability of § 48-1201.

[11] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

RCC § 48-904.01b. Trafficking of a Controlled Substance.

Explanatory Note. *This section establishes the trafficking of a controlled substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly distributing, manufacturing, or possessing with intent to distribute or manufacture a controlled substance. The offense is divided into five penalty gradations based on the type and quantity of controlled substance involved in the offense. The revised trafficking of a controlled substance statute replaces portions of the District's current controlled substance prohibited acts statute,[1] the distribution to minors statute,[2] the drug free zones statute,[3] the attempt and conspiracy penalty provision,[4] the repeat offender penalty enhancement statute,[5] part of the statute criminalizing possession of a firearm or imitation firearm during a dangerous crime,[6] and the additional penalty for committing crime when armed statute.[7]*

Subsection (a) specifies the elements of first degree trafficking of a controlled substance. Paragraph (a)(1) requires that the person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance. A measurable quantity is a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[8] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "distribute" is defined in D.C. Code § 48-901.01, and means "the actual, constructive, or attempted transfer from one person to another other than by administering or dispensing of a controlled substance, whether or not there is an agency relationship."[9] The term "manufacture" is defined in D.C. Code § 48-901.02, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis[.]" The term "controlled substance" is defined under D.C. Code § 48-901.01, and includes a broad array of substances organized into five different schedules.

Paragraph (a)(1) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 to mean that the accused was practically certain that he or she would distribute or manufacture a controlled substance. It is not required that the accused knew which specific controlled substance he or she would distribute or manufacture. This element may be satisfied by showing that the accused was practically

[1] D.C. Code § 48-904.01(d).
[2] D.C. Code § 48-904.06.
[3] D.C. Code § 48-904.07a.
[4] D.C. Code § 48-904.09.
[5] D.C. Code § 48-904.08.
[6] D.C. Code § 22-4504 (b).
[7] D.C. Code § 22-4502.
[8] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).
[9] The terms "administering" and "dispensing" are also defined in D.C. Code § 48-901.02.

certain that he or she distributed or manufactured any controlled substance. Alternatively, a person commits trafficking in a controlled substance if he or she knowingly possesses a controlled substance with intent to distribute or manufacture a controlled substance. Again, it is not required that the accused knew which specific controlled substance he or she possessed with intent to distribute or manufacture. The term "intent" is defined in RCC § 22E-206, which here requires that the person was practically certain that he or she would distribute or manufacture a controlled substance. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the person's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually distributed or manufactured a controlled substance, only that the actor believed to a practical certainty that he or she would distribute or manufacture a controlled substance.

Paragraph (a)(2) requires that the controlled substance is, in fact, one of the substances listed in subparagraphs (a)(2)(A)-(H). Subparagraphs (a)(2)(A)-(H) also require a minimum quantity for each substance. The elements in subparagraphs (a)(2)(A)-(H) can be satisfied if the offense involved the minimum quantity of a *mixture* that contains the specified substance.[10] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the type or quantity of substance involved in the offense.

Subsection (b) specifies the elements of second degree trafficking in a controlled substance. The elements of second degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the minimum required quantity for each specified controlled substance in subparagraphs (b)(2)(A)-(H) are lower than those required for first degree trafficking.

Subsection (c) specifies the elements of third degree trafficking in a controlled substance. The elements of third degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that there is no minimum quantity required for each specified controlled substance in subparagraphs (c)(2)(A)-(H). Third degree trafficking only requires that the actor distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a compound or mixture containing of the substances listed in subparagraphs (c)(2)(A)-(H).

Subsection (d) specifies the elements of fourth degree trafficking in a controlled substance. The elements of fourth degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the offense requires that the actor distributes, manufactures, or possesses with intent to distribute or manufacture any controlled substance that is, in fact, under schedule I, II, or III, as defined in Subchapter II of this Chapter 9 of Title 48. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the controlled substance is included in schedules I, II, or III.

[10] For example, under subparagraph (a)(2)(D), it is not required that the person distribute, manufacture, or possess X grams of pure cocaine. This element is satisfied if the defendant distributed cocaine mixed with an adulterant, if the entire mixture weighs more than X grams.

Subsection (e) specifies the elements of fifth degree trafficking in a controlled substance. The elements of fifth degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the offense requires that the actor distributes, manufactures, or possesses with intent to distribute or manufacture any controlled substance.

Subsection (f) allows for the aggregation of quantities for the purposes of offense grading when a single scheme or systematic course of conduct could give rise to multiple trafficking of a controlled substance charges. The aggregation provision only applies when the multiple charges could arise from trafficking the same type of controlled substance. The government may not aggregate quantities of two different controlled substances to determine the grade of the offense.

Subsection (g) specifies rules for edible products and non-consumable containers in determining the weight of compounds or mixtures containing controlled substances. Paragraph (g)(1) specifies that when a controlled substance is contained within an edible product, the weight of the inert edible mixture will not be included in determining the weight of the compound or mixture containing a controlled substance. Paragraph (g)(2) specifies that the weight of non-consumable containers in which a substance is stores shall not be included in the weight of the compound or mixture containing the controlled substance.[11]

Subsection (h) specifies relevant penalties for the offense. Paragraph (g)(6) provides for enhanced penalties for each grade of the offense. If the government proves at least one of the elements listed under subparagraphs (h)(6)(A)-(C), the penalty classification for each offense may be increased in severity by one penalty class. This penalty enhancement may be applied in addition to any penalty enhancements authorized by RCC Chapter 8.

Subparagraph (h)(6)(A) codifies a penalty enhancement if the actor was, in fact, over the age of 21, and distributed a controlled substance to a person with recklessness as to the fact that the person is under the age of 18. This enhancement does not apply if an actor distributes a controlled substance to an adult who subsequently distributes the substance to a person under the age of 18, unless the actor knew that the adult was going to transfer the substance to the other person, and the actor was at least reckless as to the fact that other person was under the age of 18.

Subparagraph (h)(6)(B) codifies a penalty enhancement if the actor distributes or possesses with intent to distribute a controlled substance while knowingly possessing, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." However, not all constructive possession suffices, as the penalty enhancement further requires that the item be "on the actor's person or in a location where it is readily available." An item is in a location where it is readily available if it is

[11] For example, if a cigarette is dipped in liquid PCP, the weight of the tobacco containing the liquid PCP may be included in the weight of the compound or mixture. However, if some of the liquid PCP also soaks into the cigarette box, the weight of the box would *not* be included in the weight.

in "close proximity or easily accessible during the commission of the offense."[12] The term "firearm" is defined in RCC § 22E-701 to have the same meaning as under D.C. Code § 7-2501.01.[13] The term "imitation firearm" is defined in RCC § 22E-701, and means "any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real." The term "dangerous weapon" is defined in RCC § 22E-701, and includes an array of specified weapons, as well as "[a]ny object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person." Subparagraph (g)(6)(B) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means the accused was practically certain that he or she possessed on his or her person, or in a location where it is readily available, an imitation firearm or dangerous weapon. In addition, the possession of the firearm, imitation firearm, or dangerous weapon must occur during, and be in furtherance of the offense. Incidental possession that occurs during commission of the offense is insufficient. The "in furtherance" language is adapted from 18 U.S.C. § 924, which authorizes enhanced penalties for possessing a firearm in furtherance of a drug trafficking offense.[14] It is not required that the actor actually displayed or used the firearm, imitation firearm, or dangerous weapon, but the imitation firearm or weapon must at least facilitate commission of the offense in some manner.[15]

Subparagraph (h)(6)(C) codifies as a penalty enhancement that the actor was, in fact, 21 years of age or older, and engages in the conduct constituting the offense by enlisting, hiring, contracting, or encouraging any person to sell or distribute any controlled substance for the profit or benefit of the actor, with recklessness as to the person being under the age of 18. A person may be liable for committing an offense under this section based on the conduct of another if the actor satisfies either the requirements for accomplice liability[16], or liability for causing crime by an innocent or irresponsible party.[17] If an actor commits trafficking of a controlled substance under either of these theories of liability, with recklessness that the person enlisted, hired, etc. is under the age of 18, this penalty enhancement applies.

Subparagraph (h)(6)(D) codifies a penalty enhancement if the person commits the offense in a location that is, in fact, within 300 feet of a school, college, university, public

[12] *Clyburn v. United States*, 48 A.3d 147, 153–54 (D.C. 2012) (interpreting the meaning of the term "readily available" as used in D.C. Code § 22-4502 (a)).

[13] However, the term "firearm" as used in the RCC "shall not include a firearm frame or receiver; [s]hall not include a firearm muffler or silencer; and [s]hall include operable antique pistols."

[14] 18 U.S.C. § 924 (c)(1)(A). *See*, Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018, at 8 (discussing the "in furtherance" requirement under 18 U.S.C. § 94, and federal courts' holdings regarding factors that are relevant in determining whether possession of firearm was in furtherance of predicate drug offense).

[15] For example, if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm.

[16] RCC § 22E-210.

[17] RCC § 22E-211. Although this enhancement does not require any culpable mental state as to enlisting, hiring, contracting, or encouraging any person to sell or distribute a controlled substance, liability still requires that the actor satisfy the *mens rea* requirements for accomplice liability under RCC § 22E-210 or causing crime by an innocent or irresponsible party.

swimming pool, public playground, public recreation center, public library, or children's day care center, that displays clear and conspicuous signage which indicates controlled substances are prohibited or the location is a drug free zone. This enhancement applies if the offense occurs within 300 feet of the building or grounds, or within the building or grounds. The term "in fact" specifies that there is no culpable mental state as to whether the person committed the offense while in the specified location.

Subsection (i) specifies two defenses to prosecution under this section. Under paragraph (i)(1), it is a defense that the person distributes or possesses with intent to distribute a controlled substance, but such distribution or possession with intent to distribute is not in exchange for something of value or future expectation of financial gain from distribution of a controlled substance. In addition, paragraph (i)(1) requires that either the quantity of the substance distributed does not exceed the amount for a single use by the recipient, or the recipient intends to immediately use the controlled substance. This defense generally applies to sharing or giving away controlled substances for free,[18] rather than substances distributed in exchange for anything of value, which includes services, satisfaction of debt, or promises of future payment or services. However, even when sharing or giving away controlled substances for free, the defense is not available if such action was taken with future expectation of financial gain from distribution of a controlled substance.[19]

Under paragraph (i)(2), it is a defense to that the person manufactured, or possessed with intent to manufacture, a controlled substance by packaging, repackaging, labeling, or relabeling a controlled substance for his or her own personal use. It is also a defense to prosecution for possession with intent to manufacture that the person possessed a controlled substance with intent to package, repackage, label, or re-label the substance for one of the purposes specified in paragraph (h)(2). Under this defense, packaging, repackaging, labeling, or relabeling a controlled substance for personal use, or possessing a controlled substance with intent to package, repackage, label, or relabel it for personal use does not constitute a violation of this section.[20]

Paragraph (i)(3) establishes the burden of proof for the defenses under subsection (h). If any evidence of the defenses is presented at trial by either the government or the accused, the government bears the burden of proving the absence of all elements of the defense beyond a reasonable doubt.

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

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[18] For example, an actor who shares a controlled substance with his or her spouse or a friend, without receiving anything of value in return and having no future expectation of receiving something of value in return, may claim this defense. However, a person successfully raising this defense likely would still be liable for committing a lesser crime—possession of a controlled substance.

[19] For example, an actor would not be able to claim this defense who distributes free "samples" of a controlled substance for marketing purposes or to create addiction in a population, which is expected to end up yielding the actor some sort of financial gain from drug distribution.

[20] For example, a person who packages cocaine in a bag for his own use later in time has technically "manufactured" a controlled substance as the term is defined. Under this defense, this conduct would not constitute a violation of this section. However, a person successfully raising this defense likely would still be liable for committing a lesser crime—possession of a controlled substance.

Subsection (k) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The trafficking of a controlled substance statute changes current law in nine main ways.*

First, the revised offense grades, in part, based on the weight of the controlled substance involved in the offense. The current D.C. Code statute only provides for different penalties based on the *type* of controlled substance, but not the weight. The current statute provides for a maximum 30-year sentence if the offense involves a schedule I or II drug that is an "abusive" or "narcotic" drug, regardless of the quantity. In contrast, under the revised statute, the first and second grades of the offense each require a minimum quantity for each specified controlled substance. In addition, under subsection (f), when a single scheme or course of conduct could give rise to multiple charges of trafficking of a controlled substance, the government may bring one charge and aggregate the quantity of the controlled substances involved in the scheme or course of conduct. This change improves the proportionality of the revised statute.

Second, the revised statute authorizes the same penalties when the offense involves controlled substances under Schedules IV or V. The current D.C. Code statute provides for different maximum penalties based on whether the actor committed the offense with respect to a controlled substance under Schedule IV or V.[21] In contrast, under the revised statute, fifth degree trafficking of a controlled substance includes committing the offense with respect to substances included in Schedules IV and V. The difference in potential harmfulness between schedule IV and V drugs appears to be quite minor. This change improves the proportionality of the revised statute.

Third, the revised statute includes a defense if the person distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance. Under the current D.C. Code, a person commits distribution of a controlled substance regardless of whether the controlled substance was distributed in exchange for anything of value.[22] Consequently, non-commercial transfers of a controlled substance between two people such as gifting and sharing are subject to liability.[23] In contrast, the revised statute provides a defense if the actor distributed or possessed with intent to distribute a controlled substance, but did not do so in exchange for anything of value or future expectation of receiving something of value. However, both the person distributing and the recipient of such a transaction likely would still be liable for a lesser possessory offense.[24] This change improves the proportionality of the revised statute.

Fourth, the revised statute includes a defense if the person packages, repackages, labels or relabels a controlled substance for his or her own personal use, or possesses a

[21] D.C. Code § 48-904.01 (a)(2)(C), (D).
[22] *Durham v. United States*, 743 A.2d 196, 201 (D.C. 1999) ("The prosecutor need not prove that a sale took place").
[23] See *Wright v. United States*, 588 A.2d 260, 262 (D.C. 1991) ("Appellant testified that he possessed drugs when arrested which he intended to share with his companion. Such evidence proves possession with intent to distribute.").
[24] RCC § 48-904.01a.

controlled substance with intent to do so. Under the current D.C. Code, a person commits manufacturing of a controlled substance regardless of the purpose for packaging, repackaging, labeling, or relabeling of a controlled substance. Consequently, a person who packages a controlled substance for his or her own use is subject to liability. In contrast, the revised statute provides a defense if the actor packaged, repackaged, labeled, or relabeled a controlled substance for his or her personal use. It is also a defense to prosecution for possession with intent to manufacture that the person possessed a controlled substance with intent to package, repackage, label, or relabel a substance for one the purposes specified in paragraph (h)(2). However, the person would still be liable for a lesser possessory offense.[25] This change improves the proportionality of the revised statute.

Fifth, the RCC trafficking of a controlled substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[26] In contrast, under the RCC, penalties for attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[27] and conspiracy[28] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statute.

Sixth, the RCC trafficking of a controlled substance offense treats repeat offender penalty enhancements consistent with other revised offenses. Under the current D.C. Code, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[29] In contrast, the revised code omits a drug-offense specific repeat offender provision, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 address any increased penalties. There is no clear rationale for why, at present, repeat controlled substance offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised statute.

Seventh, the RCC limits the area around schools and other specified locations that are subject to a penalty enhancement, and eliminates public housing and "video arcade[s]" altogether as specified locations. Under the current D.C. Code, drug free zones extend to all areas within 1,000 feet of any designated location, including all day care centers (public or private), schools, playgrounds, libraries, public housing, and video

[25] RCC § 48-904.01a.
[26] D.C. Code § 48-904.09.
[27] RCC § 22E-301.
[28] RCC 22E-303.
[29] D.C. Code § 48-904.08.

arcades.[30] In contrast, the revised statute applies a penalty enhancement only if the offense occurs within 100 feet of a designated location, which does not categorically include public housing or video arcades. While heightened penalties are warranted for committing trafficking of a controlled substance on or near locations where youth gather, 1,000 feet appears to be an excessive distance. In an urban jurisdiction like the District, a 1,000 foot radius around every playground, school, etc. listed in the current drug free zone statute leaves almost no location in the District in an *unenhanced* location.[31] In addition to considerably expanding the zones where there are enhanced penalties, categorically raising penalties in areas of public housing (as opposed to private housing) raises concerns about equitable treatment under the law. This change improves the proportionality of the revised statute.

Eighth, the RCC includes a penalty enhancement only if the person commits an offense while possessing on one's person or having readily available, a firearm, imitation firearm, or other dangerous weapon, and such possession is in furtherance of the offense. The current D.C. Code "while armed" enhancement in § 22-4502[32] and the separate criminal offense of "possessing a firearm during a crime of violence or dangerous crime" in § 22-4504[33] provide substantially increased penalties and liability for distribution, or

[30] Drug free zones include "[a]ll areas within 1000 feet of an appropriately identified public or private day care center, elementary school, vocational school, secondary school, junior college, college, or university, or any public swimming pool, playground, video arcade, youth center, or public library, or in and around public housing, as defined in section 3(1) of the United States Housing Act of 1937, approved August 22, 1974 (88 Stat. 654; 42 U.S.C. § 1437a(b)), the development or administration of which is assisted by Department of Housing and Urban Development, or in or around housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority, or an event sponsored by any of the above entities shall be declared a drug free zone." D.C. Code § 48-904.07a.

[31] See, Judith Greene, Kevin Prains, Jason Ziedenberg, Justice Policy Institute. *Disparity by Design: How drug-free zone laws impact racial disparity – and fail to protect youth*. March, 2006. This report notes that the New Jersey Sentencing Commission concluded that under New Jersey's drug free zone laws, "urban areas where schools, parks, and public housing developments are numerous and closely spaced, overlapping zones turn entire communities into prohibited zones – erasing the very distinction between school and non-school areas that the law was intended to create." *Id*. at 4. For example, drug free zones covered 76 percent of Newark, and over half of Camden and Jersey City. *Id*. at 26. A partial map of District schools and other locations which comprise the District's gun-free zone (locations nearly identical to those listed in the drug-free zone) was compiled by the Crime Prevention Research Institute. *See* https://crimeresearch.org/2017/10/dcs-gun-free-zone-problem-regulations-effectively-ban-anyone-legally-carrying-gun/ (last visited June 25, 2019).

[32] D.C. Code § 22-4502 authorizes additional penalty for "Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)[.]" The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress."

[33] D.C. Code § 22-4504 (b) states "No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence." The

possession with intent to distribute a controlled substance. D.C. Code § 22-4502 authorizes an enhanced penalty for distributing of or possessing with intent to distribute a controlled substance[34] "when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous weapon[.]" D.C. Code § 22-4504 criminalizes possession of a firearm or imitation firearm while committing a dangerous crime. Under § 22-4504, there is no requirement that the firearm or imitation firearm be in proximity to the person at the time of the offense, or that the firearm or imitation firearm had any relationship to the offense.[35] However, neither D.C. Code § 22-4502 nor D.C. Code § 22-4504 has a statutory requirement that the dangerous weapon or imitation firearm had any relationship to the offense. There is no DCCA case law as to whether coincidental possession of a dangerous weapon or imitation firearm during drug distribution or possession with intent to distribute would be sufficient for increased liability under 22-4502 or 22-4504.[36] In addition, both the penalty enhancement under § 22-4502, and the separate criminal offense under § 22-4504 may apply to a single act or course of conduct.[37]

In contrast, the revised statute includes a single penalty enhancement for involvement of a firearm, imitation firearm, or dangerous weapon, clearly requires a connection between the possession of a firearm, imitation firearm, or dangerous weapon and the drug crime, and does not provide enhanced liability for an imitation firearm or dangerous weapon that is not readily available to the actor at the time of the drug crime. This penalty enhancement changes current District law in three main ways. First, the revised enhancement does not treat firearms more severely as compared to other dangerous weapons or imitation weapons, and does not provide for stacking the enhancement with a duplicative crime of possessing a weapon during commission of a drug crime. This change caps the effect of a dangerous weapon or imitation dangerous

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term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress."

[34] The penalty enhancement under D.C. Code § 22-4502 applies to "crimes of violence" and "dangerous crimes." D.C. Code § 22-4501 defines "dangerous crime" as "distribution of or possession with intent to distribute a controlled substance."

[35] D.C. Code § 22-4504 could apply if a person distributes a controlled substance while constructively possessing a firearm or switchblade knife in his home located miles away, even if the weapon was inaccessible and played no role in commission of the offense

[36] *But see*, *Easley v. United States*, 482 A.2d 779 (D.C. 1984) (holding that when determining whether an actor was aware of a firearm, as required for constructive possession, a criminal venture is only relevant if there was a connection between the firearm and the criminal venture).

[37] *Hawkins v. United States*, 119 A.3d 687, 702 (D.C. 2015) (citing *Thomas v. United States*, 602 A.2d 647 (D.C.1992)). The penalty for distribution of, or possession with intent, to distribute a controlled substance that is an abusive or narcotic drug is 30 years. D.C. Code § 48-904.01. If the person commits this offense while possessing a firearm, the person may be subject to an additional 30 years, with a 5 year mandatory minimum, under the while armed enhancement in § 22-4502, and an additional 15 years, with a 5 year mandatory minimum under § 22-4504. In total, a person who distributes, or possesses with intent to distribute an abusive or narcotic drug while possessing a firearm is subject to a maximum of 75 years imprisonment, including two separate 5 year mandatory minimums. The 75 year maximum sentence exceeds the maximum sentence for first degree murder, absent aggravating circumstances. D.C. Code § 22-2104.

weapon being possessed during the controlled substance offense to an increase of one penalty class as compared with an increase of up to 45 years.[38] Second, the revised enhancement requires that the person possessed the firearm, dangerous weapon, or imitation firearm while committing and in furtherance of the drug offense. This change requires, as in comparable federal legislation,[39] proof of some nexus between possession of a firearm, imitation firearm, or dangerous weapon and the controlled substance offense, which excludes coincidental possession.[40] Third, the revised statute does not provide an enhancement for constructively possessing a firearm, dangerous weapon, or imitation firearm that isn't readily available to the actor, contrary to D.C. Code § 22-4504(b).[41] These latter two changes eliminate an enhancement for trafficking a controlled substance when there is not a substantially increased risk of harm during the offense due to possession of the firearm, dangerous weapon, or imitation dangerous weapon.[42] These changes improve the clarity, consistency, and proportionality of the revised statute.

Ninth, the trafficking of a controlled substance statute does not include a separate penalty for first time offenders who distribute or possess with intent to distribute ½ pound or less of marijuana. Under the current statute, distributing or possessing with intent to distribute marijuana is subject to a 5 year maximum sentence. However, if the offense involved ½ pound or less of marijuana, and the person had not been previously convicted of the offense, the maximum sentence is 180 days. In contrast, the revised trafficking of a controlled substance statute does not provide a separate penalty for first time offenders trafficking ½ pound or less of marijuana. Violations of this statute involving marijuana constitutes fourth degree trafficking of a controlled substance, and is subject to the penalty specified in paragraph (g)(4).[43] This change improves the consistency and proportionality of the revised statutes.

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[38] Under D.C. Code 22-4502 a person convicted of a crime of violence or dangerous crime while armed with or having readily available a firearm or dangerous weapon may sentenced to a maximum of 30 years in addition to the penalty provided for the crime of violence or dangerous crime. D.C. Code § 22-4504 provides a separate criminal offense for possessing a firearm or imitation firearm while committing a crime of violence or dangerous crime, subject to a maximum 15 year sentence.

[39] *See generally*, Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018.

[40] For example, if a person distributes a controlled substance while possessing a 7 inch chef's knife with intent to use the knife as a weapon if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply. However, a person who distributes a controlled substance in a kitchen while incidentally in close proximity to a 7 inch chef's knife would not be subject to this penalty enhancement.

[41] The scope of the revised enhancement—"readily available"—matches the breadth of current D.C. Code § 22-4502, but is narrower than D.C. Code § 22-4504(b), which applies to any constructive possession. *Compare, Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (firearm in dresser in the same room as defendant was "readily accessible"), *with Moore v. United States*, 927 A.2d 1040, 1050 (D.C. 2007) (holding that evidence of constructively possession was sufficient when firearm found in defendant's apartment, while defendant was outside the apartment sitting in a car).

[42] An actor who constructively possesses a dangerous weapon in furtherance of a drug crime may still be liable for one or more separate weapon offenses under the RCC. See RCC § 22E-XXXX [Weapon crimes] and accompanying commentary for more details.

[43] The exact effect of this change is unclear at this time, as penalties have not been determined for the trafficking offense.

Beyond these nine substantive changes to current District law, three other aspects of the revised trafficking of controlled substances statute may be viewed as substantive changes of law.

First, the revised statute caps the increased penalties an actor may be subject to for different types of penalty enhancements. The current D.C. Code provides separate penalty enhancements in the current distribution to minors statute[44], the drug free zone statute[45], and portions of the while armed enhancement statute.[46] However, the D.C. Code is silent as to whether or how these different penalty enhancements may be stacked, and there is no relevant D.C. Court of Appeals (DCCA) case law. The revised statute resolves this ambiguity by specifying that only one of the enhancements may apply.[47] This change improves the clarity and proportionality of the revised statutes.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Third, the penalty enhancement under paragraph (h)(6)(C) requires that the actor encourages, hires, contracts, or encourages a person to sell or distribute a controlled substance, and was reckless as to the person being under the age of 18. This penalty enhancement is intended to replace current D.C. Code § 48-904.07, which criminalizes enlistment of minors to distribute a controlled substance. Although D.C. Code § 48-904.07 does not specify a culpable mental state, the D.C. Court of Appeals (DCCA) has held that current statute does not require knowledge as to the age of the person enlisted to distribute a controlled substance.[48] However, the DCCA has not directly held that strict liability is sufficient, or if any other culpable mental state is required as to the enlisted person's age. By contrast, the revised statute's penalty enhancement requires that the actor was reckless as to the fact that the enlisted person was under the age of 18. Applying a penalty enhancement when the actor was not aware of a substantial risk that the enlisted person was under the age of 18 is disproportionately severe.

The remaining changes to the revised statute are clarificatory in nature and are not intended to change current District law.

[44] D.C. Code 48-904.06.
[45] D.C. Code § 48-904.07a.
[46] D.C. Code § 22-4502.
[47] For example, a person who sells a controlled substance to a minor while in a drug free zone would only be subject to an increase in penalty severity of one class.
[48] *Outlaw v. United States*, 604 A.2d 873, 876 (D.C. 1992).

First, the revised statute specifies particular controlled substances rather than rely on the defined terms "abusive" or "narcotic" drugs to list those controlled substances. The current statute provides different maximum penalties based on the type of controlled substance involved in the offense. The highest penalty is reserved for offenses committed "with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug[.]"[49] The terms "abusive drug" and "narcotic drug" are defined in the current D.C. Code, and include an array of controlled substances.[50] The revised statute does not use the terms "abusive drug" or "narcotic drug," but the first three grades of the offense enumerate all of the substances that are defined as "abusive" or "narcotic" under current law.

Second, the revised statute requires that the person distributes, manufactures, or possesses a "measurable quantity" of a controlled substance. Although the current statute does not require any minimum quantity of controlled substance, the DCCA has clearly held that the current statute requires distribution, manufacture, or possession of a measurable quantity of a controlled substance.[51]

Third, the revised trafficking in controlled substance statute does not include exceptions for offenses committed with respect to marijuana. This is not intended to change current District law. The revised definition of the term "controlled substance" includes all of the exceptions that are recognized under current law with respect to possession, distribution, and manufacturing of marijuana.

[49] D.C. Code § 48-904.01 (a)(2)(A).
[50] D.C. Code § 48-901.02.
[51] *Thomas v. United States*, 650 A.2d 183, 184 (D.C. 1994).

RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

Explanatory Note. *This section establishes the trafficking a counterfeit substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly distributing, creating, or possessing with intent to distribute a counterfeit substance. The offense is divided into five penalty gradations which are based on the type and quantity of counterfeit substance. The revised trafficking a counterfeit substance statute replaces portions of the District's current controlled substance prohibited acts statute,[1] the attempt and conspiracy penalty provision,[2] and the repeat offender penalty enhancement statute.[3]*

Subsection (a) specifies the elements of first degree trafficking of a counterfeit substance. Paragraph (a)(1) requires that the accused knowingly distributes, creates, or possesses with intent to distribute, a measurable quantity of a counterfeit substance. A measurable quantity means a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[4] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "distribute" is defined in D.C. Code § 48-901.02, and means "the actual, constructive, or attempted transfer from one person to another other than by administering or dispensing of a controlled substance, whether or not there is an agency relationship." The term "creates" is intended to have the same meaning as under current law. The term "counterfeit substance" is defined under D.C. Code § 48-901.02, and means "a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance."

Paragraph (a)(1) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means that the accused was practically certain that he or she would distribute or create a counterfeit substance. It is not required that the accused knew which specific counterfeit substance he or she would distribute or create. This element may be satisfied by showing that the accused was practically certain that he or she distributed or created any counterfeit substance. Alternatively, a person commits trafficking in a counterfeit substance if he or she knowingly possesses a counterfeit substance with intent to distribute the counterfeit substance. The term "intent" is defined in RCC § 22E-206 and, applied here, requires that the accused was practically certain that he or she would distribute a counterfeit substance. Per RCC § 22E-205, the object of the phrase "with intent that" 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 actor actually distributed a

[1] D.C. Code § 48-904.01(d).
[2] D.C. Code § 48-904.09.
[3] D.C. Code § 48-904.08.
[4] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

counterfeit substance, only that the actor believed to a practical certainty that he or she would distribute a counterfeit substance.

Paragraph (a)(2) requires that the counterfeit substance is, in fact, one of the substances listed in subparagraphs (a)(2)(A)-(H). Subparagraphs (a)(2)(A)-(H) also require a minimum quantity for each substance. The elements in subparagraphs (a)(2)(A)-(H) can be satisfied if the offense involved the minimum quantity of a *mixture* that contains the specified substance.[5] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the type or quantity of substance involved in the offense.

Subsection (b) specifies the elements of second degree trafficking in a counterfeit substance. The elements of second degree trafficking in a counterfeit substance are identical to the elements of first degree trafficking in a counterfeit substance, except that the minimum required quantity for each specified controlled substance in subparagraphs (b)(2)(A)-(H) are lower than those required for first degree trafficking.

Subsection (c) specifies the elements of third degree trafficking in a counterfeit substance. The elements of third degree trafficking in a counterfeit substance are identical to the elements of first degree trafficking in a counterfeit substance, except that there is no minimum quantity required for each specified counterfeit substance in subparagraphs (c)(2)(A)-(H). Third degree trafficking only requires that the actor distributes, creates, or possesses with intent to distribute, a measurable quantity of a compound or mixture containing one of the substances listed in subparagraphs (c)(2)(A)-(H).

Subsection (d) specifies the elements of fourth degree trafficking in a counterfeit substance. The elements of fourth degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the offense requires that the actor distributes, creates, or possesses with intent to a distribute any counterfeit substance that is, in fact, a controlled substance under schedule I, II, or III, as defined in Subchapter II of Chapter 9 of Title 48. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the substance is included in schedules I, II, or III.

Subsection (e) specifies the elements of fifth degree trafficking in a counterfeit substance. The elements of fifth degree trafficking in a counterfeit substance are identical to the elements of first degree trafficking in a counterfeit substance, except that the offense requires that the actor distributes, creates, or possesses with intent to a distribute any counterfeit substance.

Subsection (f) allows for the aggregation of quantities for the purposes of offense grading when a single scheme or systematic course of conduct could give rise to multiple trafficking of a counterfeit substance charges. The aggregation provision only applies when the multiple charges could arise from trafficking the same type of counterfeit substance. The government may not aggregate quantities of two different counterfeit substances to determine the grade of the offense.

[5] For example, under subparagraph (a)(2)(D), it is not required that the person distribute, manufacture, or possess X grams of pure cocaine. This element is satisfied if the defendant distributed cocaine mixed with an adulterant, if there were more than X grams of the entire mixture.

Subsection (g) specifies relevant penalties for the offense. [*See* Second Draft of Report #41.]

Paragraph (g)(6) codifies a penalty enhancement if the actor distributes or possesses with intent to distribute a counterfeit substance while knowingly possessing, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." However, not all constructive possession suffices, as the penalty enhancement further requires that the item be "on the actor's person or in a location where it is readily available." An item is in a location where it is readily available if it is in "close proximity or easily accessible during the commission of the offense."[6] The term "firearm" is defined in RCC § 22E-701 to have the same meaning as under D.C. Code § 7-2501.01.[7] The term "imitation firearm" is defined in RCC § 22E-701, and means "any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real." The term "dangerous weapon" is defined in RCC § 22E-701, and includes an array of specified weapons, as well as "[a]ny object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person." Paragraph (g)(6) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means the accused was practically certain that he or she possessed on his or her person, or in a location where it is readily available, an imitation firearm or dangerous weapon. In addition, the possession of the firearm, imitation firearm, or dangerous weapon must occur during, and be in furtherance of the offense. Incidental possession that occurs during commission of the offense is insufficient. The "in furtherance" language is adapted from 18 U.S.C. § 924, which authorizes enhanced penalties for possessing a firearm in furtherance of a drug trafficking offense.[8] It is not required that the actor actually displayed or used the firearm, imitation firearm, or dangerous weapon, but the imitation firearm or weapon must facilitate commission of the offense in some manner.[9]

Subsection (h) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (i) specifies that that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The trafficking in counterfeit substances statute changes current law in four main ways.*

First, the first three grades of the revised offense are based on the quantity of the counterfeit substance. The current statute only provides for different penalties based on

[6] *Clyburn v. United States*, 48 A.3d 147, 153–54 (D.C. 2012) (interpreting the meaning of the term "readily available" as used in D.C. Code § 22-4502 (a)).

[7] However, the term "firearm" as used in the RCC "shall not include a firearm frame or receiver; [s]hall not include a firearm muffler or silencer; and [s]hall include operable antique pistols."

[8] 18 U.S.C. § 924 (c)(1)(A).

[9] For example, if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm.

the *type* of substance, but not the quantity. The current statute provides for a maximum 30 year sentence if the offense involves a schedule I or II drug that is an "abusive" or "narcotic" drug, regardless of the quantity. In contrast, under the revised statute, the first and second grades of the offense each require a minimum quantity for each specified controlled substance. In addition, when a single scheme or course of conduct could give rise to multiple trafficking of a counterfeit substance charges, the government may bring one charge and aggregate the quantity of the counterfeit substances involved in the scheme or course of conduct. This change improves the proportionality of the revised statute.

Second, the revised statute authorizes the same penalties when the offense involves counterfeit substances under Schedules IV or V. The current statute provides for different maximum penalties based on whether the actor committed the offense with respect to substances under Schedule IV or V.[10] In contrast, under the revised statute, fifth degree trafficking of a counterfeit substance includes committing the offense with respect to substances included in Schedules IV and V. The difference in potential harmfulness between schedule IV and V drugs appears to be quite minor.[11] This change improves the proportionality of the revised statute.

Third, the RCC trafficking of a counterfeit substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[12] In contrast, under the RCC, penalties for attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[13] and conspiracy[14] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statute.

Fourth, the RCC trafficking of a controlled substance offense treats repeat offender penalty enhancements consistent with other revised offenses. Under current law, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[15] In contrast, the revised code omits a drug-offense specific repeat offender provision, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 address

[10] D.C. Code § 48-904.01 (a)(2)(C), (D).
[11] The current D.C. Code provides tests for determining which substances should be categorized into each schedule. The tests for schedules IV and V are require a "low potential for abuse," and "limited physical dependence or psychological dependence" if the substance is abused. D.C. Code §§ 48-902.03, 48-902.05, 48-902.07, 48-902.09, 48-902.11.
[12] D.C. Code § 48-904.09.
[13] RCC § 22E-301.
[14] RCC 22E-303.
[15] D.C. Code § 48-904.08.

any increased penalties. There is no clear rationale for why, at present, repeat controlled substance offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised statute.

Fifth, the RCC includes a penalty enhancement only if the person commits the offense while possessing on one's person or having readily available, a firearm, imitation firearm, or other dangerous weapon, and such possession is in furtherance of and while committing the offense. The current D.C. Code "while armed" enhancement in § 22-4502[16] and the separate criminal offense of "possessing a firearm during a crime of violence or dangerous crime" in § 22-4504[17] provide substantially increased penalties and liability for distribution, or possession with intent to distribute a counterfeit substance. D.C. Code § 22-4502 authorizes an enhanced penalty for distributing of or possessing with intent to distribute a counterfeit substance[18] "when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous weapon[.]" D.C. Code § 22-4504 criminalizes possession of a firearm or imitation firearm while committing a dangerous crime. Under § 22-4504, there is no requirement that the firearm or imitation firearm be in proximity to the person at the time of the offense, or that the firearm or imitation firearm had any relationship to the offense.[19] However, neither D.C. Code § 22-4502 nor D.C. Code § 22-4504 has a statutory requirement that the dangerous weapon or imitation firearm had any relationship to the offense. There is no DCCA case law as to whether coincidental possession of a dangerous weapon or imitation firearm during drug distribution or possession with intent

[16] D.C. Code § 22-4502 authorizes additional penalty for "Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)[.]" The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress." As defined in D.C. Code § 48-901.02 (5), "counterfeit substances" are controlled substances.

[17] D.C. Code § 22-4504 (b) states "No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence." The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress." As defined in D.C. Code § 48-901.02 (5), "counterfeit substances" are controlled substances.

[18] The penalty enhancement under D.C. Code § 22-4502 applies to "crimes of violence" and "dangerous crimes." D.C. Code § 22-4501 defines "dangerous crime" as "distribution of or possession with intent to distribute a controlled substance."

[19] D.C. Code § 22-4504 could apply if a person distributes a controlled substance while constructively possessing a firearm or switchblade knife in his home located miles away, even if the weapon was inaccessible and played no role in commission of the offense

to distribute would be sufficient for increased liability under 22-4502 or 22-4504.[20] In addition, both the penalty enhancement under § 22-4502, and the separate criminal offense under § 22-4504 may apply to a single act or course of conduct.[21]

In contrast, the revised statute includes a single penalty enhancement for involvement of a firearm, imitation firearm, or dangerous weapon, clearly requires a connection between the possession of a firearm, imitation firearm, or dangerous weapon and the drug crime, and does not provide enhanced liability for an imitation firearm or dangerous weapon that is not readily available to the actor at the time of the drug crime. This penalty enhancement changes current District law in three main ways. First, the revised enhancement does not treat firearms more severely as compared to other dangerous weapons or imitation weapons, and does not provide for stacking the enhancement with a duplicative crime of possessing a weapon during commission of a drug crime. This change caps the effect of a dangerous weapon or imitation dangerous weapon being possessed during the counterfeit substance offense to an increase of one penalty class as compared with an increase of up to 45 years.[22] Second, the revised enhancement requires that the person possessed the firearm, dangerous weapon, or imitation firearm while committing and in furtherance of the drug offense. This change requires, as in comparable federal legislation,[23] proof of some nexus between possession of a firearm, imitation firearm, or dangerous weapon and the counterfeit substance offense, which excludes coincidental possession.[24] Third, the revised statute does not provide an enhancement for constructively possessing a firearm, dangerous weapon, or imitation firearm that isn't readily available to the actor, contrary to D.C. Code § 22-

[20] *But see*, Easley v. United States, 482 A.2d 779 (D.C. 1984) (holding that when determining whether an actor was aware of a firearm, as required for constructive possession, a criminal venture is only relevant if there was a connection between the firearm and the criminal venture).

[21] *Hawkins v. United States*, 119 A.3d 687, 702 (D.C. 2015) (citing *Thomas v. United States*, 602 A.2d 647 (D.C.1992)). The penalty for distribution of, or possession with intent, to distribute a counterfeit substance that is an abusive or narcotic drug is 30 years. D.C. Code § 48-904.01. If the person commits this offense while possessing a firearm, the person may be subject to an additional 30 years, with a 5 year mandatory minimum, under the while armed enhancement in § 22-4502, and an additional 15 years, with a 5 year mandatory minimum under § 22-4504. In total, a person who distributes, or possesses with intent to distribute a counterfeit substance that is an abusive or narcotic drug while possessing a firearm is subject to a maximum of 75 years imprisonment, including two separate 5 year mandatory minimums. The 75 year maximum sentence exceeds the maximum sentence for first degree murder, absent aggravating circumstances. D.C. Code § 22-2104.

[22] Under D.C. Code 22-4502 a person convicted of a crime of violence or dangerous crime while armed with or having readily available a firearm or dangerous weapon may sentenced to a maximum of 30 years in addition to the penalty provided for the crime of violence or dangerous crime. D.C. Code § 22-4504 provides a separate criminal offense for possessing a firearm or imitation firearm while committing a crime of violence or dangerous crime, subject to a maximum 15 year sentence.

[23] See generally, Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018.

[24] For example, if a person distributes a controlled substance while possessing a 7 inch chef's knife with intent to use the knife as a weapon if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply. However, a person who distributes a controlled substance in a kitchen while incidentally in close proximity to a 7 inch chef's knife would not be subject to this penalty enhancement.

4504(b).[25] These latter two changes eliminate an enhancement for trafficking a controlled substance when there is not a substantially increased risk of harm during the offense due to possession of the firearm, dangerous weapon, or imitation dangerous weapon.[26] These changes improve the clarity, consistency, and proportionality of the revised statute.

Beyond these five substantive changes to current District law, two other aspects of the revised trafficking of counterfeit substances statute may be viewed as substantive changes of law.

First, the revised statute specifies that the actor must knowingly distribute, create, or possesses a counterfeit substance. The current statute does not specify any culpable mental state, there is no relevant DCCA case law, and there is no Redbook Jury Instruction that specifically applies to the counterfeit substance offense. One means of committing the current offense is to "possess with intent to distribute a counterfeit substance,"[27] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[28] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

The remaining changes to the revised statute are clarificatory in nature and are not intended to change current District law.

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[25] The scope of the revised enhancement—"readily available"—matches the breadth of current D.C. Code § 22-4502, but is narrower than D.C. Code § 22-4504(b), which applies to any constructive possession. *Compare, Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (firearm in dresser in the same room as defendant was "readily accessible"), *with Moore v. United States*, 927 A.2d 1040, 1050 (D.C. 2007) (holding that evidence of constructively possession was sufficient when firearm found in defendant's apartment, while defendant was outside the apartment sitting in a car).

[26] An actor who constructively possesses a dangerous weapon in furtherance of a drug crime may still be liable for one or more separate weapon offenses under the RCC. See RCC § 22E-XXXX [Weapon crimes] and accompanying commentary for more details.

[27] D.C. Code § 48-904.01 (b)(1).

[28] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

First, the revised statute does not refer to the terms "abusive" or "narcotic" drugs. The current statute provides different maximum penalties based on the type of substance involved in the offense. The highest penalty is reserved for offenses committed "with respect to . . . A counterfeit substance classified in Schedule I or II that is a narcotic or abusive drug[.]"[29] The terms "abusive drug" and "narcotic drug" are defined in the current D.C. Code, and include an array of controlled substances.[30] The revised statute does not use the terms "abusive drug" or "narcotic drug," but the first three grades of the offense enumerate all of the substances that are defined as "abusive" or "narcotic" under current law.

Second, the revised statute requires that the actor distributes, creates, or possesses a "measurable quantity" of a counterfeit substance. Although the current statute does not require any minimum quantity of counterfeit substance, the DCCA has clearly held that the current statute requires distribution, creation, or possession of a measurable quantity of a controlled substance.[31]

[29] D.C. Code § 48-904.01 (a)(2)(A).
[30] D.C. Code § 48-901.02.
[31] *Thomas v. United States*, 650 A.2d 183, 184 (D.C. 1994). Although the *Thomas* case did not involve the counterfeit substance offense, the DCCA held that "in order to secure a conviction for controlled substance violations, the government need only prove there was a measurable amount of the controlled substance in question."

RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

Explanatory Note. *This section establishes the possession of drug manufacturing paraphernalia offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly possessing an object with intent to use the object to manufacture a controlled substance. The revised possession of drug manufacturing paraphernalia offense does not cover possession of objects with intent to use them for any other purpose related to controlled substances. The revised possession of drug paraphernalia statute replaces the current possession of drug paraphernalia statute that applies specifically to hypodermic needles and syringes[1], portions of the general drug paraphernalia statute criminalizing possession of drug paraphernalia,[2] the definition of the term "drug paraphernalia" included in the statute defining terms as used in Subchapter I of Chapter 11[3], and the statute specifying factors to be considered in determining whether object is paraphernalia.[4]*

Subsection (a) specifies the elements of possession of drug paraphernalia. Subsection (a) specifies that the accused must knowingly possess an object. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Subsection (a) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which here requires that the accused was practically certain that he or she possessed an object. Subsection (a) also requires that the actor had intent to use the object to manufacture a controlled substance. The term "manufacture" is defined in RCC § 22E-701, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis[.]" The term "controlled substance" is defined under D.C. Code § 48-901.02, and includes a broad array of substances organized into five different schedules. The term "intent" is defined in RCC § 22E-206 and, applied here, requires that the accused was practically certain that he or she would use the object to manufacture a controlled substance. Per RCC § 22E-205, the object of the phrase "with intent that" 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 person actually used the object to manufacture a controlled substance, only that the person believed to a practical certainty that he or she would use the object to manufacture a controlled substance.

Subsection (b) provides two exclusions to liability. Paragraph (b)(1) provides an exception to liability if the object is 50 year of age or older. This exclusion applies regardless of the intended use of the object. Paragraph (b)(2) provides an exclusion to liability if the person possesses an object with intent to use the object to package or repackage a controlled substance for that person's own use.

Subsection (c) specifies penalties for the offense.

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[1] D.C. Code § 48-904.10.
[2] D.C. Code § 48-1103 (a)(1).
[3] D.C. Code §48-1101 (3).
[4] D.C. Code § 48-1102.

Subsection (d) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (e) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised possession of drug manufacturing paraphernalia statute changes current District law in three main ways.*

First, the revised statute limits liability to possession of objects related to the manufacture of a controlled substance. The current D.C. Code general paraphernalia statute requires a person to use or possess with intent to use "drug paraphernalia," a defined term,[5] to "plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inhale, ingest, or otherwise introduce into the human body a controlled substance[.]"[6] In addition, current D.C. Code § 48-904.01 specifically criminalizes possession of a "hypodermic needle, hypodermic syringe . . . with intent to use it for administration of a controlled substance by subcutaneous injection"[7] In contrast, the revised statute does not use a defined term of "drug paraphernalia" and more simply requires that the person possessed an object that was actually used to manufacture a controlled substance, or with intent to use it to manufacture a controlled substance. Objects that are used or intended for use for any other purpose, most notably personal consumption, are not covered by the revised statute.[8] This change improves the clarity and proportionality of the revised criminal code.

Second, the revised statute does not provide as a basis for liability that a person possesses an object that has been "designed for use" in manufacturing a controlled substance. The current D.C. Code paraphernalia statute includes liability for "objects used, intended for use, or designed for use in manufacturing…a controlled substance." [9] In contrast, the revised statute provides liability only for possession of an object with intent to use the object to manufacture a controlled substance. Determining whether an item is specially "designed for" a particular purpose based on its objective features is a potentially difficult task, subject to arguments over whether a possessor is sufficiently on notice as to the item being contraband.[10] Moreover, in practice, the revised statute's elimination of separate liability for possession of items "designed for use in manufacturing…a controlled substance" may be quite narrow. Most objects involved in

[5] D.C. Code § 48-1101 (3). This definition of "drug paraphernalia" includes a list of items that largely, though not entirely, replicates the functions of the object described in the general paraphernalia statute, for example: "planting," "propagating," "cultivating," "growing."

[6] D.C. Code § 48-1103.

[7] This statute also requires that the needle or syringe "has on it or in it any quantity (including a trace) of a controlled substance [.]"

[8] For example, possession of an instrument with intent to use it to ingest a controlled substance is not covered by the revised statute. This decriminalizes conduct currently covered by both D.C. Code § 48-904.10, and § 48-1103.

[9] D.C. Code § 48-1101 (3)(B).

[10] *See, generally, Fatumabahirtu v. United States*, 26 A.3d 322, 333 (D.C. 2011)(discussing constitutional litigation of paraphernalia statutes regarding "notice as to when otherwise innocuous household items qualified as drug paraphernalia.").

the planned[11] manufacture of a controlled substance are either general purpose items not specially designed[12] for manufacturing a controlled substance, or, if they are so specially designed,[13] would need few additional facts to allow inference of an intent to use to manufacture a controlled substance under the revised statute. This change clarifies and improves the proportionality of the revised statute.

Third, the revised statute includes an exclusion to liability if a person possesses an object with intent to use the object to package or repackage a controlled substance for the person's own use. Under current law, the term "manufacturing" includes "any packaging or repackaging of the [controlled] substance" with no exception for personal use.[14] In contrast, the revised statute provides an exclusion to liability for possessing an object with intent to use it to package or repackage a controlled substance for the actor's own use. This change improves the proportionality of the revised statute.

Beyond these three substantive changes to current District law, two other aspects of the revised possession of drug paraphernalia statute may be viewed as substantive changes of law.

First, the revised statute specifies that the actor must knowingly possess an object. The current D.C. Code statute does not specify any culpable mental state as to the possession of the object, and there is no DCCA case law on point. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

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[11] The revised statute continues liability for knowing possession of an object that has been used to manufacture a controlled substance.

[12] For example, scales, packaging equipment, adulterants, and other items listed in D.C. Code § 48-1101 (3)(B).

[13] For example, a chemical preparation apparatus configured in a unique way to produce a controlled substance.

[14] The current definition of the term "manufacture" includes exceptions for "preparation or compounding of a controlled substance by an individual for his or her own use," but not for packaging or repackaging of a controlled substance for his or her own use. D.C. Code § 48-901.01 (13).

[15] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

Four other changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute does not include an exception to liability for possession of testing equipment for the purpose of testing personal use quantities of a controlled substance. The current statute provides that "it shall not be unlawful for a person to use, or possess with the intent to use, [paraphernalia] for the purpose of testing personal use quantities of a controlled substance."[16] However, omitting this language is not intended to change District law. Under the revised possession of drug paraphernalia statute, possession of testing equipment with intent to test personal quantities of a controlled substance is not criminalized, as the revised statute requires that the actor possesses an object that has been used, or with intent to use, it to manufacture a controlled substance.

Second, the revised statute does not include an exception for possession of objects with intent to ingest or manufacture cannabis. The current statute provides an exception for persons 21 years of age or older who use, or possess with intent to use, paraphernalia to use or possess cannabis, or to grow, possess, harvest, or process cannabis plants in a manner lawful under D.C. Code § 48-904.01(a). However, omitting this exception is not intended to change current District law. A person who possesses an object with intent to use or possess would not be liable under the revised statute, which requires intent to manufacture. The term "controlled substance" as defined excludes cannabis plants that are grown in the manner set forth in D.C. Code § 48-904.01 (a). A person who possesses an object with intent to use it to grow, possess, harvest, or process cannabis plants in the manner that is lawful under D.C. Code § 48-904.01 (a) would not have the requisite intent to manufacture a "controlled substance," and would not liable under the revised offense.

Third, the revised statute includes an exclusion to liability if the object is 50 years of age or older. The current D.C. Code paraphernalia offenses do not include this exclusion. However, in the current D.C. Code § 48-1101 definition of "drug paraphernalia" it states that "[t]he term 'drug paraphernalia' shall not include any article that is 50 years of age or older." Although the revised statute does not use a defined term of "drug paraphernalia," this exclusion is intended to maintain current law by excluding cases involving objects that are 50 years of age or older.

Fourth, the forfeiture under D.C. Code § 48-1104 includes two technical amendments. First, the statute refers to the revised paraphernalia offenses under D.C. Code § 48-904.10 and § 48-904.11, instead of current D.C. Code § 48-1103. Second, the forfeiture statute also omits the reference to use or possession of drug paraphernalia for "personal use." Under the current forfeiture statute, money or currency that has been used or intended for use in conjunction with the use or possession of paraphernalia, other than for personal use, is subject to forfeiture. This limitation on the forfeiture statute is unnecessary under the revised statutes, as use or possession of an object that is used for personal use of a controlled substance is not a criminal offense.

[16] D.C. Code § 48-1103.

RCC § 48-904.11. Trafficking of Drug Paraphernalia.

Explanatory Note. *This section establishes the trafficking of drug paraphernalia offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly selling or delivering, or possessing with intent to sell or deliver, an object with intent that another person will use the object for one of several specified purposes in conjunction with a controlled substance. The revised distribution of drug paraphernalia statute replaces portions of the general drug paraphernalia statute that criminalize sale, delivery, or possession with intent to sell or deliver drug paraphernalia,[1] the definition of the term "drug paraphernalia" included in the statute defining terms as used in Subchapter I of Chapter 11,[2] and the statute providing factors to be considered in determining whether an object is paraphernalia.[3]*

Subsection (a) specifies the elements of trafficking of drug paraphernalia. Paragraph (a)(1) specifies that the accused must knowingly deliver or sell, or possess with intent to deliver or sell, an object. The terms "deliver" and "sell" are intended to have the same meaning as under current District law. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, and applied here requires that the accused was practically certain that he or she delivered, sold, or possessed an object. The term "intent" is defined in RCC § 22E-206, and applied here requires that the accused was practically certain that he or she would deliver or sell an object. Per RCC § 22E-205, the object of the phrase "with intent that" 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 actor actually delivered or sold the object, only that the actor possessed the object while believing to a practical certainty that he or she would deliver or sell the object.

Paragraph (a)(2) requires that the person had intent that another person will use the object to introduce into the human body, produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a controlled substance. The term "intent" is defined in RCC § 22E-206, and applied here requires that the accused was practically certain that another person would use the object for one of the specified purposes. Per RCC § 22E-205, the object of the phrase "with intent that" 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 another person actually used the object, only that the person believed to a practical certainty that another person would use the object for one of the specified purposes.

Subsection (b) provides four exceptions to liability. Paragraph (b)(1) specifies that it is not a violation of this section for a community-based organization to deliver, or possess with intent to deliver, testing equipment or other objects used, intended for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance, or for ingestion or inhalation of a controlled substance. The term

[1] D.C. Code § 48-1103 (b), (c), and (e).
[2] D.C. Code §48-1101 (3).
[3] D.C. Code § 48-1102.

"community based organization" is defined in D.C. Code § 7-404, and means "an organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use . . . [and] includes all organizations currently participating in the Needle Exchange Program with the Department of Human Services under § 48-1103.01."

Paragraph (b)(2) specifies that it is not a violation of this section for a person to sell, deliver, or possess with intent to sell or deliver an unused hypodermic syringe or needle.

Paragraph (b)(3) specifies that it is not a violation of this section to sell, deliver, or possess with intent to sell or deliver, an item intended for use in a medical procedure or treatment permitted under District or federal civil law, to be performed by a licensed health professional or by a person acting at the direction of a licensed health professional.

Paragraph (b)(4) specifies that it is not a violation of this section for a person to deliver or sell, or possess with intent to deliver or sell, any object that is 50 years of age or older. This exception applies regardless of the intended use of the object.

Subsection (c) specifies relevant penalties for the offense.

Subsection (d) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (e) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The trafficking of drug paraphernalia statute changes current law in eight main ways.*

First, the revised distribution of drug paraphernalia statute does not require that the actor distributed or possessed "drug paraphernalia," a defined term that includes objects designed in a particular way. The current D.C. Code statute requires delivery or sale, or possession with intent to deliver or sell of "drug paraphernalia," a defined term which includes a broad array of specified objects used to produce, package, test, measure, or ingest a controlled substance, as well as any object "used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing . . . [a] controlled substance into the human body[.]"[4] In contrast, the revised statute covers any object provided that the accused intended that another person would use it for one of the specified purposes.[5] This change improves the clarity of the revised criminal code.

Second, the revised statute requires that the actor's sale, delivery, or possession with intent to sell or deliver the object be with intent that another person would use the object for one of the specified purposes. The current D.C. Code statute requires that the defendant sells or delivers paraphernalia "knowingly, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body

[4] D.C. Code § 48-1101 (3).

[5] This change may have no practical effect on current District law. As currently defined, any object can constitute "drug paraphernalia" if it is used or intended to be used to manufacture or ingest a controlled substance. Any time a person satisfies the elements under the revised statute, the object in question would have constituted "drug paraphernalia" as currently defined.

a controlled substance[.]" The D.C. Court of Appeals has applied this culpable mental state language without discussion as to the meaning of such terms or whether or how such language equates to a negligence standard under the Model Penal Code or other jurisdictions."[6] Coupled with the current D.C. Code definition of "drug paraphernalia" as including, in part, items that are "designed for" use with controlled substances, the current statute provides liability for selling or delivering an item, without any awareness of that the other person may or will use that item in relation with a controlled substance. In contrast, the revised statute requires that the person's sale, delivery, or possession be with intent to sell or deliver an object be done "with intent" that the object be used for one of the specified purposes. While it need not be proven that an actor consciously desired for the recipient of the object to use it with respect to a controlled substance, the actor must be at least practically certain that the object would be used for such purposes. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[7] while basing criminal liability on negligence[8] is generally disfavored.[9]. This change improves the clarity and proportionality of the revised criminal code.

Third, the revised statute does not specifically criminalize sale of items currently enumerated in D.C. Code § 48-1103 (e)(1). Under the current D.C. Code statute, sale of cocaine free base kits, glass or ceramic tubes,[10] cigarette rolling papers, and cigar wrappers is criminalized for most[11] vendors, regardless of their actual or intended use. In

[6] *Fatumabahirtu v. United States*, 26 A.3d 322, 336 (D.C. 2011). This case involved a glass ink pen, which could be used to inhale or ingest a controlled substance. However, the holding in *Fatumabahirtu* may presumably be applied to all other prohibited uses of drug paraphernalia.

[7] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[8] The DCCA's opinion in *Fatumabahirtu* strongly suggests that, per the current statute's reference to "under circumstances where one reasonably should know…," something akin to mere *negligence* as to whether the buyer would use the paraphernalia to ingest a controlled substance would suffice for criminal liability. The DCCA's opinion referenced the Model Drug Paraphernalia Act, which served as a model for the District's current paraphernalia statute and stated: "The knowledge requirement of Section B is satisfied when a supplier: (i) has actual knowledge an object will be used as drug paraphernalia; (ii) is aware of a high probability an object will be used as drug paraphernalia; or (iii) is aware of facts and circumstances from *which he should reasonably conclude there is a high probability* an object will be used as drug paraphernalia. Section B requires a supplier of potential paraphernalia to exercise a reasonable amount of care." *Fatumabahirtu*, 26 A.3d at 334 (emphasis added). To the extent that the DCCA ruling in *Fatumabahirtu* establishes or requires a lower culpable mental state as to whether the person to whom an object is delivered or sold will use the object in a proscribed manner with respect to a controlled substance, that case would no longer be valid law upon adoption of the revised statute.

[9] The Supreme Court has stated that the principle that "the understanding that an injury is criminal only if inflicted knowingly is 'as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Rehaif v. United States*, No. 17-9560, 2019 WL 2552487, at *4 (U.S. June 21, 2019) (quoting *Morisette v. United States*, 342 U.S. 246, 250 (1952)).

[10] The tubes must be 6 inches in length and 1 inch in diameter.

[11] The statute excepts from this blanket prohibition on sale certain businesses. Commercial retail or wholesaler establishments may sell cigarette rolling papers if the establishment: derives at least 25% of its total annual revenue from the sale of tobacco products; and sells loose tobacco intended to be rolled into cigarettes or cigars.

contrast, under the revised statute sale of these objects is not criminalized, unless the person selling the objects intends that another person will use them in a manner specified in paragraph (a)(2) in relation to a controlled substance. Most of these items are objects with legitimate uses[12] and are currently available for purchase by District residents on the websites of major online retail sellers—any sale of which may constitute a crime under current law.[13] This change improves the proportionality of the revised criminal code.

Fourth, the revised statute penalizes repeat offenders consistent with other offenses in the RCC. Under the current D.C. Code statute, a person convicted of delivering or selling drug paraphernalia who has previously been convicted in the District of Columbia of a violation under subchapter I of Chapter 11, may be sentenced up to 2 years, four times the 6 month penalty for first time offenders. In contrast, the revised code omits any special repeat offender provision for trafficking of drug paraphernalia, and relies on the general repeat offender penalty enhancement under RCC § 22E-606 to address any increased penalties. There is no clear rationale for why, at present, repeat paraphernalia offenders should be treated differently from other types of repeat offenders. This change improves the consistency and proportionality of the revised criminal code.

Fifth, the revised statute eliminates penalty enhancements for delivering or selling paraphernalia to a person under the age of 18. Under the current D.C. Code statute, any person who is 18 year of age or older who delivers or sells paraphernalia to a person who is under the age of 18 and who is at least 3 years younger may be sentenced to a term of imprisonment of up to 8 years, sixteen times the penalty for delivery or sale to an adult.[14] In contrast, the revised statute does not include an age-based penalty enhancement. Delivering or selling drug paraphernalia to a minor would likely give rise to liability for contributing to the delinquency of a minor[15] that effectively raises the penalty for such behavior in a more proportionate manner. This change improves the proportionality of the revised criminal code.

Sixth, paragraph (b)(1) of the revised statute excludes from liability community-based organizations selling, delivering, or possessing with intent to sell or deliver any item for ingestion or inhalation of a controlled substance. The current D.C. Code statute states that "it shall not be unlawful for a community based organization as that term is defined in § 7-404(a)(1), to deliver or sell, or possess with intent to deliver or sell, the materials described in § 48-1101(3)(D)."[16] By reference to D.C. Code § 48-1101(3)(D), the current statute excludes community-based organizations selling, delivering, or possessing with intent to sell or deliver certain types of testing equipment. In contrast, the revised statute also excludes community-based organizations selling, delivering, or

[12] *See, e.g.*, Toff, Nancy, *The Flute Book: A Complete Guide for Students and Performers* (2012) at 36.
[13] *See,* D.C. Code § 45–604 ("The word "person" shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense.").
[14] D.C. Code § 48-1103 (c). Notably, an 8 year maximum sentence is longer than the maximum sentence authorized for felony assault, D.C. Code § 22-404, fourth degree sexual abuse, D.C. Code §22-3005, or second degree sexual abuse of a minor, D.C. Code § 22-3009.02.
[15] D.C. Code § 22–811(a)(5)(carrying a six-month maximum penalty for a first-time offense).
[16] D.C. Code § 48-1103(b)(1)(A).

possessing with intent to sell any item for ingestion or inhalation of a controlled substance. Community-based organizations may address public health concerns associated with controlled substance use by distributing items for use in ingesting or inhaling controlled substance. The revised statute bars criminal liability in these cases. This change improves the proportionality of the revised criminal code.

Seventh, paragraph (b)(2) of the revised statute excludes from liability selling, delivering, or possessing with intent to sell or deliver an unused hypodermic syringe or needle. Under current D.C. Code § 48-1103.01, certain persons authorized by the Needle Exchange Program may distribute hypodermic needles and syringes. In contrast, the revised statute excludes any person selling, delivering, or possessing with intent to sell an unused hypodermic needle. Used hypodermic syringes and needles present significant health risks, and distribution of unused needles and syringes can mitigate this risk, regardless of whether the person distributing them is authorized under the Needle Exchange Program. This change improves the proportionality of the revised criminal code.

Eighth, paragraph (b)(3) of the revised statute excludes from liability selling, delivering, or possessing with intent to sell or deliver an item intended for use in a medical procedure or treatment. Current District law does not provide an explicit exclusion for distribution of paraphernalia for such purposes. Under current law, it appears that selling a hypodermic needle intended for use by a physician or nurse in administering a controlled substance constitutes a criminal offense. In contrast, the revised statute establishes that this conduct is not subject to criminal liability. Including this exclusion improves the clarity and proportionality of the revised criminal code.

Beyond these eight substantive changes to current District law, two other aspects of the revised possession of drug paraphernalia statute may be viewed as substantive changes of law.

First, the revised statute specifies that the actor must knowingly distribute or sell the object that is to be used in connection with a controlled substance. The current D.C. Code statute does not specify any culpable mental state for "deliver or sell," however the DCCA has stated that the current statute requires "specific intent" to deliver or sell the paraphernalia.[17] The revised statute specifies that a "knowingly" culpable mental state is required. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[18] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current

[17] *Fatumabahirtu*, 26 A.3d at 325 ("We hold that D.C.Code § 48–1103(b) requires the government to prove that an owner or a clerk of a commercial retail store had (1) the specific intent to deliver or sell drug paraphernalia (as defined in D.C.Code § 48–1101(3))…."). The DCCA discussion of "specific intent" in *Fatumabahirtu* does not appear to distinguish between conduct to "deliver or sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell."

[18] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Five other changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute does not specifically criminalize manufacturing drug paraphernalia. The current D.C. Code statute specifically includes "manufacture with intent to deliver or sell drug paraphernalia" as a distinct form of a paraphernalia offense.[19] The revised statute, however, does not explicitly refer to manufacturing objects that are intended for use with controlled substances because such language is surplusage and potentially confusing. A person who manufactures an object would also necessarily possess the object, and fall within the scope of the revised statute.

Second, the exclusion to liability under paragraph (b)(1) specifically lists testing equipment and other objects rather than rely on a cross reference. The current D.C. Code statute states that "it shall not be unlawful for a community based organization to as that term is defined in § 7-404(a)(1), to deliver or sell, or possess with intent to deliver or sell, the materials described in § 48-1101(3)(D)."[20] In the revised statute the term "community based organization" is cross-referenced in the subsection (e), and retains the same meaning as under current law. However, instead of referring to D.C. Code § 48-1101(3), paragraph (b)(1) specifies the testing equipment and objects that are excluded from the offense, using language copied verbatim from current D.C. Code § 48-1103(3)(D).

Third, the revised statute includes an exclusion to liability if the object is 50 years of age or older. The current D.C. Code paraphernalia offense does not include this exclusion, however, current D.C. Code § 48-1101 states that "[t]he term 'drug paraphernalia' shall not include any article that is 50 years of age or older." Although the revised statute does not use the term "drug paraphernalia," this exclusion is intended to maintain current law in excluding cases involving objects that are 50 years of age or older.

Fourth, the revised statute does not include an exception for selling, delivering, or possessing with intent to sell or deliver objects with intent that another person will use the object to possess, use, grow, harvest, or process cannabis. The current statute provides an exception for selling, delivering, or possessing with intent to sell or deliver drug paraphernalia "under circumstances in which one knows or has reason to know that such drug paraphernalia will be used solely for use of marijuana that is lawful under § 48-904.01(a), or that such drug paraphernalia will be used solely for growing, possession,

[19] D.C. Code § 48-1103 (b)(1). Notably, unlike Chapter 9 of Title 48, which contains most controlled substance offenses and penalties, the term "manufacture" is not defined for Chapter 11.
[20] D.C. Code § 48-1103(b)(1)(A).

harvesting, or processing of cannabis plants that is lawful under § 48-904.01(a)."[21] However, omitting this exception is not intended to change current District law. A person who sells, delivers, or possesses with intent to sell or deliver an object with intent that a person will use the object to use, possess, grow, harvest, or process cannabis plants in a manner that is lawful under § 48-901.01(a) will not be liable under the revised offense. Under both current law and the RCC, the term "controlled substance" does not include marijuana used or possessed in manner defined in §48-904.01 (a), or cannabis plants that are grown in the manner set forth in D.C. Code § 48-904.01 (a). A person who sells, delivers, or possesses with intent to sell or deliver an object with intent that another person will use the object with marijuana or cannabis plants in a manner that is lawful under D.C. Code § 48-904.01 (a) would not have the requisite intent that another person will use the object to produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a "controlled substance," and would not liable under the revised offense.

Fifth, the forfeiture statute under D.C. Code § 48-1104 includes two technical amendments. First, the statute refers to the revised paraphernalia offenses under D.C. Code § 48-904.10 and § 48-904.11, instead of current D.C. Code § 48-1103. Second, the forfeiture statute also omits the reference to use or possession of drug paraphernalia for "personal use." Under the current forfeiture statute, money or currency that has been used or intended for use in conjunction with the use or possession of paraphernalia, other than for personal use, is subject to forfeiture. This limitation on the forfeiture statute is unnecessary under the revised statutes, as use or possession of an object that is used for personal use of a controlled substance is not a criminal offense.

[21] D.C. Code § 48-1103 (b)(1).

RCC § 48-904.12. Maintaining Methamphetamine Production.

Explanatory Note. *This section establishes the maintaining methamphetamine production offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly opening or maintaining a place with intent to manufacture methamphetamine. The offense does not include merely packaging, repackaging, labeling, or relabeling methamphetamine. The maintaining methamphetamine production offense replaces the current D.C. Code § § 48–904.03, which criminalizes opening or maintaining a place to manufacture, distribute, or store for the purposes of manufacturing or distributing a narcotic or abusive drug.*

Subsection (a) specifies the elements of maintaining methamphetamine production. Subsection (a) requires that the actor opens or maintains any location. Subsection (a) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be practically certain that he or she is opening or maintaining any location. Subsection (a) also requires that the actor with intent to manufacture methamphetamine, its salts, isomers, or salts of its isomers. Per RCC § 22E-205, the object of the phrase "with intent that" 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 anyone actually manufactured methamphetamine.

Subsection (a) excludes certain types of manufacturing. The term "manufacture" is defined in D.C. Code § 48-901.02, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container." Subsection (a) specifies that maintaining a place with intent to package, repackage, label, or relabel methamphetamine is not included in the offense.

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (d) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised maintaining a place for methamphetamine manufacturing statute changes current District law in two main ways.*

First, the revised requires intent to manufacture methamphetamine. The current statute includes maintaining or opening a location "for the purpose of manufacture or distribution a narcotic or abusive drug."[1] By contrast, the revised statute does not criminalize maintaining a location with intent to manufacture substances other than methamphetamine, or with intent to distribute any controlled substance. Conspiracy and accomplice liability are sufficient to deter and punish maintaining a location for manufacturing or distributing other controlled substances. However, due to the particular dangerousness associated with manufacturing methamphetamine, a separate criminal

[1] D.C. Code § 48-904.03a.

offense, with different culpability requirements than required for accomplice[2] or conspiracy[3] liability, is warranted. This change improves the proportionality of the revised criminal code.

Second, the revised excludes maintaining a location with intent to package, repackage, label, or relabel, methamphetamine. The current statute does not include any exclusions or exceptions to liability. By contrast, the revised statute excludes certain types of conduct that are included in the definition of "manufacture." Although included in the definition of "manufacture," packaging and labeling of methamphetamine does not create the same safety risks associated with the actual production of methamphetamine. This change improves the proportionality of the revised criminal code.

Beyond these two main changes to current District law, one other aspect of the revised maintaining a place for methamphetamine manufacturing statute may constitute a substantive change of law.

The revised statute criminalizes maintaining or opening a location with intent to manufacture methamphetamine. The current statute criminalizes knowingly opening or maintaining any location "*to* manufacture, distribute, or store *for the purpose* of manufacture or distribution a narcotic or abusive drug." The current statute is semi-inchoate in that it does not require that the location actually be used to manufacture or distribute a controlled substance. However, although the statute requires that the person must knowingly open or maintain a place, it does not specify a culpable mental state as to whether the location will be used to manufacture or store controlled substances. The revised statute resolves this ambiguity by specifying that the actor must act "with intent" that the location will be used to manufacture methamphetamine.

[2] Under RCC § 22E-210, accomplice liability requires that the actor acts with the culpability required by the offense, and either *purposely* assists another person with the planning or commission of conduct constituting that offense; or *purposely* encourages another person to engage in specific conduct constituting that offense. A person who maintains a location knowing but not *consciously desiring* that it be used to manufacture methamphetamine would not satisfy the requirements for accomplice liability.

[3] Under RCC § 22E-303, conspiracy liability requires that the actor *purposely agrees* "to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense[.]" A person who maintains a location knowing that another person will use the location to manufacture methamphetamine, without purposely forming an agreement with the other person would not be guilty of conspiracy to manufacture methamphetamine.

D.C. Code § 5-115.03. Repeal of Neglect to Make Arrest for Offense Committed in Presence.

Explanatory Note and Relation to Current District Law
Current D.C. Code § 5-115.03 provides:

> If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District Jail or Penitentiary not exceeding 2 years, or by a fine not exceeding $500. A member of the police force who deals with an individual in accordance with § 24-604(b) shall not be considered as having violated this section.[1]

The D.C. Court of Appeals (DCCA) does not appear to have published any opinions in which a criminal defendant was charged with violating this statute. However, the DCCA has referred to this statute when finding that members of the Metropolitan Police Departments are "always on duty."[2] Additionally, the U.S. District Court for the District of Columbia has referred to this statute when finding that the District does not have a policy or practice of allowing officers to break the law and shielding the government from liability under 42 U.S.C. § 1983.[3]

There is no legislative history available as to the original intent of the statute because it is among the oldest in the D.C. Code. The crime began as part of wartime (Civil War) 1861 legislation that originally created a unified "Metropolitan Police district of the District of Columbia" out of the "corporations of Washington and Georgetown, and the county of Washington." [4]

The scope of D.C. Code § 5-115.03 is ambiguous because it does not specify culpable mental states as to applicable criminal laws or the relevant conduct of persons. In other words, it is unclear from the statute whether police officers may be criminally

[1] D.C. Code § 5-115.03.
[2] *See* D.C. Code § 22–405; *Mattis v. United States*, 995 A.2d 223, 225–26 (D.C. 2010)(finding off-duty police officers are protected by the District's assault on a police officer statute); *Lande v. Menage Ltd. Pshp.*, 702 A.2d 1259 (D.C. 1997)(finding private business not liable for the unlawful actions of the off-duty police officers they employed as security guards).
[3] *Gregory v. District of Columbia*, 957 F. Supp. 299 (D.D.C. 1997)
[4] *See Compilation of the Laws in Force in the District of Columbia, April 1, 1868*, U.S. Government Printing Office (1868) at 400, (available online at https://books.google.com/books?id=87kWAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false) (citing Congress' August 6, 1861 Act to create a Metropolitan Police district of the District of Columbia, and to establish a police therefor, and providing in section 21 of the law: "It shall be a misdemeanor punishable by imprisonment in the county jail or penitentiary not exceeding two years, or by a fine not exceeding five hundred dollars for any person without justifiable or excusable cause to use personal violence upon any elector in said district, or upon any member of the police force thereof when in the discharge of his duty, or for any such member to neglect making any arrest for an offence against the law of the United States, committed in his presence, or for any person not a member of the police force to falsely represent himself as being such member, with a fraudulent design.").

liable for neglecting to arrest persons if he or she is unaware of the laws being broken or that person's conduct.[5]

However, even if limited to situations where an officer knows a person is breaking a criminal law in their presence, the statutory language makes no exception for the many circumstances in which safety concerns or District policy would require an officer to decline to arrest. In some situations, requiring an officer to make an arrest may compromise the officer's safety,[6] the arrestee's safety,[7] or the safety of a third party.[8] In some situations, Metropolitan Police Department (MPD) orders specifically direct officers to engage with people in a manner that may not result in an arrest for wrongdoing.[9] In still other situations, District law[10] conflicts with federal law[11] and requiring an arrest undermines the District's authority to make and enforce its own criminal laws.[12]

In rare circumstances,[13] requiring law enforcement officers to make arrests for criminal actions they know to be committed in their presence may be consistent with District policy. The CCRC will evaluate such situations in the context of its review of future offenses. However, the CCRC recommends the repeal of the broad failure to make arrest requirement in D.C. Code § 5-115.03. This change improves the consistency and proportionality of the revised offenses.

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[5] For example, it is unclear if an officer would be liable for failure to arrest when he or she observes a group of people playing outside without knowing that the game they are playing is shindy or that there is a law against playing shindy, D.C. Code § 22-1308.

[6] E.g., the officer is undercover, the officer is outnumbered, the officer is unarmed or physically outmatched,

[7] E.g., a person in need of immediate medical care for an injury, illness, or psychiatric condition. *See* D.C. Code § 21-521.

[8] E.g., a hostage.

[9] *See., e.g.,* Metropolitan Police Department, General Order 201.26(V)(D)(2)(f), April 6, 2011; Metropolitan Police Department, General Order 303.01(I)(B)(2)-(3), April 30, 1992; Metropolitan Police Department, Special Order 96-10, July 10, 1996; Metropolitan Police Department, General Order 502.04, April 24, 2018;

[10] D.C. Code § 48-1201 (providing a civil penalty for possession of marijuana, one ounce or less).

[11] 21 U.S. Code § 844 (criminalizing possession of a controlled substance, including marijuana).

[12] Notably, the District recently adopted a policy of non-custodial arrests for public consumption of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, Washington Post, September 21, 2018, *available at* https://wapo.st/2OJBEZo?tid=ss_mail&utm_term=.9078c3261301.

[13] *See, e.g.,* D.C. Code § 16-1031 (requiring police officers to make an arrest in domestic violence, but without a criminal penalty for failure to comply). Another situation where a mandatory arrest policy may be considered is when a law enforcement officer is present during a criminal act by another officer. For example, Officer A witnesses Officer B steal narcotics from the evidence control branch and, although A did not consciously desire B to steal and was not an accomplice or accessory after-the-fact, he fails to arrest B to protect B's job. In such situations, the officer's failure to arrest may be conduct sufficiently harmful to be criminalized. This situation will be reviewed when the CCRC examines the District's obstruction of justice statutory provisions.

D.C. Code §§ 7-2502.12 and 7-2502.13. Repeal of Possession of Self-Defense Sprays.

Explanatory Note and Relation to Current District Law. Current D.C. Code § 7-2502.12 provides:

> For the purposes of §§ 7-2502.12 through 7-2502.14, the term:
>
> "Self-defense spray" means a mixture of a lacrimator including chloroacetophenone, alphacloracetophenone, phenylchloromethylketone, orthochlorobenazalm-alononitrile or oleoresin capsicum.

Current D.C. Code § 7-2502.13 provides:

> (a) Notwithstanding the provisions of § 7-2501.01(7)(C), a person may possess and use a self-defense spray in the exercise of reasonable force in defense of the person or the person's property only if it is propelled from an aerosol container, labeled with or accompanied by clearly written instructions as to its use, and dated to indicate its anticipated useful life.
>
> (b) No person shall possess a self-defense spray which is of a type other than that specified in §§ 7-2502.12 to 7-2502.14.

D.C. Code § 7-2502.14 has already been repealed.

The meaning and scope of a "self-defense spray" is unclear. Specifically, it is unclear from whether § 7-2502.12 defines the permissible "self-defense spray" to include any mixture containing a lacrimator of any kind and non-lacrimators, any mixture consisting solely of lacrimators that are one of the five listed substances, or any mixture consisting solely of lacrimators of any kind.

The proportionality of criminal penalties for possession of a self-defense spray is also questionable. The District of Columbia Court of Appeals ("DCCA") has held that lacrimators are unlikely to cause great bodily injury.[1] However, simple possession of a self-defense spray is currently punishable by up to one year in jail,[2] the same maximum penalty currently available for possession of a fully automatic machine gun.[3]

Under the revised code, harmful uses of a self-defense spray would remain criminal even without a separate offense penalizing possession of such a spray. Any object, including a self-defense spray of any kind, is treated as a dangerous weapon if the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.[4] Furthermore, if an actor uses a self-defense spray to assault another person, the potential punishment is determined by the degree of the injury suffered. For

[1] *See Jones v. United States*, 67 A.3d 547 (D.C. 2013).
[2] D.C. Code § 7-2507.06.
[3] D.C. Code §§ 22-4514(a) and 22-4515; *see also* D.C. Code § 7-2501.01(10) (defining "machine gun").
[4] RCC § 22E-701 (defining "dangerous weapon"). Consider, for example, an actor who uses self-defense spray against a person who is operating a motor vehicle.

example, if the spray causes an injury that requires immediate medical treatment beyond what a layperson can personally administer,[5] the assault may be punished as a third or fourth degree assault, instead of as a sixth degree, simple assault.[6] Other offenses committed by use of a self-defense spray also are penalized more severely in the RCC, including robbery,[7] menacing,[8] sexual assault,[9] kidnapping,[10] and criminal restraint.[11]

However, the RCC differentiates self-defense sprays from firearms and other weapons. Weapons that are most likely to facilitate a mass casualty event, are prohibited and punished as contraband *per se*.[12] Weapons that are likely to cause a more serious bodily injury are punished if they are carried outside of the home,[13] possessed with intent to commit a crime,[14] or possessed during a crime.[15]

This change clarifies, logically reorganizes, and improves the consistency and proportionality of the revised offenses.

[5] *See* RCC § 22E-701 (defining "significant bodily injury").
[6] RCC § 22E-1202.
[7] RCC § 22E-1201.
[8] RCC § 22E-1203.
[9] RCC § 22E-1301.
[10] RCC § 22E-1401.
[11] RCC § 22E-1402.
[12] RCC § 22E-4101.
[13] RCC § 22E-4102.
[14] RCC § 22E-4103.
[15] RCC § 22E-4104.

D.C. Code § 22-1511. Repeal of Fraudulent Advertising.

Explanatory Note and Relation to Current District Law.
Current D.C. Code § 22-1511 provides:

> It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public; or to deliver, exhibit, mail, or send to any person, firm, association, or corporation any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value or to deceive, mislead, or induce any person, firm, association, or corporation to purchase, discount, or in any way invest in or accept as collateral security any bonds, bill, share of stock, note, warehouse receipt, or any security; or with the purpose to deceive, mislead, or induce any person, firm, association, or corporation to purchase, make any loan upon or invest in any property of any kind; or use any of the aforesaid methods with the intent or purpose to deceive, mislead, or induce any other person, firm, or corporation for a valuable consideration to employ the services of any person, firm, association, or corporation so advertising such services.

Repealing the fraudulent advertising statute in D.C. Code § 22-1511 will decriminalize little conduct because nearly all such conduct is already prohibited under the District's current fraud statute[1] and will be criminalized by the RCC fraud statute.[2] The revised fraud statute criminalizes taking, obtaining, transferring, or exercising control over property, with the consent of the owner obtained by deception.[3] However, repealing the fraudulent advertising statute does narrow current District law in one or two minor ways.

First, the fraudulent advertising statute differs from the RCC's fraud statute in that the fraudulent advertising statute covers conduct "with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value." Consequently, the current fraudulent advertising statute does not require that the actor actually succeeded in

[1] D.C. Code § 22-3221. ("A person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.")
[2] RCC § 22E-2201. A person commits fraud when that person "Knowingly takes, obtains, transfers, or exercises control over the property of another; (2) With the consent of an owner obtained by deception; (3) With intent to deprive that owner of the property[.]"
[3] RCC § 22E-2201.

defrauding anyone.[4] In contrast, the RCC's fraud statute requires that the actor actually takes, obtains, transfers, or exercises control over property. However, the RCC fraud statute still criminalizes conduct an actor who is unsuccessful in defrauding anyone through the use of deceptive advertising if the conduct is sufficiently close to success that it constitutes an attempt.[5]

Second, the fraudulent advertising statute differs from the RCC's fraud statute in that the fraudulent advertising statute is silent as to whether it includes advertising with immaterial misleading statements or puffery. The plain language seems to suggest even the most trivial, ineffective, or clearly outrageous claims could satisfy the elements of the offense, and there is no relevant D.C. Court of Appeals case law. However, the revised fraud offense specifically excludes liability for such minimal harms by requiring the property of another be obtained by means of "deception" and defining "deception" as "creating or reinforcing a *material* false impression," and excludes "puffing statements unlikely to deceive ordinary persons[.]"[6] Consequently, to the extent that the fraudulent advertising statute includes displaying advertising that includes immaterial misrepresentations[7] or mere puffery[8], repealing the statute would decriminalize this conduct.

Repealing the fraudulent advertising statute eliminates unnecessary overlap and improves the proportionality and consistency of the revised criminal code.

[4] *See, Green v. United States*, 312 A.2d 788, 791 (D.C. 1973) (evidence for fraudulent advertising sufficient even without proof that any customers actually purchased falsely advertised goods).
[5] RCC § 22E-301.
[6] RCC § 22E-701 (emphasis added).
[7] For example, if an alcohol vendor advertises liquor as being 50% alcohol by volume, but the liquor is actually only 49.9% alcohol by volume, this immaterial misrepresentation could arguably constitute fraudulent advertising.
[8] For example, if the owner of a diner displays an advertisement that says "word's best coffee," when the diner's coffee is not actually the best coffee in the entire world, these puffing statements would not constitute deception as defined in the RCC, but could arguably constitute fraudulent advertising.

D.C. Code § 22-3224. Repeal of Fraudulent Registration.

Explanatory Note and Relation to Current District Law. Current D.C. Code § 22-3224 provides: "A person commits the offense of fraudulent registration if, with intent to defraud the proprietor or manager of a hotel, motel, or other establishment which provides lodging to transient guests, that person falsely registers under a name or address other than his or her actual name or address." This conduct may still be criminalized under the RCC's fraud[1] statute. Repealing the fraudulent registration statute may change current District law in two ways.

Repealing the fraudulent registration statute in D.C. Code § 22-3224 will decriminalize little conduct because nearly all such conduct is already prohibited under the District's current fraud statute[2] and will be criminalized by the RCC fraud[3] statutes. The revised fraud statute criminalizes taking, obtaining, transferring, or exercising control over property, with the consent of the owner obtained by deception.[4] However, repealing the fraudulent registration statute does narrow current District law in one or two minor ways.

First, the fraudulent registration statute does not require that the actor actually defrauded the proprietor or manager of the hotel. The offense only requires registering under a false name or address, with *intent* to defraud. Consequently, the current fraudulent registration statute does not require that the actor actually succeeded in defrauding anyone. A person who provides a false name or address, but does not actually use the hotel room without payment would be guilty of fraudulent registration. In contrast, the RCC's fraud statute requires that the actor actually takes, obtains, transfers, or exercises control over property. However, the RCC fraud statute still criminalizes conduct an actor who is unsuccessful in defrauding anyone through the use of deceptive registration if the conduct is sufficiently close to success that it constitutes an attempt.[5]

Second, the fraudulent registration statute does not define the term "defraud." Using a false name or address to obtain a hotel room without paying for it would constitute fraud or theft of services[6] under the RCC. However, since the term "defraud" is undefined, it is unclear if the fraudulent registration statute covers cases where a person provides a false name or address to deceive the manager or proprietor of the hotel, but still intends to pay for the room. If the fraudulent registration offense includes use of a false name or address, even when the actor intends to pay for the room, repealing the statute would decriminalize this conduct.

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[1] RCC § 22E-2201.
[2] D.C. Code § 22-3221. ("A person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.")
[3] RCC § 22E-2201. (A person commits fraud when that person "Knowingly takes, obtains, transfers, or exercises control over the property of another; (2) With the consent of an owner obtained by deception; (3) With intent to deprive that owner of the property[.]").
[4] RCC § 22E-2201.
[5] RCC § 22E-301.
[6] RCC § 22E-2101

Repealing the fraudulent registration statute eliminates unnecessary overlap and improves the proportionality and consistency of the revised criminal code.

D.C. Code § 37-131.08(b). Repeal of Penalties for Illegal Vending.

Explanatory Note and Relation to Current District Law. Title 37 of the D.C. Code and Title 24 of the D.C. Municipal Regulations ("DCMR") address a wide array of rules for vending goods from public spaces such as streets and sidewalks. A failure to comply with any of the regulations triggers both civil[1] and criminal penalties.[2] D.C. Code § 37-131.08(b) specifies a maximum penalty of 90 days in jail and a $500 fine for a violation of "any of the provisions of this chapter or any regulations issued pursuant to this chapter."[3] An arrest may also result in significant business losses to a vendor.[4]

Imprisonment does not appear to be a proportionate punishment for conduct that fails to comply with vending regulations does not otherwise involve fraudulent activity,[5] physically harm others,[6] involve the sale of spoiled, contaminated, or food unfit for consumption,[7] or block public use of locations[8]—harms separately addressed in the current and/or revised criminal code. Recent journalism has highlighted that the District imposes some of the highest fees and most stringent requirements for vending of any American city, limiting the ability of micro-businesses and entrepreneurs young and old to legally engage in sales.[9] The scope of illegal vending activity[10] and the relatively small number of prosecutions (see below) also raise concerns about selective enforcement that may disproportionately affect some members of the community.[11]

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[1] The Commission makes no recommendation at this time regarding civil remedies or penalties. Notably, however, violations involving nonpayment of fees, such as failure to maintain a business license and parking illegally, trigger steeper penalties than do violations involving risks to public safety, such as failure to comply with the District's health and fire codes. *See* 16 DCMR § 3313.

[2] D.C. Code §§ 37-131.08 and 22-3571.01; 24 DCMR § 575; 16 DCMR §§ 3201 and 3313.

[3] *See also* D.C. Code § 22-3571.01.

[4] Vendors who are arrested are subject to both lost revenue and lost product. *See* Associated Press, *LA Joins Other Big Cities in Legalizing Street Vending*, U.S. NEWS & WORLD REPORT (November 28, 2018) (explaining "If someone complains, the police, they could come in and take everything from us. Make us throw all our stuff away and we lose all our money for that day.").

[5] *See* D.C. Code § 22-3221; RCC § 22E-2201.

[6] *See* D.C. Code §§ 22-401 – 22-405; 22-406; RCC § 22E-1202.

[7] *See* D.C. Code § 48-109 (authorizing a penalty of up to 1 year of imprisonment and fines of up to $10,000 for sale or possession with intent to sell an adulterated food or other item).

[8] *See* D.C. Code §§ 22-1307; RCC § 22E-4203.

[9] *See, e.g.*, Jeff Clabaugh, *Why DC is 2nd-most challenging city for food trucks*, WTOP (March 22, 2018) (noting vendors must complete at least 23 specific interactions with regulators, pay high start-up fees, and overcome a significant number of ongoing, city-imposed hurdles in their quest to turn a profit); Robert Frommer, *Washington DC vs. Entrepreneurs: DC's Monumental Regulations Stifle Small Businesses*, Institute for Justice City Study Series (November 2010).

[10] Vending without a license is an open, longstanding, tolerated practice in many District locations. *See, e.g.*, Orion Donovan-Smith, *At Dave Thomas Circle, fixing a traffic nightmare threatens a D.C. vending empire*, WASHINGTON POST (August 14, 2019).

[11] In 2017, three black teenagers were handcuffed and detained on the National Mall by undercover U.S. Park Police officers for attempting to sell cold water without a permit. In response, Councilmember Charles Allen sent a letter to the U.S. Park Police Chief, Robert D. MacLean stating, "I can't help but think how the reaction by these same officers might have varied if different children had set up a quaint hand-painted lemonade stand on the same spot. While still the same violation of selling a beverage without proper permits and licenses, I doubt we would have seen little girls in pigtails handcuffed on the ground." *See* NBC Channel 4 Washington, *Teens Detained for Selling Water on the National Mall*, (June 23, 2017). *See, also, United States v. Harrison*, 2018 WL 5046496 Slip Copy (D.D.C. Aug 7, 2018) at 1 (where a

The Metropolitan Police Department reports hundreds of arrests for vending violations each year, including 472 in 2017 (its most recent annual report).[12] However, according to a CCRC analysis of data received from the Superior Court of the District of Columbia, over the entire 10-year span of 2009-2018, there were just 58 charges and fewer than 20 convictions of adults for vending without a license.[13] Vending without a license is a crime eligible for post and forfeit procedures,[14] however, which may partly account for the low number of prosecutions.

In a recent CCRC survey, District voters were asked to assign a ranking to the seriousness of "selling sunglasses on a public sidewalk without a business license or vending permit, as required by law."[15] The most frequent (modal) response, selected by 28.2% of recipients, was "0," a rating equivalent to "Not a crime (e.g. a speeding ticket)." The median response was a "2," a low rating equivalent to "non-painful physical contact (e.g. pushing someone around)." The mean response was a "3.1," a rating that is about one class lower than a "4" which was equivalent to the harm of causing a "minor injury treatable at home (e.g. a black eye)."[16] Given the skewed distribution of responses,[17] the mode or median is likely the best indicator of the central tendency of responses.

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parolee was arrested for vending without a license but was otherwise compliant with his conditions of release).

[12] *See* MPD Annual Report: 2017 (February 22, 2019) (available at https://mpdc.dc.gov/page/mpd-annual-reports).

[13] See CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (October 10, 2019) and Appendix D to Advisory Group Memorandum #28 - DC Superior Court Criminal Division Adult Charges and Convictions Disposed (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

Data labeled as vending without a license specifically cited to 24 DCMR 502.2 which states: "In addition to the requirements specified in § 502, no person shall vend food from public or private space in the District of Columbia without obtaining and maintaining a valid: (a) Health inspection certificate issued by the DOH Director; (b) Food Protection Manager Certificate issued by the Conference of Food Protection Standards for Accreditation of Food Protection Manager Certification Programs in accordance with § 203.1 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; (c) Certified Food Protection Manager Identification Card issued by DOH in accordance with § 203 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; provided, that a vendor without such certification may employ a person who holds a valid: (1) Food Protection Manager Certificate issued by the Conference of Food Protection Standards for Accreditation of Food Protection Manager Certification Programs in accordance with § 203.3 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; and (2)Certified Food Protection Manager Identification Card issued by DOH in accordance with § 203 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; (d) Required food safety analyses and plans in accordance with § 3701 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; and (e) Permit from FEMS, if the vendor uses propane gas, open flames, or solid fuels such as wood pellets or charcoal."

[14] *See* Superior Court Bond and Collateral List: Non-Traffic Offenses – Collateral (July 5, 2019) (available at https://www.dccourts.gov/sites/default/files/Bond%20Collateral_Non-Traffic%20Offenses-Collateral)_07052019.pdf).

[15] For more information on the survey results and methodology, see CCRC Advisory Group Memo #27, Public Opinion Surveys on Ordinal Rankings of Offenses (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

[16] This conduct is roughly equivalent to simple assault under current District law, punishable by up to 180 days imprisonment. *See* D.C. Code § 22-404; RCC §§ 22E-1202 and 22E-1205.

[17] Notably, 20.5% of survey respondents selected a value of "1," the lowest possible criminal conduct, rated a class less than to "non-painful physical contact (e.g. pushing someone around)."

In sum, the CCRC recommends the repeal of D.C. Code § 37-131.08(b). This will eliminate imprisonment penalties of up to 90 days for violations of vending regulations but leave in place civil liability under D.C. Code § 37-131.08(a) and 24 DCMR § 575 for violations.[18] This change improves the proportionality of the revised offenses.

Legislative History. The District of Columbia has regulated street vending since 1887.[19] Past regulations have been described as "vague and practically impossible to enforce."[20] After a comprehensive reform effort in 1974 proved ineffective, the District imposed a moratorium on new vending licenses in 1998.[21] Eight years later, the Department of Consumer and Regulatory Affairs ("DCRA") produced a report comparing best practices in other cities, the moratorium was temporarily lifted, and the District began passing emergency and temporary legislation to regulate vending based on the DCRA's research.[22]

The purpose of the Vending Regulation Act of 2009 was to reestablish[23] a vibrant vending program in the District that provides residents and visitors safe and varied foods, goods, and services.[24] The bill was expected to encourage entrepreneurs and bolster the District's tax rolls.[25] The Council recognized that, "historically, vending has provided a means for people to earn a living independently while gaining experience in the operation of a small business"[26] and explained that the legislation aimed to balance interests of "safety and economic opportunity."[27]

In contrast to the substantial public comment, discussion, and controversy preceding passage of the Vending Regulation Act of 2009,[28] there was minimal

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[18] The fine amounts appear in D.C. Code § 22-3571.01 and 16 DCMR §§ 3201 and 3313.

[19] *See* Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009) at Page 3.

[20] *See Id.* at 3, 5.

[21] *Id.* at 3.

[22] *Id.* DCRA based its research on vending programs in Boston, Atlanta, New York City, Philadelphia, Chicago, Miami, and Portland.

[23] The Afro-American Vendors Association testified:

> Street vendors have been a hallmark in Washington, D.C. since the turn of the century when the first pushcart peddlers began selling their wares around the Capitol. Most vendors are people of color who earn very little money and work under harsh conditions. They perform an important service by providing convenient and affordable goods to both Washingtonians and tourists alike. Street vendors are entrepreneurs who ask for nothing more than the opportunity to earn a decent living. Yet, the city continues to treat these small businessowners as criminals.

Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009) at Page 152.

[24] *Id.* at 2.

[25] *Id.* at 11.

[26] *Id.* at 6.

[27] *Id.* at 18.

[28] The hearing record includes 26 witnesses, 30 letters, and a petition with 305 signatures, overwhelmingly advocating for deregulation and decriminalization. *See* Report on Bill 18-257, the "Vending Regulation

community input or discussion on the record regarding amendments in 2014[29] and 2015[30] that included the criminal penalties.[31] The criminal provisions were introduced as a technical correction of an inadvertent oversight in failing to provide criminal penalties in the Vending Regulation Act of 2009.[32]

On two occasions since the current laws were passed, the Council has recognized some instances of vending without a license[33] that should not be penalized. First, in 2015, the Council authorized the mayor to establish exemptions from the licensure requirement "when the public interest would be served by establishing such an exemption." The Council explained, "[P]unishing Girl Scouts for selling cookies outside of a grocery store without a license would not serve the public interest."[34] Second, in 2019, the Council unanimously introduced the "Lemonade Stand Amendment Act of 2019," which proposes an exemption for any minor who is operating on a small-scale[35] without a business license or vending site permit.[36]

However, neither the 2015 amendment nor the pending legislation exempts a child (or adult) from other requirements such as obtaining a Health Inspection Certificate, Food Protection Manager Certificate, Certified Food Protection Manager Identification Card, or food safety analyses and plans in accordance with 25 DCMR § 3701.[37] Nor do these exceptions apply to adult owners of micro-businesses. Also, neither the 2015 amendment nor the pending legislation specify what culpable mental state, if any, a person needs as to the existence of vending regulations. A person generally is not liable

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Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009).

[29] D.C. Act 20-354 (temporarily adding a D.C. Code § 37-131.08(b) and a 24 DCMR § 575.4 ("A person convicted of violating any provision of this chapter shall be punished by a fine of not more than three hundred dollars ($300) or by imprisonment for not more than ninety (90) days, or both, for each such offense.")).

[30] D.C. Act 21-261.

[31] Only two parties testified at the public hearing on Oct 5, 2015, both of whom supported the addition of the penalties. The first was a panel of executives from the Washington Nationals Baseball Club, and the second was a Government Witness, Melinda Bolling, the Director of DCRA.

[32] *See* Report on Bill 21-113, the "Vending Regulations Amendment Act of 2015," Council of the District of Columbia Committee on Business, Consumer, and Regulatory Affairs (November 4, 2015). Notably, however, the Committee Report on the Vending Regulation Act of 2009 does not indicate a clear intent to criminalize improper vending. *See* Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009).

[33] The D.C. Code provides that "a person shall not vend from a sidewalk, roadway, or other space unless the person holds" the proper licensure, and unless the person is located in a specifically approved vending location that has been assigned to them by lottery. D.C. Code §§ 37-131.02 – 131.04. The DCMR provides that "[n]o person shall vend any product, service, or merchandise from public space in the District of Columbia without obtaining and maintaining a valid…business license for vending…issued by the [Department of Consumer and Regulatory Affairs] Director…" 24 DCMR § 502.1.

[34] *See* Report on Bill 21-113, the "Vending Regulations Amendment Act of 2015," Council of the District of Columbia Committee on Business, Consumer, and Regulatory Affairs (November 4, 2015) at Page 2.

[35] "Small-scale" means selling no more than 10 types of items on a sporadic basis, and in operation no more than 100 days per year.

[36] Bill 23-398; *see also* Natalie Delgadillo, *D.C. Council Stands United On…Lemonade Stands*, DCist (July 11, 2019).

[37] *See* 24 DCMR § 502.2.

for reasonable mistakes of fact about the circumstances and results of one's behavior.[38] However, neither the D.C. Code nor the DCMR address these matters, and the District of Columbia Court of Appeals ("DCCA") has not yet addressed whether a person must be notified of (or otherwise familiar with) the vending rules and whether a reasonable mistake of law is an available defense.[39]

[38] 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)).

[39] Some street vending rules are more obvious than others. For example, 24 DCMR § 503.3 categorically prohibits peddling counterfeit goods, pornography, and drug paraphernalia. However, it also prohibits selling large luggage and carpets, which may not be as intuitive. Moreover, a person who observes someone vending a particular item in a particular location may innocently assume that they, too, may vend. *See, e.g.*, Mikaela Lefrak, *What's the Story Behind Those $5 Baseball Hats at Nationals Park?*, WAMU 88.5 (Oct 5, 2017).