D.C. Criminal Code Reform Commission
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ADVISORY GROUP MEMORANDUM #22

To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: April 15, 2019
Re: Supplemental Materials to the First Draft of Report #36

This Advisory Group Memorandum (Memo) supplements the First Draft of Report #36, *Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code* (Report) with relevant information on the organization and scope of the Report and various background materials.

Report Organization & Scope.

- *Due to the volume of materials, the statutory language is not repeated before each commentary.* Instead, the compilation of draft RCC statutes is intended to be read alongside the commentary.
- *Some provisions of the compilation of draft RCC statutes are highlighted in yellow to indicate that they are not subject to review as part of this Report.* [1] The yellow highlighted text (mainly from the general part) is included so that readers have access to all draft RCC statutory language to date. Due to renumbering of Chapters, RCC draft statutory provisions that were previously placed in Chapter 8 have now been placed in Chapter 6 (Offense Classes, Penalties, & Enhancements) but otherwise have not been changed.
- *Unlike prior reports, this Report does not include a section comparing the revised statute to national legal trends.* Prior sections comparing RCC statutes to national legal trends have been compiled in Appendix J at the end of this Memo, as reference material.[2] Such other jurisdiction analyses may be submitted to the Council and Mayor as background materials, but will not be part of the RCC statutory language and Commentary that the Advisory Group is asked to vote upon.[3] Going forward, the CCRC intends to continue providing the Advisory

[1] Note that only RCC § 22E-214, provisions in RCC Chapter 3, and provisions in RCC Chapter 7 are part of this review. Other statutory language in the General Part, highlighted in yellow, is provided for reference only and is not part of the this review.
[2] However, please note that such national legal trends materials are not being updated to track changes in national legislation, nor do they necessarily address new changes to the RCC statutory text.
[3] The consideration of national legal trends in the formulation of reform recommendations is part of the agency's mandate, but the agency's deliverables to the Council and Mayor do not include such analysis. *See* D.C. Code § 3-152 ("(b) The comprehensive criminal code reform recommendations required by subsection (a) of this section shall be in the form of a report that: (1) Includes draft legislation or other

Group with a national legal trends analysis on new draft recommendations when time permits and such analysis is helpful.[4]

- *There are some draft statutory provisions with corresponding commentary that are presented in this Report for the first time, but all else is an update to prior recommendations.* These provisions consist of various definitions codified in RCC § 22E-701, rape shield and child sexual abuse reporting provisions in RCC §§ 22E-1309 - 1311, and one property offense in RCC § 22E-2106, Unlawful Operation of a Recording Device in a Motion Picture Theater. To simplify and expedite review, recommendations for these items were incorporated with the updates in this Report.
- *Updates to RCC statutory provisions that were not included in Report #35 (issued March 12, 2019) or this Report are planned for release this summer of 2019.* These previously-released provisions still needing updates consist of general provisions in RCC Chapter 1 (Preliminary Provisions), the De Minimis Defense in RCC § 22E-215, and RCC Chapter 6 (Offense Classes, Penalties, & Enhancements). Updates to these draft revisions are planned for release after drug and weapon provisions, along with the first draft of specific offense penalty recommendations.
- *While offense-specific recommendations on merger were largely[5] omitted from this Report, further recommendations may be released this summer of 2019.* The prior draft RCC recommendations included a range of offense-specific merger provisions that were cut from statutory language and commentary in this Report. This omission does not reflect a final decision to omit such language from draft recommendations, but rather a decision to solidify RCC § 22E-214, Merger of Related Offenses and offenses in the Special Part, before reevaluating offense-specific merger provisions.
- *Despite the lack of corresponding draft Commentary, draft statutory language for two justification defenses—RCC § 22E-40X Special Responsibility for Care, Discipline, or Safety Defense, and RCC § 22E-40X Effective Consent Defense—is included in this Report in order to receive preliminary feedback and provide background for review of other offenses.* While CCRC was unable to timely complete a commentary entry, the terms and operation are largely self-explanatory and based on Model Penal Code and common provisions in other

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specific steps for implementing the recommendations; (2) Includes charging, sentencing, and other relevant statistics regarding the offenses affected by the recommendations; and (3) Explains how and why the recommendations change existing District law. (c) In preparing the comprehensive criminal code reform recommendations required by subsection (a) of this section, the Commission shall: (1) Consult with the Code Revision Advisory Group established pursuant to § 3-153; and (2) Review criminal code reforms in other jurisdictions, recommend changes to criminal offenses by the American Law Institute, and survey best practices recommended by criminal law experts.").

[4] However, as the particular statutes that remain for revision go beyond the general provisions, offenses against persons, and property offenses that are at the heart of the common law and the Model Penal Code, analysis of other jurisdictions can be extremely complex and of dubious value. State weapon, drug, and public order laws, in particular, vary widely in their structure and details.

[5] RCC § 22E-1401, Kidnapping, still contains an offense-specific merger provision in this Report.

jurisdictions. There is virtually no relevant District case law.[6] The CCRC will endeavor to provide the Advisory Group commentary explaining the terms of these defenses in the summer of 2019. In the meantime, preliminary comments from the Advisory Group on the terms of the draft defenses in RCC § 22E-40X and their interplay with other offenses is welcome.

- *The CCRC expects the agency's final recommendations to the Mayor and Council to follow the general format and presentation of the Report (RCC statutory language and Commentary) with additional information arranged in a manner corresponding to the Appendices in this Memo.* Consequently, Advisory Group comments on this format and presentation are welcome. Additional (future) appendices containing statistical information and a bill-form of the recommended statutory language are also planned.

Background Materials.

- *Appendix A, Report #36 RCC Draft Statutes Comparison to Prior Draft Statutes*, provides marked-up copies of all statutes in the Report that compare the current statute to the last draft that was distributed to the Advisory Group. (Note that there are no prior drafts for some statutory provisions presented for the first time in Report #35, as discussed above.) Review of this document is the most expeditious way to see what changes the update has made to RCC statutes.
- *Appendix B, Table of Advisory Group Draft Documents*, provides a table listing all prior RCC draft reports and memoranda distributed to the Advisory Group.
- *Appendix C, Advisory Group Comments on Draft Documents*, compiles the original Advisory Group written comments to date.
- *Appendix D, Disposition of Advisory Group Comments & Other Changes to Draft Documents*, provides the CCRC staff's disposition of Advisory Group written comments, and other changes recommended by the CCRC staff on RCC sections that are the subject of the Report.
- *Appendices E-I* are not included in this report, but are reserved for future distribution of statistics and penalty-related matters.
- *Appendix J, Research on Other Jurisdictions' Relevant Criminal Code Provisions*, compiles the relation to national legal trends entries previously produced by the CCRC staff in conjunction with prior drafts of the statutes addressed in the Report.

[6] For discussion of the limited case law on consent, see the Commentary entries regarding "consent" and "effective consent" in RCC § 22E-701, Generally Applicable Definitions, and corresponding discussion in the District law section of Commentary on offenses such as § 22E-1202, Assault.

APPENDIX A:

RCC DRAFT STATUTES COMPARISON TO PRIOR DRAFT STATUTES (4-15-19)

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
[…] Possible or planned RCC statute, no draft to date.
Provisions not under review in Report #36

CCRC Draft Title 22E
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[Reserved.]

Chapter 37.
[Reserved.]

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[Reserved.]

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[Reserved.]

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* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
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* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
[…] Possible or planned RCC statute, no draft to date.
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RCC § 22E-214. Merger of Related Offenses.

(a) *Merger* ~~Presumption of Merger Applicable to Commission~~ *of Multiple Related Offenses.* ~~There is a presumption that~~ M~~m~~ultiple convictions for two or more offenses arising from the same course of conduct merge whenever:

(1) One offense is established by proof of the same or less than all the facts required to establish the commission of the other offense as a matter of law;

(2) The offenses differ only in that:

(A) One prohibits a less serious harm or wrong to the same person, property, or public interest;

(B) One may be satisfied by a lesser kind of culpability; or

(C) One is defined to prohibit a designated kind of conduct generally, and the other is defined to prohibit a specific instance of such conduct;

(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law;

(4) One offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each;

(5) One offense consists only of an attempt or solicitation toward commission of:

(A) The other offense; or

(B) A different offense that is related to the other offense in the manner described in paragraphs (1)-(4); or

(6) Each offense is a general inchoate offense designed to culminate in the commission of:

(A) The same offense; or

(B) Different offenses that are related to one another in the manner described in paragraphs (1)-(4).

(b) *General Merger Rules* ~~Presumption of Merger Applicable~~ *Inapplicable Where Legislative Intent Is Clear.* The ~~presumption of~~ merger rules set forth in subsection (a) ~~is~~ are inapplicable whenever the legislature clearly ~~manifests~~ expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct.

(c) *Alternative Elements.* The court shall, in applying subsections (a) and (b) to an offense comprised of alternative elements that protect distinct societal interests, limit its analysis to the elements upon which a defendant's conviction is based.

(d) *Rule of Priority.* When two or more convictions for different offenses arising from the same course of conduct merge, the offense that remains shall be:

(1) The ~~most serious~~ offense with the highest statutory maximum among the offenses in question; or

(2) If the offenses ~~are of equal seriousness~~ have the same statutory maximum, any offense that the court deems appropriate.

(e) *Final Judgment of Liability.* A person may be found guilty of two or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:

(1) The time for appeal has expired; or
(2) The judgment appealed from has been ~~presumption~~ decided.

RCC § 22E-301. Criminal Attempt.

(a) *Definition of Attempt*. A person is guilty of an attempt to commit an offense when~~: that person~~
(1) Planning to engage~~s~~ in conduct constituting ~~planned to culminate in~~ that offense:
(2) With the culpability ~~intent to cause any result~~ required by that offense;
~~(3) With the culpable mental state, if any, applicable to any circumstance required by that offense; and~~
(4) The person engages in conduct that ~~is either~~:
(A)
(i) Comes ~~D~~ddangerously close to completing ~~committing~~ that offense; or
(ii) Would have come ~~be~~ dangerously close to completing ~~committing~~ that offense if the situation was as the person perceived it~~,~~; and
(B) ~~provided that the person's conduct i~~Is reasonably adapted to completion ~~commission~~ of that offense.
(b) *Principle of Culpable Mental State Elevation Applicable to Results of Target Offense.* Notwithstanding subsection (a), to be guilty of an attempt to commit an offense, the defendant must intend to cause any result elements required by that offense.
(c) *Proof of Completed Offense Sufficient Basis for Attempt Conviction*. A person may be convicted of an attempt to commit an offense based upon proof that the person actually committed the target offense, provided that no person may be convicted of both the target offense and an attempt to commit the target offense arising from the same conduct.
(d) *Penalties for ~~Criminal~~ Attempt~~s~~*.
(1) An attempt to commit an offense is subject to one-half the maximum punishment ~~imprisonment or fine or both~~ applicable to that ~~the~~ offense ~~attempted~~, unless a different punishment is specified in paragraph (d)(2) ~~RCC § 301(c)(2)~~.
(2) Notwithstanding paragraph (d)(1) ~~RCC § 301(c)(1)~~, attempts to commit the following offenses may be punished accordingly: [RESERVED: List of exceptions and accompanying penalties.]
(e) *Other Definitions*.
(1) "Intent" has the meaning specified in RCC § 22E-206(c).
(2) "Result element" has the meaning specified in RCC § 22E-201(c)(2).

RCC § 22E-302. Solicitation.

(a) *Definition of Solicitation.* A person is guilty of a solicitation to commit an offense when, acting with the culpability required by that offense, the person:

(1) Purposely commands, requests, or tries to persuade another person~~; (2) T~~to engage in or aid the planning or commission of specific conduct, which, if carried out, will constitute that offense or an attempt to commit that offense; and

(2) The offense solicited is, in fact, ~~[~~a crime of violence~~]~~.

(b) *Principles of Culpable Mental State Elevation Applicable to Results and Circumstances of Target Offense.* Notwithstanding subsection (a), to be guilty of a solicitation to commit an offense, the defendant must:

(1) ~~i~~Intend to cause ~~bring about~~ any result~~s~~ element required by that offense; and

(2) Intend to cause any circumstance~~s~~ required by that offense to exist.

(c) *Uncommunicated Solicitation.* It is immaterial under subsection (a) that the intended recipient of the defendant's command, request, or efforts at persuasion fails to receive the message ~~communication~~ provided that the defendant does everything he or she plans to do to transmit the message to the intended recipient ~~effect the communication~~.

(d) ~~*Penalty.* [Reserved.]~~ Penalties for Solicitation.

(1) A solicitation to commit an offense is subject to one-half the maximum punishment applicable to that offense, unless a different punishment is specified in paragraph (d)(2).

(2) Notwithstanding paragraph (d)(1), solicitations to commit the following offenses may be punished accordingly: [RESERVED: List of exceptions and accompanying penalties.]

RCC § 22E-303. Criminal Conspiracy.

(a) *Definition of Conspiracy*. A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person:

(1) Purposely agree 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; and

(2) One of the parties to the conspiracy ~~agreement~~ engages in an overt act in furtherance of the conspiracy ~~agreement~~.

(b) *Principles of Culpable Mental State Elevation Applicable to Results and Circumstances of Target Offense*. Notwithstanding subsection (a), to be guilty of a conspiracy to commit an offense, the defendant and at least one other person must:

(3) ~~i~~Intend to cause ~~bring about~~ any result~~s~~ element required by that offense; and

(4) Intend to cause any circumstance~~s~~ required by that offense to exist.

(c) *Jurisdiction When Object of Conspiracy is Located Outside the District of Columbia.* When the object of a conspiracy formed within the District of Columbia is to engage in conduct outside the District of Columbia, the conspiracy is a violation of this section if:

(1) That conduct would constitute a criminal offense under the statutory laws of the District of Columbia ~~D.C. Code~~ if performed in the District of Columbia; and

(2) That conduct would also constitute a criminal offense under:

(A) The statutory laws of the other jurisdiction if performed in that jurisdiction; or

(B) The statutory laws of the District of Columbia ~~D.C. Code~~ even if performed outside the District of Columbia.

(d) *Jurisdiction When Conspiracy is Formed Outside the District of Columbia*. A conspiracy formed in another jurisdiction to engage in conduct within the District of Columbia is a violation of this section if:

(1) That conduct would constitute a criminal offense under the statutory laws of the District of Columbia ~~D.C. Code~~ if performed within the District of Columbia; and

(2) An overt act in furtherance of the conspiracy is committed within the District of Columbia.

(e) *Legality of Conduct in Other Jurisdiction Irrelevant*. Under circumstances where paragraphs ~~§§~~ (d)(1) and (d)(2) can be established, it is ~~immaterial and~~ no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a criminal offense under the statutory laws of the jurisdiction in which the conspiracy was formed.

~~(f) *Penalty*. [Reserved.]~~

RCC § 22E-304. Exceptions to General Inchoate Liability.

(a) *Exceptions to General Inchoate Liability*. A person is not guilty of solicitation to commit an offense under RCC § 22E-302 or conspiracy to commit an offense under RCC § 22E-303 when:

(1) The person is a victim of the target offense; or

(2) The person's criminal objective is inevitably incident to commission of the target offense as defined by statute.

(b) *Exceptions Inapplicable Where Liability Expressly Provided by Offense*. The exceptions established in subsection (a) do not limit the criminal liability expressly provided for by an individual offense.

RCC § 22E-305. Renunciation Defense to Attempt, Conspiracy, and Solicitation.

(a) ~~*Defense for* Renunciation *Defense Preventing Commission of the Offense*~~. ~~In~~ It is an affirmative defense to a prosecution for criminal attempt, criminal solicitation, or criminal conspiracy ~~in which the target offense was not committed, it is an affirmative defense~~ that:

(1) The defendant engaged in reasonable efforts ~~conduct sufficient~~ to prevent commission of the target offense;

(2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent~~.~~; and

(3) The target offense was not committed.

(b) *Scope of Voluntary and Complete ~~Renunciation Defined~~*. A renunciation is not "voluntary and complete" within the meaning of subsection (a) when it is motivated in whole or in part by:

(1) A belief that circumstances exist which:

(A) Increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or

(B) Render accomplishment of the criminal plans more difficult; or

(2) A decision to:

(A) Postpone the criminal conduct until another time; or

(B) Transfer the criminal effort to another victim or similar objective.

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

RCC § 22E-40X. Special Responsibility for Care, Discipline, or Safety Defense. [1]

(a) Except as provided in subsection (b), the following are defenses to the offenses in Subtitle II.

(1) *Parental Defense.*

(A) The complainant is under 18 years of age;

(B) The actor is either:

(i) A parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the complainant; or

(ii) Someone acting with the effective consent of such a parent or person;

(C) The actor engages in the conduct constituting the offense with the intent of safeguarding or promoting the welfare of the complainant, including the prevention or punishment of his or her misconduct; and

(D) Such conduct is reasonable in manner and degree, under all the circumstances; and

(E) Such conduct either:

(i) Does not create a substantial risk of, or cause, death or serious bodily injury; or

(ii) Is the performance or authorization of a medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or by a person acting at the direction of a licensed health professional.

(2) *Guardian Defense.*

(A) The complainant is an incapacitated individual;

(B) The actor is either:

(i) A court-appointed guardian to the complainant; or

[1] No prior draft RCC statutory language.

(ii) Someone acting with the effective consent of such a guardian;

(C) The actor engages in the conduct constituting the offense with the intent of safeguarding or promoting the welfare of the complainant, including the prevention of his or her misconduct; and

(D) Such conduct is reasonable in manner and degree under all the circumstances; and

(E) Such conduct is permitted under civil law controlling the actor's guardianship and either:

(i) Does not create a substantial risk of, or cause, death or serious bodily injury; or

(ii) Is the performance or authorization of a medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or by a person acting at the direction of a licensed health professional.

(3) *Emergency Health Professional Defense*.

(A) The complainant is presently unable to give effective consent;

(B) The actor is either:

(i) A licensed health professional; or

(ii) A person acting at a licensed health professional's direction;

(C) The conduct charged to constitute the offense is the performance or authorization of a medical procedure otherwise permitted under District and federal civil law;

(D) The actor engages in or authorizes the medical procedure with the intent of safeguarding or promoting the physical or mental health of the complainant;

(E) The medical procedure is administered or authorized in an emergency;

(F) No person that is permitted under District law to consent to the medical procedure on behalf of the complainant can be timely consulted;

(G) The actor was not aware of any legally valid standing instruction by the complainant declining the medical procedure; and

(H) A reasonable person wishing to safeguard the welfare of the complainant would consent to the medical procedure.

(4) *Limited Duty of Care Defense*.

(A) The actor has a responsibility, under District civil law, for the health, welfare, or supervision of the complainant;

(B) The actor engages in the conduct constituting the offense with intent that the conduct:

(i) Is necessary to fulfill the actor's responsibility to the complainant; and

(ii) Is consistent with the welfare of the complainant;

(C) Such conduct is reasonable in manner and degree, under all the circumstances;
(D) Such conduct does not create a substantial risk of, or cause, death or serious bodily injury; and
(E) No other defense in this section applies to the conduct.

(b) *Exceptions.* The defenses in this section do not apply to the following:
(1) Offenses in Chapter 13 of this title (Sexual Assault and Related Provisions); and
(2) Offenses in Chapter 16 of this title (Human Trafficking).

(c) *Burden of Proof.* The government must prove the absence of a defense in this section beyond a reasonable doubt if any evidence is present at trial of:
(1) Sub-paragraphs (a)(1)(A) - (a)(1)(C) of the parental defense in this section;
(2) Sub-paragraphs (a)(2)(A) - (a)(2)(C) of the guardian defense in this section;
(3) Sub-paragraphs (a)(3)(A) - (a)(3)(E) of the emergency health professional defense in this section; or
(4) Sub-paragraphs (a)(4)(A) - (a)(4)(B) of the limited duty of care defense.

(d) *Definitions.* The term "intent," has the meaning specified in § 22E-206; and the terms "actor," "complainant," "consent," "effective consent," "health professional," "person acting in the place of a parent per civil law," "person with legal authority over the complainant" and "serious bodily injury" have the meanings specified in § 22E-701. The term "incapacitated individual" has the meaning specified in D.C. Code § 21-2011.

RCC § 22E-40X. Effective Consent Defense.[2]

(a) *Defense.* Except as provided in subsection (b), it is a defense to an offense in Subtitle II of this title that:
(1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and
(2) Either:
(A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death, or a protracted loss or impairment of the function of a bodily member or organ; or
(B) The result was a reasonably foreseeable hazard of:
(i) The complainant's occupation;
(ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a

[2] No prior draft RCC statutory language.

person acting at the direction of a licensed health professional; or

(iii) Participation in a lawful contest or sport.

(b) *Exceptions to the Defense.*

(1) The defense in this section does not apply when the actor is the person with legal authority over the complainant.

(2) The defense in this section does not apply to the following:

(A) Offenses in Chapter 13 of this title (Sexual Assault and Related Provisions);

(B) Offenses in Chapter 14 of this title (Kidnapping, Criminal Restraint, and Blackmail); and

(C) Offenses in Chapter 16 of this title (Human Trafficking).

(c) *Burden of Proof.* If evidence for the requirements of this defense is present at trial, the government must prove the absence of all requirements of the defense beyond a reasonable doubt.

(d) *Definitions.* The terms "actor," "complainant," "effective consent," "health professional," and "person with legal authority over the complainant" have the meanings specified in § 22E-701.

RCC § 22E-701. Definitions.[3]

Unless otherwise defined in a particular statute, in Title 22E:

1. "Act" has the meaning specified in RCC § 22E-202.[4]
2. "Actor" means person accused of ~~any~~ criminal offense ~~proscribed under this chapter~~.[5]
   ~~"Adult" means a person who is 18 years of age or older.~~[6]
3. "Attorney General" means the Attorney General for the District of Columbia.[7]
4. "Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any.[8]

[3] RCC § 22E-701 codifies in a single statute definitions that apply to both the RCC general provisions and the RCC specific offenses. The RCC no longer contains separate statutes for definitions for any specific offenses. Each definition has a footnote that cites the document in which that definition first appeared.

[4] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

[5] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).

[6] Definition first appeared in Second Draft of Report #14, Definitions for Offenses Against Persons (issued March 16, 2018).

[7] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).

[8] Definition first appeared in First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses (issued August 11, 2017) in the unlawful creation or possession of a recording statute (then RCC § 22A-2105) and the unlawful labeling of a recording statute (then RCC § 22A-2207).

5. "Block," and other parts of speech, including "blocks" and "blocking," mean render impassable without unreasonable hazard to any person.[9]
6. "Bodily injury" means physical pain, illness, or any impairment of physical condition.[10]
   ~~"Bodily injury" means significant physical pain, illness, or any impairment of physical condition.~~[11]
7. "Building" means a structure affixed to land that is designed to contain one or more natural persons ~~human beings~~.[12]
8. "Business yard" means securely fenced or walled land where goods are stored or merchandise is traded.[13]
9. "Check" means any written instrument for payment of money by a financial institution.[14]
   ~~"Child" mean a person who is less than 18 years of age.~~[15]
10. "Circumstance element" has the meaning specified in RCC § 22E-201.[16]
    ~~"Citizen patrol" means a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for District of Columbia neighborhoods with the goal of crime prevention.~~[17]
11. "Class A contraband" means:
    (A) A dangerous weapon or imitation dangerous weapon;
    (B) Ammunition or an ammunition clip;
    (C) Flammable liquid or explosive powder;
    (D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;
    (E) A shank or homemade knife;
    (F) Tear gas, pepper spray, or other substance capable of causing temporary blindness or incapacitation; A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;

[9] Definition first appeared as "obstruct" in First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses (issued August 11, 2017).
[10] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[11] Definition first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).
[12] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[13] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[14] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[15] Definition first appeared in Second Draft of Report #14, Definitions for Offenses Against Persons (issued March 16, 2018).
[16] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).
[17] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).

(G) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;

(H) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool capable of cutting through metal, concrete, or plastic;

(I) Rope; or

(J) A ~~correctional officer's uniform,~~ law enforcement officer's uniform, medical staff clothing, or any other uniform.[18]

12. "Class B contraband" means:

(A) Any controlled substance or marijuana ~~listed or described in [Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01]~~;

(B) Any alcoholic liquor or beverage;

(C) A hypodermic needle or syringe or other item capable of administering unlawful controlled substances; or

(D) A portable electronic communication device or accessories thereto.[19]

13. "Close relative" means a parent, grandparent, sibling, child, grandchild, aunt, or uncle.[20]

14. "Coercive threat ~~coercion~~" means a threat~~ening,~~ that any person will do any one of, or a combination of, the following:

(A) Engage in conduct that, in fact, constitute~~sing~~:

(i) An offense against persons as defined in subtitle II of Title 22E; or

(ii) A property offense as defined in subtitle III of Title 22E;

~~Inflict a wrongful economic injury;~~

(B) Take or withhold action as a government official, or cause a government official to take or withhold action;

(C) Accuse another person of a crime ~~criminal offense or failure to comply with an immigration regulation~~;

(D) 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:

(i) Hatred, contempt, ridicule, or other significant injury to personal reputation;

(ii) Significant injury to credit or business reputation; or

~~Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or business repute;~~

(E) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;

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[18] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #33, Correctional Facility Contraband (issued December 28, 2018).

[19] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #33, Correctional Facility Contraband (issued December 28, 2018).

[20] Other than the redline edits, the revised definition of "close relative" is identical to the definition of "relative," which first appeared in first draft of Report #21, Recommendations for Kidnapping and Related Offenses (issued May 18, 2018).

(F) Restrict a person's access to a controlled substance ~~as defined in D.C. Code 48-901.02~~ that the person owns, or restrict a person's access to prescription medication that the person owns; or

(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply.[21]

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

~~(H) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;~~

~~(I) Accuse another person of a criminal offense or failure to comply with an immigration law or regulation;~~

~~(J) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute;~~

~~(K) Take or withhold action as an official, or cause an official to take or withhold action;~~

~~(L) Inflict a wrongful economic injury;~~

~~(M) Limit a person's access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person's access to prescription medication; or~~

~~(N) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.~~[22]

~~"Coercion" means causing another person to fear that, unless that person engages in particular conduct, then another person will:~~

~~(O) Inflict bodily injury on another person;~~

~~(P) Damage or destroy the property of another person;~~

~~(Q) Kidnap another person;~~

~~(R) Commit any other offense;~~

~~(S) Accuse another person of a crime;~~

~~(T) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule;~~

~~(U) Notify a law enforcement official about a person's undocumented or illegal immigration status;~~

~~(V) Take, withhold, or destroy another person's passport or immigration document;~~

~~(W) Inflict a wrongful economic injury on another person;~~

[21] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).

[22] Substantively identical definitions first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018) and First Draft of Report #27, Human Trafficking and Related Statutes (issued September 26, 2018).

~~(X) Take or withhold action as an official, or take action under color or pretense of right; or~~

~~(Y) Perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.~~[23]

15. "Comparable offense" means a crime ~~criminal offense~~ committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime ~~offense~~.[24]
16. "Complainant" means person who is alleged to have been subjected to a criminal offense ~~proscribed under this chapter~~.[25]
17. "Consent" means:
    (A) A word or act that indicates, expressly or implicitly, agreement to particular conduct or a particular result; and
    (B) Is 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.

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

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

~~(D) Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.~~[26]

~~"Consent" means words or actions that indicate an agreement to particular conduct. Consent includes words or actions that indicate indifference to particular conduct. Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.~~[27]

~~"Consent" means words or actions that indicate an agreement to particular conduct.~~

[23] Substantively identical definitions appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017) and in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).

[24] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #28, Stalking (issued September 26, 2018).

[25] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).

[26] Definition first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).

[27] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).

~~(E) For offenses against property in Subtitle III of this Title:~~

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

~~(ii) Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.~~[28]

18. "Conduct element" has the meaning specified in RCC § 22E-202.[29]
19. "Controlled substance" has the meaning specified in D.C. Code 48-901.02.[30]
20. "Correctional facility" means~~: (A) A~~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~~;~~

~~(B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or~~

~~(C) 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~~.[31]

21. "Court" means the Superior Court of the District of Columbia.[32]
22. "Culpable mental state" has the meaning specified in § 22E-206.[33]
23. "Culpability requirement" has the meaning specified § 22E-201.[34]
24. "Custody" means full submission after an arrest or substantial physical restraint after an arrest.[35]
25. "Dangerous weapon" means:
    (A) A firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;
    (B) A prohibited weapon ~~as defined at § 22A-1001(14)~~;
    (C) A sword, razor, or a knife with a blade over ~~three~~ 3 inches in length;
    (D) A billy club;
    (E) A stun gun; or

[28] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[29] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).
[30] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).
[31] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #31, Escape from Institution or Officer and First Draft of Report #33, Correctional Facility Contraband (issued December 28, 2018).
[32] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[33] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).
[34] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).
[35] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).

(F) Any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.[36]

26. "Deceive" and "deception" mean:
    (A) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions;
    (B) Preventing another person from acquiring material information;
    (C) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or
    (D) For offenses against property in Subtitle III of this Title, failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record.
    (E) The terms "deceive" and "deception" do not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.[37]
27. "Demonstration" means marching, congregating, standing, sitting, lying down, parading, 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.
    ~~"Demonstration" means any assembly, rally, parade, march, picket line, sitting, or lying down, conducted for the purpose of expressing a political, social, or religious view.~~[38]
28. "Deprive" means:
    (A) ~~To w~~Withhold property or cause it to be withheld from an owner permanently, or for so extended a period or under such circumstances that a substantial portion of its value or its benefit is lost to ~~that person~~ the owner; or
    (B) ~~To d~~Dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.[39]
29. "Detection device" means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology.[40]

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[36] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).

[37] The definition first appeared First Draft of Report #8, Definitions for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017) and later appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).

[38] Definition first appeared in First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses (issued August 11, 2017).

[39] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).

30. "District official" has the same meaning as "public official" in D.C. Code § 1-1161.01(47).[41]
    ~~"District official or employee" means 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.~~[42]
31. "Domestic partner" has the meaning specified in D.C. Code § 32-701(3).[43]
32. "Domestic partnership" has the meaning specified in D.C. Code § 32-701(4).[44]
    ~~"Duty of care" means a legal responsibility for the health, welfare, or supervision for another person.~~[45]
33. "Dwelling" means a structure that is either designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each individual unit is a~~n individual~~ dwelling.[46]
34. "Effective consent" means consent other than consent induced by physical force, a coercive threat, or deception.
    ~~"Effective consent" means consent obtained by means other than physical force, coercion, or deception.~~[47]
    ~~"Effective consent" means consent obtained by means other than coercion or deception.~~[48]
35. "Elderly person" means a person who is 65 years of age or older.[49]
36. "Factual cause" has the meaning specified in RCC §22E-204.[50]
37. "Fair market value" means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell,

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[40] Definition first appeared in First Draft of Report #32, Tampering with a Detection Device (issued December 28, 2018).
[41] Definition first appeared in First Draft of Report # 14, Definitions for Offenses Against Persons (issued December 21, 2017).
[42] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[43] Definition first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).
[44] Definition first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).
[45] Definition first appeared in Second Draft of Report #14, Definitions for Offenses Against Persons (issued March 16, 2018).
[46] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[47] Definition first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).
[48] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017) and later appeared in First Draft of Report # 14, Definitions for Offenses Against Persons (issued December 21, 2017).
[49] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017) and later appeared in Second Draft of Report #14, Definitions for Offenses Against Persons (issued March 16, 2018).
[50] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

considering all the uses to which the property is adapted and might reasonably be applied.[51]

~~"Family member" means an individual to whom a person 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.~~[52]

38. "Financial injury" means the reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act, including, but not limited to:
    (A) The costs of clearing a name, debt, credit rating, credit history, criminal record, or any other official record;
    (B) The costs of repairing or replacing any property that was taken or damaged;
    (C) Medical bills;
    (D) Relocation costs;
    (E) Lost wages or compensation; and
    (F) Attorney's fees.

~~"Financial injury" means all monetary costs, debts, or obligations incurred by a person as a result of another person's criminal act, including, but not limited to:~~
    ~~(A) The costs of clearing the person's credit rating, credit history, criminal record, or any other official record;~~
    ~~(B) The expenses related to any civil or administrative proceeding to satisfy or contest a debt, lien, judgment, or other obligation of the person,;~~
    ~~(C) The costs of repairing or replacing damaged or stolen property;~~
    ~~(D) Lost time or wages, or any similar monetary benefit forgone while the person is seeking redress for damages; and~~
    ~~(E) Legal fees.~~[53]

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

[51] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[52] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[53] Definition first appeared in First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses (issued August 11, 2017).

~~(F) Attorney's fees.~~[54]

39. "Halfway house" means any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program.[55]
40. "Healthcare provider" means a person referenced in D.C. Code § 16–2801.[56]
41. "Health professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3–1205.01.[57]
42. "Identification number" 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.[58]
43. "Imitation dangerous weapon" means an object used or fashioned in a manner that would cause a reasonable person to believe that the object is a dangerous weapon.[59]
44. "Innocent or irresponsible person" has the meaning specified in RCC § 22E-211(a).[60]
45. "In fact" has the meaning specified in RCC § 22E-207.[61]
46. "Intentionally," and other parts of speech, including "intent," have the meaning specified in § 22E-206.[62]
47. "Intoxication" has the meaning specified in RCC § 22E-209.[63]
48. "Knowingly," and other parts of speech, including "know," "known," "knows," "knowing," and "knowledge," have the meaning specified in § 22E-206.[64]
49. "Law enforcement officer"
    (A) A sworn member or officer of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;

[54] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #28, Stalking (issued September 26, 2018).
[55] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).
[56] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).
[57] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).
[58] The definition first appeared First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses (issued August 11, 2017).
[59] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[60] Definition first appeared in First Draft of Report #22, Accomplice Liability and Related Provisions (issued May 18, 2018).
[61] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).
[62] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).
[63] Definition first appeared in First Draft of Report #3, Recommendations for Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication (issued March 13, 2017).
[64] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

(B) A sworn member or officer of the District of Columbia Protective Services;
(C) A licensed special police officer;
(D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;
(E) Any officer or employee of the government of the District of Columbia charged with supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such an institution or facility is located within the District;
(F) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Department of Youth Rehabilitation Services, the Family Court Social Services Division of the Superior Court, the Court Services and Offender Supervision Agency, or the Pretrial Services Agency;
(G) Metro Transit police officers; ~~An employee of the Family Court Social Services Division of the Superior Court charged with intake, assessment, or community supervision;~~ and
(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in ~~subparagraphs (A), (C), (D), (E), and (F) of~~ this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.[65]

50. "Legal cause" has the meaning specified in RCC § 22E-204.[66]

~~"Licensed health professional" means a District or state licensed physician, psychologist, dentist, osteopathic physician, nurse, or other licensed practitioner of medicine.~~

~~"Manufacturer" means the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording.~~

51. "Meeting" has the meaning specified in D.C. Code § 2-574.[67]
52. "Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, ~~moped,~~ truck, ~~truck tractor,~~ truck tractor with or without a semitrailer or trailer, bus, or other vehicle designed to be propelled only by an internal-combustion engine or electricity, ~~including any non-operational vehicle that is being restored or repaired~~.[68]
53. "Negligently," and other parts of speech, including "negligence," have the meaning specified in § 22E-206.[69]

[65] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[66] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).
[67] Definition first appeared in First Draft of Report #23, Disorderly Conduct and Public Nuisance (issued July 20, 2018).
[68] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[69] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

54. "Objective element" has the meaning specified in RCC § 22E-201.[70]

~~"Obstruct" means to render impassable without unreasonable hazard to any person.~~[71]

~~"Occupant" means a person holding a possessory interest in property that with which the accused actor is not privileged to interfere with.~~[72]

55. "Offense element" has the meaning specified in RCC § 22E-201.[73]
56. "Omission" has the meaning specified in RCC § 22E-202.[74]
57. "Open to the general public" means no payment or permission is required to enter.[75]
58. "Owner" means a person holding an interest in property ~~that~~ with which the ~~accused~~ actor is not privileged to interfere ~~with~~ without consent.[76]

~~"Pattern of conduct" means conduct on two or more separate occasions, with continuity of purpose. Where conduct is of a continuing nature, each 24-hour period constitutes one occasion.~~[77]

59. "Payment card" means an instrument of any kind, including an instrument known as a credit card or debit card, issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card. "Payment card" includes the number or description of the instrument.[78]

~~"Person" means an individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, government agency, or government-owned corporation, or any other legal entity.~~[79]

~~"Person of authority in a secondary school" includes any teacher, counselor, principal, or coach in a secondary school~~.[80]

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[70] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

[71] Definition first appeared as "obstruct" in First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses (issued August 11, 2017).

[72] Definition first appeared as "obstruct" in First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses (issued August 11, 2017).

[73] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

[74]Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

[75] Definition first appeared in First Draft of Report #23, Disorderly Conduct and Public Nuisance (issued July 20, 2018).

[76] Other than the redline edits, the revised definition is the same as the definition for this term that first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017) and later appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).

[77] Definition first appeared in First Draft of Report #28, Stalking (issued September 26, 2018).

[78] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).

[79] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).

[80] Definition first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).

60. "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; or
    (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. [81]
61. "Person acting in the place of a parent per civil law" means both a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption, and any person acting by, through, or under the direction of a court with jurisdiction over the child.[82]
62. "Personal identifying information" shall include, but is not limited to the following:
    (A) Name, address, telephone number, date of birth, or mother's maiden name;
    (B) Driver's license or driver's license number, or non-driver's license or non-driver's license number;
    (C) Savings, checking, or other financial account number;
    (D) Social security number or tax identification number;
    (E) Passport or passport number;
    (F) Citizenship status, visa, or alien registration card or number;
    (G) Birth certificate or a facsimile of a birth certificate;
    (H) Credit or debit card, or credit or debit card number;
    (I) Credit history or credit rating;
    (J) Signature;
    (K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information;
    (L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
    (M) Place of employment, employment history, or employee identification number; and

[81] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).
[82] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).

(N) Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property.[83]

63. "Physically following" means maintaining close proximity to a person as they move from one location to another. [84]
~~"Physical force" means the application of physical strength.~~ [85]
64. "Physically monitoring" means being in close proximity to ~~the immediate vicinity of~~ a person's ~~the specific individual's~~ residence, workplace, or school to detect the person's ~~individual's~~ whereabouts or activities.[86]
65. "Position of trust with or authority over" ~~includes~~ means a relationship with respect to a complainant of:
    (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;
    (B) A legal or de facto guardian or any person, more than 4 years older than the ~~victim~~ complainant, who resides intermittently or permanently in the same dwelling as the complainant;
    (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the ~~act~~ offense; 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 other person responsible under civil law for the care or supervision of the complainant.[87]
66. "Possesses" means:
    (A) Holds or carries on one's person; or
    (B) Has the ability and desire to exercise control over. [88]
67. "Prohibited weapon" means:
    (A) A machine gun or sawed-off shotgun, as defined at D.C. Code § 7-2501;
    (B) A firearm silencer;
    (C) A blackjack, slungshot, sandbag cudgel, or sand club;
    (D) Metallic or other false knuckles as defined at D.C. Code § 22-4501; or
    (E) A switchblade knife.[89]

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[83] Definition first appeared in First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses (issued August 11, 2017).
[84] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).
[85] Definition first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).
[86] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #28, Stalking (issued September 26, 2018).
[87] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).
[88] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

68. "Property" means anything of value. The term "property" includes, but is not limited to:
    (A) Real property, including things growing on, affixed to, or found on land;
    (B) Tangible or intangible personal property;
    (C) Services;
    (D) Credit;
    (E) Debt; and
    (F) A government-issued license, permit, or benefit.[90]
69. "Property of another" means any property that a person has an interest in ~~that~~ with which the ~~accused~~ actor is not privileged to interfere ~~with~~ without consent, regardless of whether the ~~accused~~ actor also has an interest in that property. The term "property of another" does not include any property in the possession of the ~~accused~~ actor ~~that~~ in which the other person has only a security interest ~~in~~.[91]
70. "Protected person" means a person who is:
    (A) ~~Less than~~ 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 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 ~~or employee~~, while in the course of official duties~~; or~~
    (H) ~~A citizen patrol member, while in the course of a citizen patrol~~.[92]
71. "Protection order" means an order issued pursuant to D.C. Code § 16-1005(c).[93]
72. "Public body" has the meaning specified in D.C. Code § 2-574.[94]
73. "Public conveyance" means 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.[95]
74. "Public safety employee" means:

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[89] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[90] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[91] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[92] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[93] Definition first appeared in First Draft of Report #32, Tampering with a Detection Device (issued December 28, 2018).
[94] Definition first appeared in First Draft of Report #23, Disorderly Conduct and Public Nuisance (issued July 20, 2018).
[95] Definition first appeared in First Draft of Report #23, Disorderly Conduct and Public Nuisance (issued July 20, 2018).

(A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; ~~and~~

(B) Any investigator, vehicle inspection officer as defined in D.C. Code § 50-301.03(30B), or code inspector, employed by the government of the District of Columbia; and

(C) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in ~~sub~~paragraph (A) and paragraph (B) ~~of this paragraph~~.[96]

75. "Purposely," and other parts of speech, including "purpose," have the meaning specified in § 22E-206.[97]
76. "Recklessly," and other parts of speech, including "recklessness," have the meaning specified in § 22E-206.[98]
77. "Result element" has the meaning specified in RCC § 22E-201.[99]

~~"Road" includes any road, alley, or highway.~~[100]

78. "Safety" means ongoing security from significant ~~unlawful~~ intrusions on one's bodily integrity or bodily movement.[101]
79. "Secure juvenile detention facility" means 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.[102]
80. "Self-induced intoxication" has the meaning specified in RCC § 22E-209.[103]
81. "Serious bodily injury" means bodily injury or significant bodily injury that involves:
    (A) A substantial risk of death;
    (B) Protracted and obvious disfigurement; or
    (C) Protracted loss or impairment of the function of a bodily member or organ.[104]

~~"Serious bodily injury" means bodily injury or significant bodily injury that involves:~~

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[96] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).

[97] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

[98] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

[99] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

[100] Definition first appeared in First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses (issued August 11, 2017).

[101] Definition first appeared in First Draft of Report #28, Stalking (issued September 26, 2018).

[102] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).

[103] Definition first appeared in First Draft of Report #35, Cumulative Update to Sections 201-213 of the Revised Criminal Code (issued March 12, 2019).

[104] Definition first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).

~~(A) A substantial risk of death;~~
~~(B) Protracted and obvious disfigurement; or~~
~~(C) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.~~[105]

82. "Serious mental injury" means 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.[106]
83. "Services" includes, but is not limited to:
    (A) Labor, whether professional or nonprofessional;
    (B) The use of vehicles or equipment;
    (C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;
    (D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;
    (E) Admission to public exhibitions or places of entertainment; and
    (F) Educational and hospital services, accommodations, and other related services.[107]
84. "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 the penis of any person, the mouth of any person and the vulva of any person, or the mouth of any person and the anus of any person ~~with intent to sexually degrade, arouse, or gratify any person.~~; ~~or~~
    (C) ~~The p~~Penetration, however slight, of the anus or vulva of any person by a hand or finger or by any object ~~or body part~~, with ~~intent~~ the desire to abuse, humiliate, harass, ~~sexually~~ degrade, sexually arouse, or sexually gratify any person.[108]
85. "Sexual contact" means:
    (A) Sexual act; or
    (B) ~~the t~~Touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with ~~intent~~ the desire to sexually degrade, sexually arouse, or sexually gratify any person.[109]

[105] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[106] Definition first appeared in Second Draft of Report #14, Definitions for Offenses Against Persons (issued March 16, 2018).
[107] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).
[108] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).
[109] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018).

86. "Significant bodily injury" means 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. The following injuries constitute at least a significant bodily injury: 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.[110]
87. "Significant emotional distress" means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. It is must rise significantly above the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day living.[111]
88. "Sound recording" means a material object in which sounds, other than those accompanying a motion picture or other audiovisual recording, are fixed by any method now known or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[112]
89. "Speech" means oral or written language, symbols, or gestures.[113]
90. "Strangulation or suffocation" means a restriction of normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth ~~of another person~~.[114]
91. "Strict liability" or "Strictly liable" has the meaning specified in RCC § 22E-205.[115]
92. "Transportation worker" means:
    (A) A person who is licensed to operate, and is operating, a publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia;
    (B) Any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station within the District of Columbia;

[110] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[111] Definition first appeared in First Draft of Report #28, Stalking (issued September 26, 2018).
[112] Definition first appeared in First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses (issued August 11, 2017) in the unlawful creation or possession of a recording statute (then RCC § 22A-2105) and the unlawful labeling of a recording statute (then RCC § 22A-2207).
[113] Definition first appeared in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (issued April 15, 2019).
[114] Definition first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).
[115] Definition first appeared in First Draft of Report #2, First Draft Recommendations for Chapter 2 of the Revised Criminal Code – Basic Requirements of Offense Liability (issued December 21, 2016).

(C) A person who is licensed to operate, and is operating, a taxicab within the District of Columbia; and

(D) A person who is ~~registered~~ licensed to operate, and is operating within the District of Columbia, a personal motor vehicle to provide private vehicle-for-hire service in contract with a private vehicle-for-hire company as defined by D.C. Code § 50-301.03(16B).[116]

~~"Undue influence" means: 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.~~[117]

93. "Value" means:

(A) The fair market value of the property at the time and place of the offense; or

(B) If the fair market value cannot be ascertained:

(i) For property other than a written instrument, the cost of replacement of the property within a reasonable time after the offense;

(ii) For a written instrument constituting evidence of debt, such as a check, draft, or promissory note, the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied; and

(iii) For any other written instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument.

(C) Notwithstanding subsections (A) and (B) of this section, the value of a payment card is $[X] and the value of an unendorsed check is $[X].[118]

94. "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.[119]

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[116] Other than the redline edits, the revised definition is identical to the definition as it first appeared in First Draft of Report #14, Definitions for Offenses Against Persons (issued December 21, 2017).

[117] This definition first appeared in First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses (issued August 11, 2017) in the financial exploitation of a vulnerable adult or elderly person statute (then RCC § 22A-2208).

[118] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).

[119] A substantively identical definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017) (instead of "his or her," the definition used "their.") This exact definition first appeared in Second Draft of Report #14, Definitions for Offenses Against Persons (issued March 16, 2018).

~~95. "Walkway" includes a sidewalk, trail, railway, bridge, passageway within a public building or public conveyance, or entrance of a public or private building or business yard.~~[120]

96. "Written instrument" includes, but is not limited to, any:

(A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28;

(B) Will, contract, deed, or any other document purporting to have legal or evidentiary significance;

(C) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity;

(D) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items;

(E) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or

(F) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.[121]

RCC § 22E-1101. Murder.

~~*(a) Aggravated Murder.* A person commits the offense of aggravated murder when that person:~~

~~(1) Knowingly causes the death of another person; and~~

~~(2) Either:~~

~~(A) The death is caused with recklessness as to whether the decedent is a protected person; or~~

~~(B) The death is caused with the purpose of harming the decedent because of the decedent's status as a:~~

~~(i) Law enforcement officer;~~

~~(ii) Public safety employee;~~

~~(iii) Participant in a citizen patrol;~~

~~(iv) District official or employee; or~~

~~(v) Family member of a District official or employee;~~

~~(C) The defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;~~

~~(D) The defendant mutilated or desecrated the decedent's body;~~

~~(E) The defendant committed the murder after substantial planning;~~

[120] Definition first appeared in First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses (issued August 11, 2017).

[121] Definition first appeared in First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions (issued August 11, 2017).

~~(F) The defendant committed the murder for hire;~~
~~(G) The defendant committed the murder because the victim was or had been a witness in any criminal investigation or judicial proceeding, or because the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;~~
~~(H) The defendant committed the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; or~~
~~(I) In fact, the death is caused by means of a dangerous weapon.~~

~~(b)~~ (a) *First Degree ~~Murder~~*. A person commits ~~the offense of~~ first degree murder when that person~~:~~ purposely, with premeditation and deliberation, causes the death of a person.

~~(1) Knowingly causes the death of another person; or~~
~~(2) Commits second degree murder and either:~~
~~(A) The death is caused with recklessness as to whether the decedent is a protected person;~~
~~(B) The death is caused with the purpose of harming the complainant because of the complainant's status as a:~~
~~(i) Law enforcement officer;~~
~~(ii) Public safety employee;~~
~~(iii) Participant in a citizen patrol;~~
~~(iv) District official or employee; or~~
~~(v) Family member of a District official or employee;~~
~~(C) The defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;~~
~~(D) The defendant mutilated or desecrated the decedent's body;~~
~~(E) The defendant committed the murder after substantial planning;~~
~~(F) The defendant committed the murder for hire;~~
~~(G) The defendant committed the murder because the victim was or had been a witness in any criminal investigation or judicial proceeding, or because the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;~~
~~(H) The defendant committed the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; or~~
~~(I) In fact, the death is caused by means of a dangerous weapon.~~

~~*(c)*~~ *(b) Second Degree ~~Murder~~*. A person commits ~~the offense of~~ second degree murder when that person:

(1) Recklessly, ~~under circumstances manifesting~~ with extreme indifference to human life, causes the death of another person; or
(2) Negligently causes the death of another person, other than an accomplice, in the course of and in furtherance of committing, or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], ~~aggravated~~ first degree robbery, ~~first~~ second degree robbery, ~~second~~ third degree robbery, fourth degree robbery [aggravated kidnaping, or kidnapping]; provided that the person ~~or an accomplice~~ committed the lethal act.

(c) Voluntary Intoxication. A person shall be deemed to have consciously disregarded the risk required to prove that the person acted with extreme indifference to human life in paragraph (b)(1) if the person, is unaware of the risk due to his or her self-induced intoxication, but would have been aware had he or she been sober.

(d) Penalties. Subject to the merger provisions in RCC § 22E-214 and subsection (h) of this section:

(1) ~~Aggravated Murder.~~ ~~Aggravated~~ First Degree murder is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~First Degree Murder~~. ~~First~~ Second degree murder is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~Second Degree Murder. Second degree murder is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.~~ *Enhanced Penalties for First and Second Degree Murder.* The penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class when a person commits first degree murder or second degree murder and the person:

(A) Is reckless that the decedent is a protected person;

(B) Commits the murder with the purpose of harming the decedent because of the decedent's status as a law enforcement officer, public safety employee, or District official;

(C) Commits the murder with intent to avoid or prevent a lawful arrest or effecting an escape from custody;

(D) Knowingly commits the murder for hire;

(E) Knowingly inflicts extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;

(F) Knowingly mutilates or desecrates the decedent's body; or

(G) In fact, commits the murder after substantial planning.

(e) *Definitions.* The terms "knowingly," "negligently," "purpose," ~~"knowledge,"~~ and "recklessness," ~~"negligence,"~~ ~~and "circumstances manifesting extreme indifference"~~ have the meanings specified in RCC § 22~~A~~E-206; the terms "citizen patrol," "District official or employee," "law enforcement officer," "protected person," ~~"law enforcement officer,"~~ "public safety employee," ~~"District official or employee," and "citizen patrol"~~ have the meanings specified in RCC § 22E-701 ~~22A-1001~~; and the terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.

(f) *Evidence of Extreme Pain, Mental Suffering, Mutilation, or Desecration.* Notwithstanding any other provision of law, a person charged with penalty enhancements under subparagraph (c)(3)(E) or (c)(3)(F) shall be subject to a bifurcated criminal proceeding. In the first stage of the proceeding, the factfinder must determine if the defendant committed either first degree murder as defined under subsection (a) or second degree murder as defined under subsection (b). In the first stage of the proceeding, evidence of penalty enhancements under subparagraph (c)(3)(E) or (c)(3)(F) is inadmissible except if such evidence is relevant to determining whether the defendant committed first degree murder or second degree murder. In the second stage of the proceeding, after the defendant has been convicted of either first degree murder or second

degree murder, the factfinder may consider any evidence relevant to penalty enhancements under subparagraphs (c)(3)(E) or (c)(3)(F).

(g) *Defenses*.

(1) *Mitigation Defense*. In addition to any defenses otherwise applicable to the defendant's conduct under District law, the presence of mitigating circumstances is a defense to prosecution under this section. Mitigating circumstances means:

(A) Acting under the influence of an extreme emotional disturbance for which there is a reasonable cause as determined from the viewpoint of a reasonable person in the defendant's situation under the circumstances as the defendant believed them to be;

(B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent the decedent from unlawfully causing death or serious bodily injury; or

(C) Any other legally-recognized partial defense which substantially diminishes either the defendant's culpability or the wrongfulness of the defendant's conduct.

(2) *Burden of Proof for Mitigation Defense*. If evidence of mitigation is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt.

(3) *Effect of Mitigation Defense*.

(A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant shall not be found guilty of murder, but may be found guilty of first degree manslaughter.

(B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant shall not be found guilty of murder, but may be found guilty of aggravated manslaughter.

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

RCC § 22E-1102. Manslaughter.

~~(a) **Aggravated Manslaughter.** A person commits the offense of aggravated manslaughter when that person:~~

~~(1) Knowingly causes the death of another;~~

~~(2) Recklessly, under circumstances manifesting extreme indifference for human life, causes death of another; or~~

~~(3) Negligently causes the death of another person in the course of and in furtherance of committing or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnaping, or kidnapping], provided that the person or an accomplice committed the lethal act; and~~

~~(4) Either:~~

~~(A) The death is caused with recklessness as to whether the decedent is a protected person;~~

(B) ~~The death is caused with the purpose of harming the complainant because of the complainant's status as a:~~

(i) ~~Law enforcement officer;~~

(ii) ~~Public safety employee;~~

(iii) ~~Participant in a citizen patrol;~~

(iv) ~~District official or employee; or~~

(v) ~~Family member of a District official or employee; or~~

(C) ~~In fact, the death is caused by means of a dangerous weapon.~~

~~(b)~~ (a) ~~**First Degree**~~ **Voluntary Manslaughter.** A person commits voluntary ~~the offense of first degree~~ manslaughter when that person:

(1) ~~Knowingly causes the death of another~~,

(2) Recklessly, ~~under circumstances manifesting~~ with extreme indifference for human life, causes death of another;

(3) Negligently causes the death of another person in the course of and in furtherance of committing or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnaping, or kidnapping], provided that the person or an accomplice committed the lethal act; or

(4) ~~Recklessly causes the death of another and:~~

(A) ~~The death is caused with recklessness as to whether the decedent is a protected person;~~

(B) ~~The death is caused with the purpose of harming the complainant because of the complainant's status as a:~~

(i) ~~Law enforcement officer;~~

(ii) ~~Public safety employee;~~

(iii) ~~Participant in a citizen patrol;~~

(iv) ~~District official or employee; or~~

(v) ~~Family member of a District official or employee; or~~

(C) ~~In fact, the death is caused by means of a dangerous weapon.~~

~~(c)~~ (b) ~~**Second Degree**~~ **Involuntary Manslaughter**. A person commits ~~the offense of second degree~~ involuntary manslaughter when that person recklessly causes the death of another person.

(c) *Voluntary Intoxication*. A person shall be deemed to have consciously disregarded the risk required to prove that the person acted with extreme indifference to human life in paragraph (b)(1)] if the person is unaware of the risk due to his or her self-induced intoxication, but would have been aware had he or she been sober.

(d) *Penalties*.

~~(1) *Aggravated manslaughter*. Aggravated manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.~~

~~(2)~~ (1) ~~*First degree*~~ *Voluntary manslaughter*. ~~*First degree*~~ *Voluntary* manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

~~(3)~~ (2) ~~*Second degree*~~ *Involuntary manslaughter*. ~~*Second degree*~~ *Involuntary* manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Enhanced Penalties for Voluntary and Involuntary Manslaughter*. The penalty classification for voluntary and involuntary manslaughter may be increased in severity by one penalty class when a person commits voluntary or involuntary manslaughter and the person:

(A) Is reckless as to the fact that the decedent is a protected person; or

(B) Commits the offense with the purpose of harming the decedent because of the decedent's status as a law enforcement officer, public safety employee, or District official.

(e) *Definitions*. The terms ~~"knowledge,"~~ "negligently," "purposely," and "recklessly," ~~and "circumstances manifesting extreme indifference,"~~ have the meanings specified in RCC § 22~~A~~E-206; the terms "District official," "law enforcement officer," "protected person," and "public safety employee" have the meanings specified in RCC § 22E-901. ~~"protected person," "law enforcement officer," "public safety employee," "District official or employee," and "citizen patrol" have the meanings specified in § 22A-1001.;~~ and the terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.

RCC § 22E-1103. Negligent Homicide.

(a) *Offense* ~~*Definition*~~. A person commits negligent homicide when that person negligently causes the death of another person.

(b) *Penalties*. Negligent homicide is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The term "negligently" has the meaning specified in RCC § 22E-206.

RCC § 22E-1201. Robbery.

(a) ~~*Aggravated*~~ *First Degree* ~~*Robbery*~~. A person commits ~~the offense of aggravated~~ first degree robbery when that person:

(1) Commits ~~Third~~ fifth degree robbery; and

(2) In the course of doing, to someone other than an accomplice:

(A) Recklessly causes serious bodily injury to someone physically present, other than an accomplice, by means of what, in fact, is a dangerous weapon; or

(B) Recklessly causes serious bodily injury to someone physically present, other than an accomplice, who is a protected person.

(b) ~~*First*~~ *Second Degree* ~~*Robbery*~~. A person commits ~~the offense of first~~ second degree robbery when that person:

(1) Commits ~~Third~~ fifth degree robbery and;

(2) In the course of doing so, to someone other than an accomplice:

(A) Recklessly causes serious bodily injury ~~to someone physically present, other than an accomplice~~;

(B) Recklessly causes significant bodily injury ~~to someone physically present, other than an accomplice,~~ by means of what, in fact, is a dangerous weapon~~; or~~

~~(C) Recklessly causes significant bodily injury to someone physically present, other than an accomplice, who is a protected person; or~~

~~(D) Knowingly takes or exercises control over, or attempts to take or exercise control over what is, in fact, a motor vehicle, by means of a dangerous weapon~~.

(c) ~~*Second*~~ *Third Degree* ~~*Robbery*~~. A person commits ~~the offense of second~~ third degree robbery when that person:

(1) Commits ~~Third~~ fifth degree robbery; and

(2) Either:

(A) In the course of doing so, to someone other than an accomplice:

(i) Recklessly causes significant bodily injury to ~~someone physically present, other than an accomplice who is~~ a protected person; or

(ii) Recklessly causes bodily injury by displaying or using what, in fact, is a dangerous weapon ~~to, or commits a first degree criminal menace as defined in RCC 22A-1203(a) against, someone physically present other than an accomplice, who is a protected person~~; or

(B) In fact, the property that is the object of the offense is a motor vehicle, and the person recklessly displays or uses what, in fact, is a dangerous weapon.

(d) *Fourth Degree* ~~*Robbery*~~. A person commits ~~the offense of second~~ fourth degree robbery when that person:

(1) Commits ~~Third~~ fifth degree robbery; and

(2) Either;

(A) In the course of doing so, to someone other than an accomplice:

(i) Recklessly causes significant bodily injury ~~to someone physically present, other than an accomplice~~; or

(ii) Recklessly displays what, in fact, is a dangerous weapon or imitation dangerous weapon;

(iii)Recklessly causes bodily injury to ~~or commits a first degree criminal menace as defined in RCC 22A-1203(a) against, someone physically present other than an accomplice, who is a protected person~~ a protected person; or

(B) In fact, the property that is the object of the offense is a motor vehicle.

(e) ~~*Third*~~ *Fifth Degree* ~~*Robbery*~~. A person commits ~~the offense of third~~ fifth degree robbery when that person:

(1) Knowingly takes~~,~~ or exercises control over ~~the~~ property of another~~, or attempts to take or exercise control over~~;

(2) ~~The property of another~~ That the complainant possesses either on his or her person or within his or her immediate physical control;

~~(3) That is in the immediate actual possession or control of another person;~~ With intent to deprive the complainant of the property; and

(4) ~~By means of or facilitating flight by~~ Knowingly does so by:

(A) ~~Using physical force that overpowers any other person present, other than an accomplice;~~ Causing bodily injury to the complainant or any person present other than an accomplice;

(B) ~~Causing bodily injury to any other person present, other than an accomplice, or~~ Threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act against the complainant or any person present other than an accomplice; or

(C) ~~Committing conduct constituting a second degree criminal menace as defined in RCC 22A-1203(b) against any other person present, other than an accomplice;~~ Using physical force that overpowers the complainant or any person present other than an accomplice.

~~(5) With intent to deprive the owner of the property.~~

(f) *Penalties.*

~~*Aggravated Robbery.* Aggravated robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.~~

(1) *First Degree Robbery.* First degree robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Robbery.* Second degree robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree Robbery.* Third degree robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) *Fourth Degree Robbery.* Fourth degree robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) *Fifth Degree Robbery.* Fourth degree robbery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions.* ~~The terms "knowingly," "with intent," and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "serious bodily injury," "protected person," "significant bodily injury," "dangerous weapon" and "bodily injury," "physical force" and "" have the meanings specified in § 22A-1001.~~ The terms "intent," "knowingly," "purpose," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "bodily injury," "dangerous weapon," "imitation dangerous weapon," "motor vehicle," "physical force," "possesses," "protected person," "serious bodily injury," and "significant bodily injury" have the meanings specified in RCC § 22E-701.

RCC § 22E-1202. Assault.

(a) ~~*Aggravated*~~ *First Degree* ~~*Assault*~~. A person commits ~~the offense of aggravated~~ first degree assault when that person:

(1) Purposely causes serious and permanent disfigurement to ~~another person~~ the complainant;

(2) Purposely destroys, amputates, or permanently disables a member or organ of ~~another person~~ the complainant's body;

(3) Recklessly, ~~under circumstances manifesting~~ with extreme indifference to human life, causes serious bodily injury to ~~another person~~ the complainant by ~~means of~~ displaying or using an object that ~~what~~, in fact, is a dangerous weapon; or

(4) Recklessly, ~~under circumstances manifesting~~ with extreme indifference to human life, causes serious bodily injury to ~~another person~~ the complainant:~~; and~~

(A) ~~Such injury is caused with recklessness~~ Reckless as to ~~whether~~ the fact that the complainant is a protected person; or

(B) ~~Such injury is caused w~~With the purpose of harming the complainant because of the complainant's status as a~~:~~ law enforcement officer, public safety employee, or District official.

~~(i) Law enforcement officer;~~

~~(ii)Public safety employee; or~~

~~(iii) Participant in a citizen patrol;~~

~~(iv) District official. or employee; or~~

~~(v) Family member of a District official or employee;~~

(b) ~~*First*~~ *Second Degree* ~~*Assault*~~. A person commits ~~the offense of~~ ~~first~~ second degree assault when that person:

(1) Recklessly, ~~under circumstances manifesting~~ with extreme indifference to human life, causes serious bodily injury to ~~another person~~ the complainant; or

(2) Recklessly causes significant bodily injury to ~~another person~~ the complainant by ~~means of~~ displaying or using an object that ~~what~~, in fact, is a dangerous weapon.~~;~~

(c) ~~*Second*~~ *Third Degree* ~~*Assault*~~. A person commits ~~the offense of~~ ~~second~~ third degree assault when that person:

(1) Recklessly causes significant bodily injury to ~~another person~~ the complainant:~~; and~~

(A) ~~Such injury is caused with recklessness~~ Reckless as to ~~whether~~ the fact that the complainant is a protected person; or

(B) ~~Such injury is caused w~~With the purpose of harming the complainant because of the complainant's status as a~~:~~ law enforcement officer, public safety employee, or District official; or

~~(i) Law enforcement officer;~~

~~(ii) Public safety employee; or~~

~~(iii) Participant in a citizen patrol;~~
~~(iv) District official. or employee; or~~
~~(v) Family member of a District official or employee;~~

(2) Recklessly causes bodily injury to ~~another person~~ the complainant by ~~means of~~ displaying or using an object that ~~what~~, in fact, is a dangerous weapon.~~;~~

(d) ~~*Third*~~ *Fourth Degree* ~~*Assault*~~. A person commits ~~the offense of~~ ~~third~~ fourth degree assault when that person recklessly causes significant bodily injury to ~~another person~~ the complainant.~~;~~

(e) ~~*Fourth*~~ *Fifth Degree* ~~*Assault*~~. A person commits ~~the offense of~~ ~~fourth~~ fifth degree assault when that person:

~~(1)~~ Recklessly causes bodily injury to the complainant~~:, or uses physical force that overpowers, another person; and~~

(A) ~~Such injury is caused with recklessness~~ Reckless as to ~~whether~~ the fact that the complainant is a protected person; or

(B) ~~Such injury is caused w~~With the purpose of harming the complainant because of the complainant's status as a~~:~~ law enforcement officer, public safety employee, or District official; or

~~(i) Law enforcement officer;~~
~~(ii) Public safety employee; or~~
~~(iii) Participant in a citizen patrol;~~
~~(iv) District official. or employee; or~~
~~(v) Family member of a District official or employee;~~

(2) Negligently causes bodily injury to ~~another person~~ the complainant by ~~means of~~ discharging an object that ~~what~~, in fact, is a firearm, as defined in D.C. Code § 22-4501(2A)~~, regardless of whether the firearm is loaded;~~.

(f) ~~*Fifth*~~ *Sixth Degree* ~~*Assault*~~. A person commits ~~the offense of~~ ~~fifth~~ sixth degree assault when that person recklessly causes bodily injury to the complainant~~, or uses physical force that overpowers, another person~~.

(g) *Limitation on Justification and Excuse Defenses to Assault on a Law Enforcement Officer*. For prosecutions brought under this section, there are no justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] ~~it is neither a justification nor an excuse~~ for a person to actively oppose the use of physical force by a law enforcement officer when:

(A) The person was reckless as to the fact that the complainant was a law enforcement officer;

(B) The use of force occurred during an arrest, stop, or detention for a legitimate police purpose; and

(C) The law enforcement officer used only the amount of physical force that appeared reasonably necessary.

(h) *Voluntary Intoxication.* A person shall be deemed to have consciously disregarded the risk required to prove that the person acted with extreme indifference to human life in paragraphs (a)(3), (a)(4), and (b)(1) if the person

is unaware of the risk due to his or her self-induced intoxication, but would have been aware had he or she been sober.

(i) *Jury Demandable Offense.* [When charged with a violation or inchoate violation of fifth degree assault and either the complainant is a law enforcement officer, while in the course of his or her official duties, or the conduct was committed with the purpose of harming the complainant because of his or her status as a law enforcement officer, the defendant may demand a jury trial. If the defendant demands a jury trial, then the court shall impanel a jury.]

(j) *Penalties.*

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

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

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

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

(5) ~~*Fourth Degree Assault.* Fourth~~ Fifth degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(6) ~~*Fifth Degree Assault.* Fifth~~ Sixth degree assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(k) *Definitions.* The terms "purposely," "negligently," "reckless," and "recklessly" ~~"recklessly, under circumstances manifesting extreme indifference to human life," "recklessly," and "negligently"~~ have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; ~~and~~ the terms "bodily injury," "complainant," ["court,"] "dangerous weapon," "District official," "law enforcement officer," "protected person," "public safety employee," "serious bodily injury," and "significant bodily injury ~~"serious bodily injury," "protected person," "law enforcement officer," "citizen patrol," "District official or employee," "significant bodily injury," "dangerous weapon" "bodily injury," "physical force," "public safety officer," "family member," and "effective consent"~~ have the meanings specified in RCC § 22E-~~1001~~701.; and the terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.

~~(l) *Defenses.*~~

~~(1) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief~~

~~that the complainant gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section if:~~

~~(A) The conduct did not inflict significant bodily injury or serious bodily injury, or involve the use of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; or~~

~~(B) The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.~~

~~(2) *Burden of Proof for Effective Consent Defense*. If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.~~

RCC § 22E-1203. ~~Criminal~~ Menaceing.

(a) *First Degree ~~Criminal Menace~~*. Except as provided in subsection (c), ~~A person~~ an actor commits first degree ~~criminal~~ menaceing when that ~~person~~ actor:

(1) Knowingly communicates to ~~another person~~ a complainant who is physically present that the actor immediately will cause a criminal harm to any person involving a bodily injury, a sexual act, a sexual contact, or confinement;

(2) The communication is made ~~B~~by displaying or making physical contact with a dangerous weapon or imitation dangerous weapon;

~~(3) That the defendant or an accomplice immediately will engage in conduct against that person or a third person constituting one of the following offenses:~~

~~(A) Homicide, as defined in RCC § 22A-1101;~~

~~(B) Robbery, as defined in RCC § 22A-1201;~~

~~(C) Sexual assault, as defined in RCC § 22A-13XX;~~

~~(D) Kidnapping, as defined in RCC § 22A-14XX; or~~

~~(E) Assault, as defined in RCC § 22A-1202;~~

(3) With intent that the communication ~~would~~ be perceived as a ~~threat~~ serious expression that the actor would cause the harm; and

(4) In fact, the communication would cause a reasonable person in the ~~recipient~~ complainant's circumstances to believe that the harm would immediately ~~take place~~ occur.

(b) *Second Degree ~~Criminal Menace~~*. Except as provided in subsection (c), ~~A person~~ an actor commits second degree ~~criminal~~ menaceing when that ~~person~~ actor:

(1) Knowingly communicates to ~~another person~~ a complainant who is physically present that the actor immediately will cause a criminal harm to any person involving a bodily injury, a sexual act, a sexual contact, or confinement;

~~(2) That the defendant or an accomplice immediately will engage in conduct against that person or a third person constituting one of the following offenses:~~

~~(A) Homicide, as defined in RCC § 22A-1101;~~
~~(B) Robbery, as defined in RCC § 22A-1201;~~
~~(C) Sexual assault, as defined in RCC § 22A-13XX;~~
~~(D) Kidnapping, as defined in RCC § 22A-14XX; or~~
~~(E) Assault, as defined in RCC § 22A-1202;~~

(2) With intent that the communication ~~would~~ be perceived as a ~~threat~~ serious expression that the actor would cause the harm; and

(3) In fact, the communication would cause a reasonable person in the ~~recipient~~ complainant's circumstances to believe that the harm would immediately ~~take place~~ occur.

(c) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575.

(d) [*Jury Trial.* A defendant charged with committing this offense or attempting to commit this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.]

(e) *Penalties.*

(1) ~~*First Degree Criminal Menace.*~~ First degree ~~criminal~~ menaceing is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree Menace.*~~ Second degree ~~criminal~~ menaceing is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The terms "knowingly" and "intent" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "complainant," "court," "dangerous weapon," "imitation dangerous weapon," "property," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-~~1001~~701.

~~(g) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is a defense to prosecution under this section. If evidence is present at trial of the complainant's effective consent or the defendant's reasonable mistake that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.~~

RCC § 22E-1204. Criminal Threats.

(a) *First Degree ~~Criminal Threat~~*. Except as provided in subsection (c), ~~A person~~ an actor commits ~~a~~ first degree criminal threats when that ~~person~~ actor:

(1) Knowingly communicates to a complainant ~~another person; (2) T~~that, anytime in the future or if any condition is met, the actor ~~defendant or an accomplice~~ will cause a criminal harm to any person involving a bodily injury, a sexual act, a sexual contact, or confinement ~~engage in conduct against that person or a third person constituting one of the following offenses:~~

(A) ~~Homicide, as defined in RCC § 22E-1101;~~
(B) ~~Robbery, as defined in RCC § 22E-1201;~~
(C) ~~Sexual assault, as defined in RCC § 22E-13XX;~~
(D) ~~Kidnapping, as defined in RCC § 22E-14XX; or~~
(E) ~~Assault, as defined in RCC § 22E-1202(a)-(d)~~;

(2) With intent that the communication ~~would~~ be perceived as a ~~threat~~ serious expression that the actor would cause the harm; and

(3) In fact, the communication would cause a reasonable person in the ~~recipient~~ complainant's circumstances to believe that the harm would ~~take place~~ occur.

(b) *Second Degree ~~Criminal Threat~~*. Except as provided in subsection (c), ~~A person~~ an actor commits ~~a~~ second degree criminal threats when that ~~person~~ actor:

(1) Knowingly communicates to a complainant ~~another person; (2) T~~that, anytime in the future or if any condition is met, the actor ~~defendant or an accomplice~~ will cause a criminal harm to any natural person involving $250 or more in loss or damage to property ~~engage in conduct against that person or a third person constituting one of the following offenses:~~

~~(A) Assault, as defined in RCC § 22E-1202(e)-(f); or~~
~~(B) Criminal damage to property, as defined in RCC § 22E-2503(c)(1)-(c)(4)~~;

(2) With intent that the communication ~~would~~ be perceived as a ~~threat~~ serious expression that the actor would cause the harm; and

(3) In fact, the communication would cause a reasonable person in the ~~recipient~~ complainant's circumstances to believe that the harm would ~~take place~~ occur.

(c) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575.

(d) [*Jury Trial ~~Demandable Offense~~*. A defendant charged with committing this offense or attempting to commit this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury. ~~When charged with a violation of this section or an inchoate violation of this section, the defendant may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.~~]

(e) *Penalties.*

(1) ~~*First Degree Criminal Threat.*~~ First degree criminal threats is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree Criminal Threat.*~~ Second degree criminal threats is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The terms "knowingly" and "intent" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms ~~"dangerous weapon," "imitation weapon," and "effective consent,"~~ "actor," "bodily injury," "complainant," "court," "property," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-~~1001~~701.

~~(g) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is a defense to prosecution under this section. If evidence is present at trial of the complainant's effective consent or the defendant's reasonable mistake that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.~~

RCC § 22E-1205. Offensive Physical Contact.

(a) *First Degree ~~Offensive Physical Contact~~*. A person commits ~~the offense of~~ first degree offensive physical contact when that person:

(1) Knowingly causes ~~another person~~ the complainant to come in physical contact with bodily fluid or excrement;

(2) With intent that the physical contact be offensive to ~~that other person~~ the complainant; and

(3) In fact, a reasonable person in the situation of the ~~recipient of the physical contact~~ complainant would regard it as offensive.

(b) *Second Degree ~~Offensive Physical Contact~~*. A person commits ~~the offense of~~ second degree offensive physical contact when that person:

(1) Knowingly causes physical contact with ~~another person~~ the complainant;

(2) With intent that the physical contact be offensive to ~~that other person~~ the complainant; and

(3) In fact, a reasonable person in the situation of the ~~recipient of the physical contact~~ complainant would regard it as offensive.

(c) *Limitation on Justification and Excuse Defenses to Offensive Physical Contact Against a Law Enforcement Officer*. For prosecutions brought under this section, there are no justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] ~~it is neither a justification nor an excuse~~ for a person to actively oppose the use of physical force by a law enforcement officer when:

(1) The person was reckless as to the fact that the complainant was a law enforcement officer;

(2) The use of force occurred during an arrest, stop, or detention for a legitimate law enforcement purpose; and

(3) The law enforcement officer used only the amount of physical force that appeared reasonably necessary.

(d) *Jury Demandable Offense.* [When charged with a violation or inchoate violation of second degree offensive physical contact and either the complainant is a law enforcement officer, while in the course of his or her official duties, or the conduct was committed with the purpose of harming the complainant because of his or her status as a law enforcement officer, the defendant may demand a jury trial. If the defendant demands a jury trial, then the court shall impanel a jury.]

(e) *Penalty*.

(1) ~~*First Degree Offensive Physical Contact.*~~ First degree offensive physical contact is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree Offensive Physical Contact.*~~ ~~First~~ Second degree offensive physical contact is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*. The terms "knowingly," ~~and~~ "intent," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "complainant," ["court,"] and "law enforcement officer" ~~and "effective consent"~~ have the meanings specified in RCC § 22E-~~1001~~701.

~~*Defenses.*~~

~~(1) *Effective Consent Defense*. In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is an defense to prosecution under this section.~~

~~(2) *Burden of Proof for Effective Consent Defense*. If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.~~

RCC § 22E-1206. Stalking.

(a) ~~*Stalking*~~ *Offense.* Except as provided in subsection (b), a ~~A~~ person commits stalking when that person:

(1) Purposely, on two or more separate occasions, engages in a ~~pattern~~ course of conduct directed at a ~~specific individual~~ complainant that consists of any ~~combination~~ of the following:

(A) Physically following or physically monitoring;

(B) Communicating to the complainant ~~individual~~, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, after knowingly ~~having received~~ receiving notice from the ~~individual~~ complainant, directly or indirectly, to ~~cease~~ stop such communication; or

(C) In fact, committing a criminal harm involving a trespass, threat, taking of property, or damage to property ~~threat as defined in § 22E-1204, a predicate property offense, a comparable offense in another jurisdiction, or an attempt to commit any of these offenses~~;

(2) Either:

(A) With intent to cause ~~that individual~~ the complainant to:

(i) Fear for ~~his or her~~ the complainant's safety or the safety of another person; or

(ii) Suffer significant emotional distress; or

(B) Negligently causing ~~that individual~~ the complainant to:

(i) Fear for ~~his or her~~ the complainant's safety or the safety of another person; or

(ii) Suffer significant emotional distress.

(b) *Exclusions from Liability.*

(1) Nothing in this section shall be construed to prohibit conduct ~~permitted~~ protected by the U.S. Constitution~~, or~~ the First Amendment Assemblies Act of 2004 codified at § 5-331.01 et al., or the Open Meetings Act codified at D.C. Code § 2-575.

(2) A person shall not be subject to prosecution under this section for a communication that:

(A) Is directed to a government official, candidate for elected office, or employee of a business that serves the public;

(B) While ~~that person~~ the complainant is involved in their official duties; and

(C) Expresses an opinion on a political or public matter.

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

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

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

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

(d) [*Jury Trial.* A defendant charged with committing this offense or attempting to commit this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.]

(e) *Penalt~~y~~ies*.

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

(2) ~~*Offense*~~ *Penalty Enhancements*. In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, ~~T~~the penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, one or more of the following is proven:

(A) The person, in fact, was subject to a court order or condition of release prohibiting contact with the ~~specific individual~~ complainant;

(B) The person, in fact, has one prior conviction ~~in any jurisdiction~~ for stalking any person within the previous 10 years;

(C) The person was, in fact, 18 years of age or older and at least 4 years older than the complainant and the person recklessly disregarded that the ~~individual~~ complainant was under 18 years of age ~~and the actor;~~ or

(D) The person caused more than $2,500 in financial injury.

(f) *Definitions*.

(1) The terms "intent," "negligently," "purposely," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "complainant," "physically following," "physically monitoring," "property," and "significant emotional distress" have the meanings specified in RCC § 22E-701; and the term "prior conviction" has the meaning specified in RCC § 22E-806.

(2) In this section, the term "safety" means ongoing security from significant intrusions on one's bodily integrity or bodily movement.

~~(3) The term "predicate property offense" means:~~

~~(A) Theft as defined in § 22E-2101;~~

~~(B) Unauthorized use of property as defined in § 22E-2102;~~

~~(C) Forgery as defined in § 22E-2204;~~

~~(D) Identity theft as defined in § 22E-2205;~~

~~(E) Arson as defined in § 22E-2501;~~

~~(F) Damage to Property as defined in § 22E-2503;~~

~~(G) Graffiti as defined in § 22E-2504; or~~

~~(H) Trespass as defined in § 22E-2601; or~~

~~(I) Trespass of motor vehicle as defined in § 22E-2602;~~

~~(4) The terms "purposely", "with intent", "recklessly", and "negligently," have the meaning specified in § 22E-206; the term "in fact" has the meaning specified in § 22E-207;~~

~~(5) The term "comparable offense," means a criminal offense committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of the corresponding District criminal threat offense or predicate property offense;~~

~~(6) The term "pattern of conduct" means conduct on two or more separate occasions, with continuity of purpose. Where conduct is of a continuing nature, each 24-hour period constitutes one occasion.~~

~~(7) The term "financial injury" means the reasonable monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, a member of the specific individual's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:~~

~~(A) The costs of replacing or repairing any property that was taken or damaged;~~

~~(B) The costs of clearing the specific individual's name or his or her credit, criminal, or any other official record;~~

~~(C) Medical bills;~~

~~(D) Relocation expenses;~~

(E) ~~Lost employment or wages; and~~

(F) ~~Attorney's fees.~~

~~(8) The term "physically following," "physically monitoring" means being in the immediate vicinity of the specific individual's residence, workplace, or school to detect the individual's whereabouts or activities;~~

~~(9) The term "safety" means ongoing security from unlawful intrusions on one's bodily integrity or bodily movement; and~~

~~(10) The term "significant emotional distress" means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling.~~

~~(g) *Defenses.*~~

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

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

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

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

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

RCC § 22E-1301. Sexual Assault.

(a) *First Degree ~~Sexual Assault~~*. An actor commits ~~the offense of~~ first degree sexual assault when that actor:

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

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

(A) By using physical force that overcomes, restrains, or causes bodily injury to the complainant;

(B) By using a weapon against the complainant;

(C) By threatening:

(i) To kill or kidnap any person;

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

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

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

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

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

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

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

(b) *Second Degree ~~Sexual Assault~~*. An actor commits ~~the offense of~~ second degree sexual assault when that actor:

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

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

(A) By ~~coercion~~ a coercive threat; or

(B) When the complainant is:

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

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

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

(c) *Third Degree ~~Sexual Assault~~*. An actor commits ~~the offense of~~ third degree sexual assault when that actor:

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

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

(A) By using physical force that overcomes, restrains, or causes bodily injury to the complainant;

(B) By using a weapon against the complainant;

(C) By threatening:

(i) To kill or kidnap any person;

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

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

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

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

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

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

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

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

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

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

(A) By ~~coercion~~ a coercive threat; or

(B) When the complainant is:

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

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

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

(e) *Defenses.*

(1) *Effective Consent Defense*. In addition to any defenses otherwise applicable to the actor's conduct under District law, the complainant's effective consent to the actor's conduct or the ~~defendant's~~ actor's reasonable belief that the complainant gave effective consent to the ~~defendant's~~ conduct charged to constitute the offense is an affirmative defense to prosecution under this section, provided that:

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

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

(i) The complainant is under 16 years of age and the actor is ~~more than~~ at least 4 ~~four~~ years older than the complainant; or

(ii) The complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant, at least 18 years of age, and at least 4 ~~four~~ years older than the complainant.~~; or~~

~~(iii) The complainant is legally incompetent; or~~

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

(2) *Burden of Proof.* If any evidence is present at trial of 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, the government must prove the absence of such circumstances beyond a reasonable doubt.

(f) *Penalties*. Subject to the general penalty enhancements in RCC §§ 22E-~~68~~05 - 22E-~~68~~08 and the offense penalty enhancements in subsection (g) of this section:

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

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

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

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

(g) *Offense Penalty Enhancements*. In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, ~~T~~the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven:

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

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

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

(4) At the time of the offense:

(A) The complainant, in fact, was under 12 years of age and the actor was, in fact, at least 4 ~~four~~ years older than the complainant;

(B) The actor was reckless~~ly disregarded~~ as to the fact that the complainant was under 16 years of age and the actor was, in fact, at least 4 ~~four~~ years older than the complainant;

(C) The actor was reckless~~ly disregarded~~ as to the fact that the complainant was under 18 years of age, that the actor was in a position of trust with or authority over the complainant, and that the actor, in fact, was at least 4 ~~four~~ years older than the complainant;

(D) The actor was reckless~~ly disregarded~~ as to the fact that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least ~~2~~ 4 years older than the complainant;

(E) The actor was reckless~~ly disregarded~~ as to the fact that the complainant was 65 years of age or older and the actor was, in fact, ~~under 65 years old~~ at least 10 years younger than the complainant; or

(F) The actor was reckless~~ly disregarded~~ as to the fact that the complainant was a vulnerable adult.

(h) *Definitions*. The terms "intent," "knowingly" ~~and~~ "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "complainant," "dangerous weapon," "effective consent," "coercive threat," "imitation dangerous weapon," "position of trust with or authority over," "serious bodily injury," "significant bodily injury," "sexual act," "sexual contact," and "vulnerable adult" ~~"serious bodily injury," "significant bodily injury," "dangerous~~

~~weapon," "imitation dangerous weapon," "bodily injury," "physical force," "effective consent," "coercion," "sexual act," "sexual contact," "position of trust with or authority over," and "vulnerable adult"~~ have the meanings specified in RCC § 22E-~~1301~~701.

RCC § 22E-1302. Sexual Abuse of a Minor.

(a) *First Degree* ~~*Sexual Abuse of a Minor*~~. An actor commits ~~the offense of~~ first degree sexual abuse of a minor when that actor:

(1) Knowingly causes the complainant to engage in or submit to a sexual act; and

(2) In fact:

(A) The complainant is under 12 years of age; and

(B) The actor is at least 4 ~~four~~ years older than the complainant.

(b) *Second Degree* ~~*Sexual Abuse of a Minor*~~. An actor commits ~~the offense of~~ second degree sexual abuse of a minor when that actor:

(1) Knowingly causes the complainant to engage in or submit to a sexual act; and

(2) In fact:

(A) The complainant is under 16 years of age; and

(B) The actor is at least 4 ~~four~~ years older than the complainant.

(c) *Third Degree* ~~*Sexual Abuse of a Minor*~~. An actor commits ~~the offense of~~ third degree sexual abuse of a minor when that actor:

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

(2) While in a position of trust with or authority over the complainant; and

(3) In fact:

(A) The complainant is under 18 years of age; and

(B) The actor is at least 18 years of age and at least 4 ~~four~~ years older than the complainant.

(d) *Fourth Degree* ~~*Sexual Abuse of a Minor*~~. An actor commits ~~the offense of~~ fourth degree sexual abuse of a minor when that actor:

(1) Knowingly causes the complainant to engage in or submit to sexual contact ~~engages in sexual contact with the complainant, or causes the complainant to engage in or submit to sexual contact~~; and

(2) In fact:

(A) The complainant is under 12 years of age; and

(B) The actor is at least 4 ~~four~~ years older than the complainant.

(e) *Fifth Degree* ~~*Sexual Abuse of a Minor*~~. An actor commits ~~the offense of~~ fifth degree sexual abuse of a minor when that actor:

(1) Knowingly causes the complainant to engage in or submit to sexual contact ~~engages in sexual contact with the complainant, or causes the complainant to engage in or submit to sexual contact~~; and

(2) In fact:

(A) The complainant is under 16 years of age; and

(B) The actor is at least 4 ~~four~~ years older than the complainant.

(f) *Sixth Degree ~~Sexual Abuse of a Minor~~*. An actor commits ~~the offense of~~ sixth degree sexual abuse of a minor when that person:

(1) Knowingly causes the complainant to engage in or submit to sexual contact ~~engages in sexual contact with the complainant, or causes the complainant to engage in or submit to sexual contact~~;

(2) While in a position of trust with or authority over the complainant; and

(3) In fact:

(A) The complainant is under 18 years of age; and

(B) The actor is, in fact, at least 18 years of age and at least 4 ~~four~~ years older than the complainant.

(g) *Defenses*. In addition to any defenses otherwise applicable to the actor's conduct under District law:

(1) *Marriage or Domestic Partnership Defense.* It is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant~~, which the actor must prove by a preponderance of the evidence,~~ that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

(2) *Reasonable Mistake of Age Defense.*

(A) It is an affirmative defense to prosecution under subsection~~s~~ (b) and subsection (e)~~, which the actor must prove by a preponderance of the evidence,~~ that:

(i) The actor reasonably believed that the complainant was 16 years of age or older at the time of the offense;

(ii) Such reasonable belief is supported by an oral statement by the complainant about the complainant's age; and

(iii) The complainant was 14 years of age or older.

(B) It is an affirmative defense to prosecution under subsection~~s~~ (c) and subsection (f)~~, which the actor must prove by a preponderance of the evidence,~~ that:

(i) The actor reasonably believed that the complainant was 18 years of age or older at the time of the offense;

(ii) Such reasonable belief is supported by an oral statement by the complainant about the complainant's age; and

(iii) The complainant was 16 years of age or older.

(3) *Burden of Proof.* The actor must prove the affirmative defenses in this subsection by a preponderance of the evidence.

(h) *Penalties*. Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608:

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

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

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

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

(5) Fifth degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(6) Sixth degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(i) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "domestic partnership," "position of trust with or authority over," "sexual act," and "sexual contact," ~~"domestic partnership,"~~ have the meanings specified in RCC § 22E-~~1001~~701.

RCC § 22E-1303. Sexual Exploitation of an Adult.

(a) *First Degree* ~~*Sexual Exploitation of an Adult*~~. An actor commits ~~the offense of~~ first degree sexual exploitation of an adult when that actor:

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

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

(A) The actor is a ~~person of authority in a secondary school~~ teacher, counselor, principal, administrator, nurse, coach, or security officer in a secondary school and recklessly disregards that:

(i) The complainant:

(I) Is an enrolled student in the same secondary school ~~system and is under the age of 20 years~~; or

(II) Receives services or attends programming at the same secondary school; and

(ii) The complainant is under ~~the age of~~ 20 years of age.

(B) The actor knowingly and falsely represents that he or she is someone else who is personally known to the complainant;

(C) The actor is, or purports to be, a healthcare provider, a health professional, or a member of the clergy, ~~or purports to be a healthcare provider or member of the clergy,~~ and:

(i) Falsely represents that the sexual act is for a bona fide professional purpose;

(ii) Commits the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services; or

(iii) Commits the sexual act while the complainant is a patient or client of the actor, and recklessly disregards that the mental, emotional, or physical condition of the complainant is such that he or she is impaired from declining participation in the sexual act; or

(D) The actor knowingly works at a hospital, treatment facility, detention or correctional facility, group home, or other institution

housing persons who are not free to leave at will, or transports or is a custodian of persons at such an institution, and recklessly disregards that the complainant is a ward, patient, client, or prisoner at such an institution.

(b) *Second Degree ~~Sexual Exploitation of an Adult~~*. An actor commits ~~the offense of~~ second degree exploitation of an adult when that actor:

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

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

(A) The actor is a ~~person of authority in a secondary school~~ teacher, counselor, principal, administrator, nurse, coach, or security officer in a secondary school and recklessly disregards that:

(i) The complainant:

(I) Is an enrolled student in the same secondary school ~~system and is under the age of 20 years~~; or

(II) Receives services or attends programming at the same secondary school; and

(ii) The complainant is under ~~the age of~~ 20 years of age.

(B) The actor knowingly and falsely represents that he or she is someone else who is personally known to the complainant.

(C) The actor is, or purports to be, a healthcare provider, a health professional, or a member of the clergy~~, or purports to be a healthcare provider or member of the clergy~~, and:

(i) Falsely represents that the sexual contact is for a bona fide professional purpose;

(ii) Commits the sexual contact during a consultation, examination, treatment, therapy, or other provision of professional services; or

(iii) Commits the sexual contact while the complainant is a patient or client of the actor, and recklessly disregards that the mental, emotional, or physical condition of the complainant is such that he or she is impaired from declining participation in the sexual contact; or

(D) The actor knowingly works at a hospital, treatment facility, detention or correctional facility, group home, or other institution housing persons who are not free to leave at will, or transports or is a custodian of persons at such an institution, and recklessly disregards that the complainant is a ward, patient, client, or prisoner at such an institution.

(c) *~~Defenses~~ Marriage or Domestic Partnership Defense*. In addition to any defenses otherwise applicable to the actor's conduct under District law, it is an affirmative defense to prosecution under this section, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

(d) *Penalties*. Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608:

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

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

(e) *Definitions*. In this section, the terms "knowingly" and "recklessly disregards" have the meaning specified in RCC § 22E-206; ~~the term "in fact" has the meaning specified in § 22A-207;~~ and the terms "actor," "complainant," "domestic partnership," "health professional," "healthcare provider," "sexual act," and "sexual contact" ~~"person of authority in a secondary school," and "domestic partnership"~~ have the meanings specified in RCC § 22E-~~1001~~701..

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

(a) ~~*Sexually Suggestive Contact with a Minor*~~ *Offense*. An actor commits ~~the offense of~~ sexually suggestive contact with a minor when that actor:

~~(1) With intent to cause the sexual arousal or sexual gratification of any person;~~

(1) Knowingly:

(A) Touches the complainant inside his or her clothing with intent to cause the sexual arousal or sexual gratification of any person;

(B) Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks with intent to cause the sexual arousal or sexual gratification of any person;

(C) Places the actor's tongue in the mouth of the complainant with intent to cause the sexual arousal or sexual gratification of any person; or

(D) Touches the actor's genitalia or that of a third person in the sight of the complainant with intent that the complainant's presence cause the sexual arousal or sexual gratification of any person; and

(2) The actor, in fact, is at least 18 years of age and at least ~~four~~ 4 years older than the complainant; and:

(A) The actor was reckless~~ly disregarded~~ as to the fact that the complainant is under 16 years of age; or

(B) The actor was reckless~~ly disregarded~~ as to the fact that the complainant is under 18 years of age and the actor knows that he or she is in a position of trust with or authority over the complainant.

(b) *Marriage or Domestic Partnership Defense*. In addition to any defenses otherwise applicable to the actor's conduct under District law, it is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant, which the actor must prove by a preponderance of the evidence,

that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

(c) ~~*Penalties*~~ *Penalty*. Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608, sexually suggestive contact with a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. The terms "intent," "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "domestic partnership," "position of trust with or authority over," "sexual act," and "sexual contact" ~~"position of trust with or authority over," and "domestic partnership"~~ have the meanings specified in RCC § 22E-~~1001~~701.

RCC § 22E-1305. Enticing a Minor Into Sexual Conduct.

(a) ~~*Enticing a Minor*~~ *Offense*. An actor commits ~~the offense of~~ enticing a minor into sexual conduct when that actor:

(1) Knowingly:

(A) Persuades or entices, or attempts to persuade or entice, the complainant to engage in or submit to a sexual act or sexual contact; or

(B) Persuades or entices, or attempts to persuade or entice, the complainant to go to another location ~~in order to~~ and plans to cause the complainant to engage in or submit to a sexual act or sexual contact at that location; and

(2) The actor, in fact, is at least 18 years of age ~~and at least four years older than the complainant~~, and:

(A) The actor:

(i) ~~Recklessly disregards~~ Was reckless as to the fact that the complainant is under 16 years of age; ~~or~~ and

(ii) In fact, is at least four years older than the complainant;

(B) The actor:

(i) ~~Recklessly disregards~~ Was reckless as to the fact that the complainant is under 18 years of age~~,~~;

(ii) Knows that ~~and~~ the actor is in a position of trust with or authority over the complainant; ~~or~~ and

(iii) In fact, is at least four years older than the complainant; or

(C) The complainant~~,~~:

(i) In fact, is a law enforcement officer who purports to be a person under 16 years of age~~,~~;

(ii) The actor ~~recklessly disregards~~ was reckless as to the fact that the complainant purports to be a person under 16 years of age~~.~~; and

(iii) In fact, the actor is at least 4 years older than the purported age of the complainant.

(b) *Marriage or Domestic Partnership Defense*. In addition to any defenses otherwise applicable to the actor's conduct under District law, it is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

(c) ~~*Penalties*~~ *Penalty*. Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608, ~~sexually suggestive contact with a~~ enticing a minor into sexual conduct is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. The terms "knows," "knowingly," and "reckless~~ly~~" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "domestic partnership," "law enforcement officer," "position of trust with or authority over," "sexual act," and "sexual contact" ~~"sexual act," "sexual contact," "position of trust with or authority over," "law enforcement officer," and "domestic partnership"~~ have the meanings specified in RCC § 22E-~~1001~~701.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.

(a) ~~*Arranging for Sexual Conduct with a Minor*~~ *Offense*. An actor commits ~~the offense of~~ arranging for sexual conduct with a minor when that actor:

(1) Knowingly arranges for a sexual act or sexual contact between:

(A) The actor and the complainant; or

(B) A third person and the complainant; and

(2) The actor and any third person, in fact, are at least 18 years of age and at least ~~four~~ 4 years older than the complainant; and

~~(3) The actor recklessly disregards that:~~

(A) The actor was reckless as to the fact that the complainant is under 16 years of age; or

(B) The actor:

(i) Was reckless as to the fact that the complainant is under 18 years of age; and

(ii) Knows that the actor is in a position of trust with or authority over the complainant; or

(3) The actor and any third person, in fact, are at least 18 years of age and at least ~~four~~ 4 years older than the purported age of the complainant, and the complainant:

(A) In fact, is a law enforcement officer who purports to be a person under 16 years of age; and

(B) The actor was reckless as to the fact that the complainant purports to be a person under 16 years of age.

(b) ~~*Penalties*~~ *Penalty*. Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608, ~~sexually suggestive contact with a minor~~ arranging for sexual conduct with a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "knows," "knowingly," and "reckless~~ly~~" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "law enforcement officer," "position of trust with or authority over," "sexual act," and "sexual contact," ~~"law enforcement officer" and "position of trust with or authority over"~~ have the meanings specified in RCC § 22E-~~1001~~701.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

(a) *First Degree ~~Nonconsensual Sexual Conduct~~*. An actor commits ~~the offense of~~ first degree nonconsensual sexual conduct when that actor recklessly causes the complainant to engage in or submit to a sexual act without the complainant's effective consent.

(b) *Second Degree ~~Nonconsensual Sexual Conduct~~*. An actor commits ~~the offense of~~ second degree nonconsensual sexual contact when that actor recklessly causes the complainant to engage in or submit to sexual contact without the complainant's effective consent.

(c) *Exclusions from Liability*. An actor shall not be subject to prosecution under this section for ~~a use of~~ deception ~~to induce~~ that induces the complainant to consent to the sexual act or sexual contact; however,~~.~~ ~~A~~an actor may be subject to prosecution under this section for ~~a use of~~ deception as to the nature of the sexual act or sexual contact.

(d) *Penalties*. Subject to the general penalty enhancements in RCC §§ 22E-605 - 22E-608:

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

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

(e) *Definitions*. The term "recklessly" has the meaning specified in RCC § 22E-206; and the terms "actor," "complainant," "deception," "effective consent," "sexual act," and "sexual contact~~,~~" ~~and "effective consent"~~ have the meanings specified in RCC § 22E-~~1001~~701.

RCC § 22E-1308. Limitations on Liability for RCC Chapter 13 Offenses.

~~(a) *Age of Liability.*~~ Notwithstanding any other provision of law, a person under the age of 12 is not subject to liability for offenses in this subchapter other than first degree sexual assault, pursuant to RCC § 22E-130~~3~~1(a) ~~first degree sexual assault~~, or third degree sexual assault, pursuant to RCC § 22E-130~~3~~1(~~a~~ c) ~~third degree sexual assault~~.

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

RCC § 22E-1309. Duty to Report a Sex Crime Involving a Person Under 16 Years of Age. [122]

(a) *Duty to Report a Sex Crime Involving a Person Under 16 Years of Age.* Except as provided in subsection (b), a person 18 years of age or older who is aware of a substantial risk that a person under 16 years of age is being, or has been subjected to, a predicate crime shall immediately report such information or belief in a call to 911, a report to the Child and Family Services Agency, or a report to the Metropolitan Police Department.

(b) *Exclusions from Duty to Report.* The following persons do not have a duty to report a predicate crime involving a person under 16 years of age per subsection (a):

(1) A person subjected to a predicate crime by the same person alleged to have committed a predicate crime against the person under 16 years of age;

(2) A lawyer or a person employed by a lawyer when the lawyer or employee is providing representation in a criminal, civil, or delinquency matter, and the information or basis for the belief arises solely in the course of that representation.

(3) 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, when the information or basis for the belief is the result of a confession or penitential communication made by a penitent directly to the minister if:

(A) The penitent made the confession or penitential communication in confidence;

(B) The confession or penitential communication was made expressly for a spiritual or religious purpose;

(C) The penitent made the confession or penitential communication to the minister in the minister's professional capacity; and

(D) The confession or penitential communication was made in the course of discipline enjoined by the church or other religious body to which the minister belongs.

(c) *Other Duties to Report.* This section should not be construed as altering the special duty to report by persons specified in D.C. Code § 4-1321.02(b).

(d) *Immunity for Good Faith Report of a Sex Crime Involving a Person Under 16 Years of Age.*

(e) Any person who in good faith makes a report pursuant to this section shall have immunity from liability, civil or criminal, that might otherwise be incurred or imposed with respect to the making of the report or any participation in any judicial proceeding involving the report. In all civil or criminal proceedings concerning the person under the 16 years of age who is the subject of the report, or resulting from the report, good faith shall be presumed unless rebutted.

[122] No prior draft RCC statutory language.

(f) Any person who makes a good-faith report pursuant to this section and, as a result thereof, is discharged from his or her employment or in any other manner is discriminated against with respect to compensation, hire, tenure, or terms, conditions, or privileges of employment, may commence a civil action for appropriate relief. If the court finds that the person was required to report pursuant to this section, in good faith made a report, and was discharged or discriminated against as a result, the court may issue an order granting appropriate relief, including reinstatement with back pay. The District may intervene in any action commenced under this subsection.

(a) *Definitions.* The term "court" has the meaning specified in RCC § 22E-701; and, in this section, the term "predicate crime" means any conduct that is a violation of:

(1) RCC § 22E-1605 [Sex Trafficking of Minors];

(2) D.C. Code § 22-2704 [Abducting or enticing child from his or her home for purposes of prostitution; harboring such child];

(3) Chapter 13 of this Subtitle; or

(4) D.C. Code § 22-3102 [Sexual Performance Using Minors].

RCC § 22E-1310. Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age. [123]

(a) *Infraction.* A person commits the civil infraction of failure to report a sex crime involving a person under 16 years of age when that person:

(1) Knows that he or she has a duty to report a predicate crime involving a person under 16 years of age pursuant to RCC § 22E-1309(a); and

(2) Fails to carry out his or her duty to report a predicate crime involving a person under 16 years of age pursuant to RCC § 22E-1309(a).

(b) *Defense for Survivors of Domestic Violence.* In addition to any defenses otherwise applicable to the person's conduct under District law, it is a defense to the civil infraction in subsection (a) that the person fails to report a predicate crime involving a person under 16 years of age pursuant to 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).

(c) *Penalty.* Failure to report a sex crime involving a person under 16 years of age is a civil infraction subject to a fine of $300.

(d) *Judicial Venue.* Adjudication of an infraction per this section shall occur in the Office of Administrative Hearings pursuant to D.C. Code § 2-1831.03(b-6).

(e) *Definitions.* The term "knows" has the meaning specified in RCC § 22E-206.

RCC § 22E-1311. Admission of Evidence in Sexual Assault and Related Cases. [124]

(a) *Reputation or Opinion Evidence of Complainant's Past Sexual Behavior Inadmissible.* Notwithstanding any other provision of law, in a criminal case

[123] No prior draft RCC statutory language.

[124] No prior draft RCC statutory language.

under RCC Chapter 13, reputation or opinion evidence of the past sexual behavior of the complainant is not admissible.

(b) *Admissibility of Other Evidence of Complainant's Past Sexual Behavior*.

(1) Notwithstanding any other provision of law, in a criminal case for an offense under RCC Chapter 13, evidence of a complainant's past sexual behavior, other than reputation or opinion evidence, is not admissible, unless such evidence is:

(A) Admitted in accordance with paragraphs (2), (3), or (4) of this subsection and is constitutionally required to be admitted; or

(B) Admitted in accordance with paragraphs (2), (3), or (4) of this subsection and is evidence of:

(i) Past sexual behavior with persons other than the actor, offered by the actor upon the issue of whether the actor was or was not, with respect to the complainant, the source of semen or bodily injury; or

(ii) Past sexual behavior with the actor where effective consent of the complainant is at issue and is offered by the actor upon the issue of whether the complainant consented to the sexual behavior that is the basis of the criminal charge.

(2) If the actor intends to offer under paragraph (1) of this subsection, evidence of specific instances of the complainant's past sexual behavior, the actor shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph, and the accompanying offer of proof, shall be filed under seal and served on all other parties and on the complainant.

(3) The motion described in paragraph (2) of this subsection shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in paragraph (1) of this subsection, the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing, the parties may call witnesses, including the complainant, and offer relevant evidence. If the relevancy of the evidence which the actor seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers, or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(4) If the court determines on the basis of the hearing described in paragraph (3) of this subsection that the evidence which the actor seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be

offered and areas with respect to which the complainant may be examined or cross-examined.

(c) *Prompt Reporting.* 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.

(d) *Privilege Inapplicable for Spouses or Domestic Partners.* Laws attaching a privilege against disclosure of communications between spouses or domestic partners are inapplicable in prosecutions under RCC Chapter 13 where the actor is or was married to the complainant, or is or was a domestic partner of the complainant, or where the complainant is a person under 16 years of age.

(e) *Definitions.* The terms "actor," "bodily injury," "complainant," "court," "domestic partner," and "effective consent" have the meanings specified in RCC § 22E-701; and, in this section, the term "past sexual behavior" means sexual behavior with respect to which an offense under RCC Chapter 13 is alleged.

RCC § 22E-140~~2~~1. Kidnapping.

(a) *Aggravated Kidnapping.* Except as specified in subsection (c), an actor commits aggravated kidnapping when that actor commits kidnapping as defined in subsection (b) and does so:

(1) Reckless as to the fact that the complainant is a protected person;

(2) 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

(3) By means of knowingly displaying or using a dangerous weapon or imitation dangerous weapon.

(b) ~~*Offense Definition.* A person commits the offense of kidnapping when that person:~~ *Kidnapping.* Except as specified in subsection (c), a person commits kidnapping when that person:

(1) Knowingly interferes ~~to a substantial degree with another person's with~~ the complainant's freedom of movement;

(2) The interference is substantial; and

(3) Either

(A) The interference occurs without the effective consent of the complainant; or

(B) The actor is, in fact, 18 years or older, and was reckless that the complainant is under 16 years of age or is incapacitated and that a person with authority over the complainant would not give effective consent to the interference;

~~(1) In one of the following ways;~~

~~(A) Without that person's consent;~~

~~(B) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury;~~

~~(C) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would~~

~~have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or~~

(D) ~~When that person is a child under the age of 16 or a person assigned a legal guardian with the legal authority to take physical custody of the person, without the effective consent of that person's parent, person how has assumed the obligations of a parent, or legal guardian; and~~

(4) With intent to:

(A) Hold the complainant for ransom or reward;

(B) Use the complainant as a shield or hostage;

(C) Facilitate the commission of any felony or flight thereafter;

(D) Inflict bodily injury upon the complainant

(E) Commit a sexual offense as defined in RCC XX-XXXX against the complainant;

(F) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;

(G) Permanently deprive a parent~~, legal guardian, or other lawful custodian~~ who is responsible for the general care and supervision of the complainant, or a court appointed guardian to the complainant, of custody of the complainant;

(H) ~~Hold the person in a condition of involuntary servitude.~~

(c) Exclusions to Liability for Close Relatives With Intent to Assume Responsibility for Minor. A person does not commit aggravated kidnapping or kidnapping under subparagraphs (a)(3)(G) or (b)(3)(G), when the person is a close relative of the complainant, acted with intent to assume full responsibility for the care and supervision of the complainant, and did not cause bodily injury or threaten to cause bodily injury to the complainant.

~~*Defense.* It is a defense to prosecution under this section that the defendant is a relative of the complainant, acted with intent to assume personal custody of the complainant, and did not cause bodily injury or threaten to cause bodily injury to the complainant.~~

(d) *Penalties*. ~~Kidnapping is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.~~

(1) *Aggravated kidnapping.* Aggravated kidnapping is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Kidnapping.* Kidnapping is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Multiple Convictions for Related Offenses*. A person may be found guilty of aggravated kidnapping or kidnapping and another offense when the interference with another person's freedom of movement was incidental to commission of the other offense. However, consistent with RCC § 22E-214, no person may be subject to a conviction for aggravated kidnapping or kidnapping and another offense when the interference with another person's freedom of movement was incidental to commission of the other offense after:

(A) The time for appeal has expired; or

(B) The judgment appealed from has been affirmed.

(f) *Definitions*. In this section:

(1) The terms "intent," "knowingly," ~~"with intent,"~~ "purpose," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22~~A~~E-207; and the terms "bodily injury," "close relative," "consent," "deception," and "effective consent, ~~"significant bodily injury"~~ have the meanings specified in RCC § 22E-701~~A-1001~~.

(2) ~~The term "relative" means a parent, grandparent, sibling, cousin, aunt, or uncle.~~

RCC § 22E-~~1403~~1402. ~~Aggravated~~ Criminal Restraint.

(a) ~~*Offense Definition.* A person commits the offense of aggravated criminal restraint when that person~~ *Aggravated Criminal Restraint.* Except as specified in subsection (c), an actor commits aggravated criminal restraint when that actor commits criminal restraint as defined in subsection (b) and does so:

(1) ~~Commits criminal restraint as defined in RCC § 22-1404;~~

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

(3) Reckless as to the fact that the complainant is a protected person;

(4) 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

(A) ~~With the purpose of harming the complainant because of the complainant's status as a:~~

(i) ~~Law enforcement officer;~~

(ii) ~~Public safety employee;~~

(iii) ~~Participant in a citizen patrol;~~

(iv) ~~District official or employee; or~~

(v) ~~Family member of a District official or employee; or~~

(5) By means of knowingly displaying or using what is, in fact, ~~touching another person with~~ a dangerous weapon or imitation dangerous weapon.

(b) *Criminal Restraint.* ~~*Offense Definition.* A person commits the offense of criminal restraint when that person:~~Except as specified in subsection (e), an actor commits the offense of criminal restraint when that actor:

(1) Knowingly interferes ~~to a substantial degree~~ with ~~another person's~~ the complainant's freedom of movement;

(2) The interference is substantial; and

(3) ~~In one of the following ways;~~Either

(A) The interference occurs without the complainant's effective consent; or

(B) The actor is, in fact, 18 years or older, and was reckless that the complainant is under 16 years of age and that a person with authority over the complainant would not give effective consent to the interference.

~~(A)Without that person's consent;~~

~~(B) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury;~~

~~(C) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or~~

~~(D)When that person is a child under the age of 16 or a person assigned a legal guardian with the legal authority to take physical custody of the person, without the effective consent of that person's parent, person who has assumed the obligations of a parent, or legal guardian.~~

(c) *Exclusions to Liability.*

(1) *Deception Without Intent to Use Force If Deception Fails.* An actor is not guilty of aggravated criminal restraint or criminal restraint when the actor lacks effective consent under paragraphs (a)(2) or (b)(2) solely because of deception by the actor, unless, in addition, the actor confined or moved the complainant with intent to proceed by the infliction of bodily injury or a coercive threat if the deception should fail.

(2) *Parents, Close Relatives, and Guardians Acting With Intent to Assume Responsibility for a Minor.* An actor is not guilty of aggravated criminal restraint or criminal restraint with respect to a complainant under 18 years of age when the actor:

(A) A person with legal authority over the complainant; or

(B) A close relative or a former legal guardian with authority to control the complainant's freedom of movement who:

(i) Acts with intent to assume full responsibility for the care and supervision of the complainant; and

(ii) Does not cause bodily injury or use a coercive threat.

(d) *Penalties.* ~~(e) *Multiple Convictions for Related Offenses*. A person may not be sentenced for criminal restraint if the interference with another person's freedom of movement was incidental to commission of any other offense.~~

(1) Aggravated criminal restraint is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Criminal restraint is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Multiple Convictions for Related Offenses.* A person may be found guilty of aggravated criminal restraint or criminal restraint and another offense when the confinement or movement was incidental to commission of the other offense. However, consistent with RCC § 22E-214, no person may be subject to a conviction for aggravated criminal restraint or criminal restraint and another offense when the confinement or movement was incidental to commission of the other offense after:

(1) The time for appeal has expired; or

(2) The judgment appealed from has been affirmed.

(f) *Definitions.* In this section, the terms "knowingly," "reckless," and "purpose" have the meanings specified in § 22~~A~~E-206; and ~~the terms "citizen patrol," "dangerous weapon," "District official or employee," "family member," "imitation dangerous weapon," "law enforcement officer," "protected person," and "public safety employee" have the meanings specified in § 22AE-1001.~~ The terms "dangerous weapon," "imitation dangerous weapon," "law enforcement officer," "protected person," "public safety employee," and "public official" have the meanings specified in § 22E-701. ~~(1) The term "knowingly" has the meaning specified in § 22A-206; the terms "bodily injury," "consent," "deception," and "effective consent" have the meanings specified in § 22A-1001. (2) The term "relative" means a parent, grandparent, sibling, aunt, uncle, or any other person related to the person by consanguinity to the second degree.~~

(d) ~~Defenses. It is a defense to prosecution under subsection (a)(2)(D) that the defendant is a relative of the complainant.~~

RCC § 22E-1501. ~~Child Abuse.~~ Criminal Abuse of a Minor.

(a) *First Degree ~~Child Abuse~~*. A person commits ~~the offense of~~ first degree ~~child abuse~~ criminal abuse of a minor when that person:

(1) 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;

(2) Either:

(A) Purposely causes serious mental injury to ~~another person~~ the complainant~~, with recklessness that the other person is a child~~; or

(B) Recklessly~~, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to ~~another person~~ the complainant~~, with recklessness that the other person is a child; and~~.

(3) ~~In fact:~~

(A) ~~That person is an adult at least two years older than the child; or~~

(B) ~~That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.~~

(b) *Second Degree ~~Child Abuse~~*. A person commits ~~the offense of~~ second degree ~~child abuse~~ criminal abuse of a minor when that person:

(1) 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;

(2) ~~Recklessly~~ Either:

(A) Causes serious mental injury to ~~a child~~ the complainant; or

(B) Causes significant bodily injury to ~~a child~~ the complainant~~; and~~.

(3) ~~In fact:~~

(A) ~~That person is an adult at least two years older than the child; or~~

(B) ~~That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.~~

(c) *Third Degree ~~Child Abuse~~*. A person commits ~~the offense of~~ third degree ~~child abuse~~ criminal abuse of a minor when that person:

(1) 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;

(2) Engages in one of the following:

(A) In fact, commits ~~harassment per § 22A-XXXX~~ stalking, per RCC § 22E-1206; menacing, per RCC § 22E-1203; criminal threats, per RCC § 22E-1204; criminal restraint, per RCC § 22E-1404; or first degree offensive physical contact, per RCC § 22E-1205(a) against ~~another person~~ the complainant~~, with recklessness that the other person is a child~~; ~~or~~

(B) Purposely causes significant emotional distress by confining the complainant; or

(C) Recklessly causes bodily injury to the complainant~~, or uses physical force that overpowers, a child; and~~.

(3) ~~In fact:~~

(A) ~~That person is an adult at least two years older than the child; or~~

(B) ~~That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.~~

(d) *Penalties*.

(1) *First Degree ~~Child Abuse~~ Criminal Abuse of a Minor*. First degree ~~child abuse~~ criminal abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree ~~Child Abuse~~ Criminal Abuse of a Minor*. Second degree ~~child abuse~~ criminal abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree ~~Child Abuse~~ Criminal Abuse of a Minor*. Third degree ~~child abuse~~ criminal abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The terms "purposely," "reckless," ~~"recklessly, under circumstances manifesting extreme indifference to human life,"~~ and "recklessly" have the meanings specified in RCC § 22E-206; and the terms "bodily injury," "complainant," "serious bodily injury," "serious mental injury," ~~"serious bodily injury,"~~ "significant bodily injury," and "significant emotional distress" ~~"bodily injury," "physical force," "child," and "adult,"~~ have the meanings specified in RCC § 22E-~~1001~~701.

(f) ~~*Defenses.*~~

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

~~(A) A parent, legal guardian, or other person who has assumed the obligations of a parent:~~

~~(i) Caused bodily injury to a child 18 months or older, other than by means of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;~~

~~(ii) Used overpowering physical force against any child, other than by means of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; or~~

~~(iii) Committed harassment per RCC § 22A-XXXX, menacing per RCC § 22A-1203, threats per RCC § 22A-1204, restraint per RCC § 22A-XXXX, or first degree offensive physical contact per RCC § 22A-1205(a) against any child, other than by means of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;~~

~~(B) The bodily injury, use of overpowering physical force, or harassment, menacing, threats, restraint, or offensive physical contact was for the purpose of exercising discipline;~~

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

~~(D) The conduct did not include:~~

~~(i) Burning, biting, or cutting;~~

~~(ii) Striking with a closed fist;~~

~~(iii) Shaking, kicking, or throwing; or~~

~~(iv) Interfering with breathing.~~

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

RCC § 22E-1501. ~~Child Neglect.~~ Criminal Neglect of a Minor.

(a) *First Degree ~~Child Neglect~~*. Except as provided in subsection (d), ~~A~~ a person commits ~~the offense of~~ first degree ~~child neglect~~ criminal neglect of a minor when that person:

(1) 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;

(2) ~~Recklessly c~~Created, or failed to mitigate or remedy, a substantial ~~and unjustifiable~~ risk that ~~a child~~ the complainant would experience serious bodily injury or death.~~;~~

~~(3) That person knows he or she has a duty of care to the child; and~~

~~(4) In fact, that person violated his or her duty of care to the child.~~

(b) *Second Degree ~~Child Neglect~~*. Except as provided in subsection (d), ~~A~~ a person commits ~~the offense of~~ second degree ~~child neglect~~ criminal neglect of a minor when that person:

(1) 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;

(2) ~~Recklessly c~~Created, or failed to mitigate or remedy, a substantial ~~and unjustifiable~~ risk that ~~a child~~ the complainant would experience:

(A) Significant bodily injury; or

(B) Serious mental injury.~~;~~

(3) ~~That person knows he or she has a duty of care to the child; and~~

(4) ~~In fact, that person violated his or her duty of care to the child.~~

(c) *Third Degree ~~Child Neglect~~*. Except as provided in subsection (d), ~~A~~ a person commits ~~the offense of~~ third degree ~~child neglect~~ criminal neglect of a minor when that person:

(1) 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;

(2) Either:

(A) Knowingly leaves the complainant in any place with intent to abandon the complainant; or

(B) Recklessly fails to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of ~~a child~~ the complainant.~~; or~~

(C) ~~Knowingly leaves a child in any place with intent to abandon the child; and~~

(3)

(A) ~~That person knows she or he has a duty of care to the child; and~~

(B) ~~In fact, that person violated his or her duty of care to the child.~~

(d) *Exception to Liability for Newborn Safe Haven.* No person shall be guilty of ~~child neglect~~ criminal neglect of a minor for the surrender of a newborn child in accordance with D.C. Code § 4-1451.01 *et seq*.

(e) *Penalties*.

(1) First Degree ~~Child Neglect~~ Criminal Neglect of a Minor. First degree ~~child neglect~~ criminal neglect of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second Degree ~~Child Neglect~~ Criminal Neglect of a Minor. Second degree ~~child neglect~~ criminal neglect of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third Degree ~~Child Neglect~~ Criminal Neglect of a Minor. Third degree ~~child neglect~~ criminal neglect of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions:* The terms "intent," "knowingly," "reckless," and "recklessly" ~~"recklessly" and "knows"~~ have the meanings specified in RCC § 22E-206; and the terms "complainant," "serious bodily injury," "serious mental injury,"

~~"serious bodily injury,"~~ and "significant bodily injury~~,~~" ~~"duty of care," and "child"~~ have the meanings specified in RCC § 22E-1001~~701~~.

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

(a) *First Degree* ~~*Abuse of a Vulnerable Adult or Elderly Person*~~. A person commits ~~the offense of~~ first degree criminal abuse of a vulnerable adult or elderly person when that person:

(1) 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;

(2) Either:

(A) Purposely causes serious mental injury to the complainant ~~a another person, with recklessness that the other person is a vulnerable adult or elderly person~~; or

(B) Recklessly~~, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to the complainant ~~a another person, with recklessness that the other person is a vulnerable adult or elderly person~~.

(b) *Second Degree* ~~*Abuse of a Vulnerable Adult or Elderly Person*~~. A person commits ~~the offense of~~ second degree criminal abuse of a vulnerable adult when that person:

(1) 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;

(2) Either:

(A) ~~Recklessly c~~Causes serious mental injury to ~~a vulnerable adult or elderly person~~ the complainant; or

(B) ~~Recklessly c~~Causes significant bodily injury to ~~a vulnerable adult or elderly person~~ the complainant.

(c) *Third Degree* ~~*Abuse of a Vulnerable Adult or Elderly Person*~~. A person commits ~~the offense of~~ third degree criminal abuse of a vulnerable adult or elderly person when that person:

(1) 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;

(2) Engages in one of the following:

(A) In fact, commits ~~harassment per § 22A-XXXX~~ stalking, per RCC § 22E-1206; menacing, per RCC § 22E-1203; criminal threats, per RCC § 22E-1204; criminal restraint per RCC § 22E-1404; or first degree offensive physical contact, per RCC § 22E-1205(a) against ~~another person, with recklessness that the other person is a vulnerable adult or elderly person~~ the complainant; or

(B) Purposely causes significant emotional distress by confining the complainant; or

(C) Recklessly causes bodily injury to the complainant~~, or uses physical force that overpowers, a vulnerable adult or elderly person~~.

(d) *Effective Consent Defense to Religious Prayer in Lieu of Medical Treatment.*

(1) Defense. In addition to any defenses otherwise applicable under District law, it is a defense to prosecution under this section that:

(A) The complainant gave effective consent, or the actor reasonably believed that the complainant gave effective consent, to the conduct charged to constitute the offense; and

(B) 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.

(2) Burden of Proof for Defense. If any evidence for the requirements of this defense is present at trial, the government must prove the absence of all requirements of the defense beyond a reasonable doubt.

(e) *Penalties*.

(1) ~~First Degree Abuse of a Vulnerable Adult or Elderly Person.~~ First degree criminal abuse of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~Second Degree Abuse of a Vulnerable Adult or Elderly Person~~. Second degree criminal abuse of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~Third Degree Abuse of a Vulnerable Adult or Elderly Person.~~ Third degree criminal abuse of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(a) Definitions: The terms "purposely," "reckless," ~~"recklessly, under circumstances manifesting extreme indifference to human life,"~~ and "recklessly" have the meanings specified in RCC § 22E-206; and the terms "actor," "bodily injury," "complainant," "effective consent," "elderly person," "serious bodily injury," "serious mental injury," ~~"serious bodily injury,"~~ "significant bodily injury," "significant emotional distress," and "vulnerable adult" ~~"bodily injury," "physical force," "effective consent," "vulnerable adult," and "elderly person"~~ have the meanings specified in RCC § 22E-~~1001~~701.

(f) ~~*Defenses.*~~

(1) ~~Effective Consent Defense~~. ~~In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the victim gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section if:~~

(A) ~~The conduct did not inflict significant bodily injury, serious bodily injury, serious mental injury, or involve the use of a firearm~~

~~as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; or~~

~~(B) The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or~~

~~(C) The conduct involved was the use of religious prayer alone, in lieu of medical treatment which the defendant otherwise had a duty to provide.~~

~~*(2) Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.~~

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

(a) *First Degree ~~Neglect of a Vulnerable Adult or Elderly Person~~*. A person commits ~~the offense of~~ first degree criminal neglect of a vulnerable adult or elderly person when that person:

(1) 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;

(2) ~~Recklessly c~~Created, or failed to mitigate or remedy, a substantial ~~and unjustifiable~~ risk that ~~a vulnerable adult or elderly person~~ the complainant would experience serious bodily injury or death.~~;~~

(3) ~~That person knows he or she has a duty of care to the vulnerable adult or elderly person; and~~

(4) ~~In fact, that person violated his or her duty of care to the vulnerable adult or elderly person.~~

(b) *Second Degree ~~Neglect of a Vulnerable Adult or Elderly Person~~*. A person commits ~~the offense of~~ second degree criminal neglect of a vulnerable adult or elderly person when that person:

(1) 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;

(2) ~~Recklessly c~~Created, or failed to mitigate or remedy, a substantial ~~and unjustifiable~~ risk that ~~a vulnerable adult or elderly person~~ the complainant would experience:

(A) Significant bodily injury; or

(B) Serious mental injury~~.;~~

(3) ~~That person knows he or she has a duty of care to the vulnerable adult or elderly person; and~~

(4) ~~In fact, that person violated his or her duty of care to the vulnerable adult or elderly person.~~

(c) *Third Degree ~~Neglect of a Vulnerable Adult or Elderly Person~~*. A person commits ~~the offense of~~ third degree criminal neglect of a vulnerable adult or elderly person when that person:

(1) 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;

(2) ~~Recklessly f~~Fails to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine or other items or care essential for the physical health, mental health, or safety of ~~a vulnerable adult or elderly person~~ the complainant.~~;~~

(3) ~~That person knows she or he has a duty of care to the vulnerable adult or elderly person; and~~

(4) ~~In fact, that person violated his or her duty of care to the vulnerable adult or elderly person.~~

(d) *Effective Consent Defense to Religious Prayer in Lieu of Medical Treatment.*

(1) Defense. In addition to any defenses otherwise applicable under District law, it is a defense to prosecution under this section that:

(A) The complainant gave effective consent, or the actor reasonably believed that the complainant gave effective consent, to the conduct charged to constitute the offense; and

(B) 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.

(2) Burden of Proof for Defense. If any evidence for the requirements of this defense is present at trial, the government must prove the absence of all requirements of the defense beyond a reasonable doubt.

(e) *Penalties*.

(1) ~~First Degree Neglect of a Vulnerable Adult or Elderly Person.~~ First degree criminal neglect of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~Second Degree Neglect of a Vulnerable Adult or Elderly Person.~~ Second degree criminal neglect of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~Third Degree Neglect of a Vulnerable Adult or Elderly Person.~~ Third degree criminal neglect of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions:* The term~~s~~ "reckless" ~~"recklessly" and "knows"~~ ~~have~~ has the meaning~~s~~ specified in RCC § 22E-206; and the terms "actor," "complainant," "effective consent," "elderly person," "serious bodily injury," "serious mental injury," ~~"serious bodily injury,"~~ "significant bodily injury," and "vulnerable adult," ~~"effective consent," "duty of care," "vulnerable adult," and "elderly person"~~ have the meanings specified in RCC § 22E-~~1001~~701.

(g) ~~*Defenses.*~~

~~*(1) Effective Consent Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section if the conduct did not involve a firearm, as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded~~

~~*(2) Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.~~

RCC § 22~~A~~E-1601~~3~~. Forced Labor or Services.

(a) *Offense ~~Definition~~*. An ~~person or business~~ actor commits ~~the offense of~~ forced labor or services when that actor ~~or business~~:

(1) Knowingly causes ~~another~~ a person to engage in labor or services;

(2) By means of ~~coercion~~ a coercive threat or debt bondage.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22~~A~~E-~~86~~05 - 22~~A~~E-~~86~~08, and the offense penalty enhancement in subsection (c) of this section, forced labor or services is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Offense Penalty Enhancements.* In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, ~~T~~the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense, one or more of the following is proven:

(1) The ~~person or business~~ actor was reckless as to the fact that the complainant was under 18 years of age; or

(2) The actor held the complainant, or caused the complainant to provide services for a total of more than 180 days. ~~The complainant was held or provides services for more than 180 days.~~

(d) *Definitions*. The terms "knowingly," and "recklessly" have the meanings specified in RCC § 22~~A~~E-206~~.~~; ~~T~~the terms ~~"business,"~~ "coercive threat" "debt bondage" "labor," and "services," ~~"coercion" and "debt bondage"~~ have the meanings specified in RCC § 22-~~A~~E-~~1601~~701.

(e) *Exclusions from Liability.* An actor ~~or business~~ shall not be subject to prosecution under this section for threats of ordinary and legal employment actions, such as threats of termination, demotion, reduced pay or benefits, or scheduling changes, in order to compel an employee to provide labor or services.

RCC § 22~~A~~E-1602~~4~~. Forced Commercial Sex.

(a) ~~*Forced Commercial Sex Offense*~~. An ~~person or business~~ actor commits ~~the offense of~~ forced commercial sex when that ~~person or business~~ actor:

(1) Knowingly causes ~~another~~ ~~person~~ the complainant to engage in a commercial sex act with another person;
(2) By means of ~~coercion~~ a coercive threat or debt bondage.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22~~A~~E-805 - 22~~A~~E-808, and the offense penalty enhancement in subsection (c) of this section, forced commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Offense Penalty Enhancements.* In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, ~~T~~the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense, one or more of the following is proven:
(1) The actor ~~person or business~~ was reckless as to the fact that the complainant was under 18 years of age, or, in fact, the complainant was under 12 years of age; or
(2) The actor held the complainant, or caused the complainant to provide commercial sex acts for a total of more than 180 days. ~~The complainant was held or provides services for more than 180 days.~~

(d) *Definitions*. The terms "knowingly," and "recklessly" have the meanings specified in § 22~~A~~E-206. The term "in fact" has the meaning specified in RCC §22E-207. The terms "business," "coercive threat" "commercial sex act," ~~"coercion,"~~ and "debt bondage" have the meanings specified in RCC § 22~~A~~E-~~1601~~701.

RCC § 22~~A~~E-160~~35~~. Trafficking in Labor or Services.

(a) *Offense ~~Definition~~*. An ~~person or business~~ actor commits ~~the offense of~~ trafficking in labor or services when that ~~person or business~~ actor:
(1) Knowingly recruits, entices, houses ~~harbors~~, transports, provides, obtains, or maintains by any means, ~~another~~ a person;
(2) With intent ~~recklessness~~ that, as a result, the person ~~is being caused or~~ will be caused to provide labor or services by means of a coercive threat or debt bondage.
~~(3) By means of coercion or debt bondage.~~

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22~~A~~E-~~86~~05 - 22~~A~~E- ~~86~~08 and the offense penalty enhancement in subsection (c) of this section, trafficking in labor or services is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Offense Penalty Enhancements.* In addition to any general penalty enhancements in RCC §§ 22E-805 – 22E-808, ~~T~~the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense, one or more of the following is proven:
(1) ~~The person or business~~ The actor was reckless as to the fact that the complainant was under 18 years of age; or
(2) The actor held the complainant, or caused the complainant to provide services, for a total of more than 180 days. ~~The complainant was held or provides services for more than 180 days.~~

(d) *Definitions*. The terms "intent," "knowingly," and "recklessly" have the meanings specified in § 22~~A~~E-206. The terms "actor," ~~"business,"~~ "coercive threat" "commercial sex act," ~~"coercion,"~~ and "debt bondage" have the meanings specified in RCC § 22~~A~~E-~~1601~~701.

RCC § 22~~A~~E-160~~46~~. Trafficking in Commercial Sex.

(a) *Offense ~~Definition~~*. An ~~person or business~~ actor commits ~~the offense of~~ trafficking in commercial sex when that ~~person or business~~ actor:
  (1) Knowingly recruits, entices, houses ~~harbors~~, transports, provides, obtains, or maintains by any means, ~~another person~~ the complainant;
  (2) With ~~recklessness~~ intent that, as a result, ~~the person~~ the complainant ~~is being caused or~~ will be caused to engage in a commercial sex act with another person~~;~~ by means of a coercive threat or debt bondage.
  ~~(3) By means of coercion or debt bondage.~~
(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22~~A~~E-~~86~~05 - 22~~A~~E-~~86~~08 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) *Offense Penalty Enhancements.* In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, ~~T~~the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense, one or more of the following is proven:
  (1) The ~~person or business~~ actor was reckless that the complainant was under 18 years of age, or, in fact, the complainant was under 12 years of age; or
  (2) The actor held the complainant, or caused the complainant to provide commercial sex acts for a total of more than 180 days. ~~The complainant was held or provides services for more than 180 days.~~
(d) *Definitions*. The terms "intent," "knowingly," and "recklessly," have the meanings specified in § 22~~A~~E-206. The term "in fact" has the meaning specified in RCC § 22E-207. The terms "actor" ~~"business,"~~ "~~coercion~~ coercive threat" ~~"debt bondage," and~~ "commercial sex act" and "debt bondage" have the meanings specified in § 22~~ A~~E -~~1601~~701.

RCC § 22~~A~~E-160~~57~~. Sex Trafficking of Minors.

(a) *Offense.* An ~~person or business~~ actor commits ~~the offense of~~ sex trafficking of minors when that ~~person~~ actor ~~or business~~:
  (1) Knowingly recruits, entices, houses ~~harbors~~, transports, provides, obtains, or maintains by any means~~,~~ ~~another person~~ the complainant;
  (2) ~~Who will~~ With intent that the complainant, as a result, will be caused to engage in a commercial sex act with another person;
  (3) With recklessness as to the fact that the complainant ~~being~~ is under the age of 18.
(b) *Penalties*. Subject to the general penalty enhancements in RCC §§ 22~~A~~E-~~68~~05 - 22~~ A~~E-~~68~~08 and the offense penalty enhancement in subsection (c) of this section,

trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Offense Penalty Enhancements.* In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, ~~T~~the penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, the person recklessly held the complainant, or caused the complainant to provide commercial sex acts for a total of more than 180 days. ~~the complainant was held or provides services [commercial sex acts] for more than 180 days~~.

(d) *Definitions.* The terms "intent," "knowingly," and "recklessly" have the meanings specified in § 22~~-AE~~-206~~.~~; the term "in fact" has the meaning specified in RCC § 22E-207; ~~T~~the terms "actor," and "commercial sex act" ~~has~~ have the meanings specified in § 22~~-AE-1601~~701.

RCC § 22~~AE~~-160~~68~~. Benefiting from Human Trafficking.

(a) *First Degree ~~Benefiting from Human Trafficking~~.* An ~~person or business~~ actor commits ~~the offense of~~ first degree benefiting from human trafficking when that ~~person or business~~ actor:

(1) Knowingly obtains any financial benefit or property;

(2) By participation in a group of two or more persons;

(3) Reckless as to the fact that the group has engaged in conduct that, in fact: constitute~~sing~~ forced commercial sex under RCC § 22~~AE~~-1604, ~~or~~ trafficking in commercial sex under RCC § 22~~-AE~~-1606, or sex trafficking of minors under RCC § 22E-1605.

(b) *Second Degree ~~Benefiting from Human Trafficking~~.* An ~~person or business~~ actor commits ~~the offense of~~ second degree benefiting from human trafficking when that ~~person or business~~ actor:

(1) Knowingly obtains any financial benefit or property;

(2) By participation in a group of two or more persons;

(3) Reckless as to the fact that the group has engaged in conduct that, in fact: constitute~~sing~~ forced labor or services under RCC § 22~~AE~~-1603 or trafficking in labor or services under RCC § 22~~AE~~-1605.

(c) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22~~AE~~-~~68~~05 - 22~~AE~~-~~68~~08, ~~and the offense penalty enhancement in subsection (d) of this section~~:

(1) First degree benefitting from human trafficking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree benefitting from human trafficking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. The terms "knowingly," and "reckless" have the meanings specified in RCC § 22~~AE~~-206. The terms "actor," person," and "property" have the meaning specified in RCC § 22E-701.

RCC § 22~~AE~~-160~~79~~. Misuse of Documents in Furtherance of Human Trafficking.

(a) *Offense ~~Definition~~*. An ~~person or business~~ actor commits ~~the offense of~~ misuse of documents in furtherance of human trafficking when that ~~person or business~~ actor:

(1) Knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, including a passport or other immigration document of any person;

(2) With intent to ~~prevent or~~ restrict, ~~or attempt to prevent or restrict~~, ~~without lawful authority,~~ the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person.

(b) *Penalty*. Subject to the general penalty enhancements in RCC §§ 22~~A~~E-~~86~~05 - 22~~A~~E-~~86~~08, misuse of documents in furtherance of human trafficking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "intent," and "knowingly" have the meanings specified in § 22~~A~~E-206. The terms "actor," "commercial sex act," "labor," "possess," and "service" have the meanings specified in § 22~~A~~E-~~1601~~701.

RCC § 22~~A~~E-160~~8~~10 Commercial Sex with a Trafficked Person ~~Sex Trafficking Patronage~~.

(a) *First Degree ~~Sex Trafficking Patronage~~*. An ~~person~~ actor commits ~~the offense of~~ first degree ~~sex trafficking patronage~~ commercial sex with a trafficked person when that ~~person~~ actor:

(1) Knowingly engages in a commercial sex act;

(2) When ~~coercion~~ a coercive threat or debt bondage ~~was used~~ by another person ~~to~~ causes the ~~person~~ complainant to submit to or engage in the commercial sex act;

(3) With recklessness as to the fact that the complainant is under 18 years of age, or, in fact, the complainant was under 12 years of age.

(b) *Second Degree ~~Sex Trafficking Patronage~~*. An ~~person~~ actor commits ~~the offense of~~ second degree ~~sex trafficking patronage~~ commercial sex with a trafficked person when that ~~person~~ actor:

(1) Knowingly engages in a commercial sex act;

(2) When either:

(A) ~~coercion~~ A coercive threat or debt bondage ~~was used~~ by another person ~~to~~ causes the ~~person~~ complainant to submit to or engage in the commercial sex act; or

(B)

~~1.~~ ~~t~~The complainant was recruited, enticed, housed ~~harbored~~, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act; and

~~2. With recklessness that~~ The actor is reckless that the complainant is under 18 years of age, or, in fact, the complainant was under 12 years of age.

~~(c) *Third Degree Sex Trafficking Patronage.* A person commits the offense of third degree sex trafficking patronage when that person:~~
~~(1) Knowingly engages in a commercial sex act;~~
~~(2) When the complainant was recruited, enticed, harbored, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act;~~
~~(3) With recklessness that the complainant is under 18 years of age.~~

(d) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22~~A~~E-805 - 22~~A~~E-808:
(1) First degree sex trafficking patronage is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree sex trafficking patronage is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree sex trafficking patronage is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*. The terms "knowingly," and "recklessly" have the meanings specified in § 22~~A~~E-206~~.~~; ~~T~~the terms ~~"business,"~~ "~~coercion~~ coercive threat" ~~"debt bondage," and~~ "commercial sex act," and "debt bondage," have the meanings specified in § 22~~A~~E -~~1601~~701.

RCC § 22~~A~~E-160~~911~~. Forfeiture.

(a) In imposing sentence on any ~~individual or business~~ person convicted of a violation of this chapter, the court ~~shall~~ may order, in addition to any sentence imposed, that ~~individual or business~~ the person shall forfeit to the District of Columbia:
(1) Any interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of the violation; and
(2) Any property, real or personal, constituting or derived from any proceeds that the ~~individual or business~~ person obtained, directly or indirectly, as a result of the violation.

(b) The following shall be subject to forfeiture to the District of Columbia and no property right shall exist in them:
(1) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter.
(2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

RCC § 22~~A~~E-161~~012~~. Reputation or opinion evidence.

In a criminal case in which a person ~~or business~~ is accused of forced commercial sex, as prohibited by RCC § 22E-1602; trafficking in commercial sex, as prohibited by RCC § 22~~A~~E-160~~64~~; sex trafficking of minors, as prohibited by RCC § 22~~–A~~E-160~~75~~; or benefitting from human trafficking, as prohibited by RCC § 22~~–A~~E-160~~86~~; reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. Evidence of an alleged victim's past sexual behavior other than reputation or opinion

evidence also is not admissible, unless such evidence other than reputation or opinion evidence is admitted in accordance with D.C. Code § 22-3022(b), and is constitutionally required to be admitted.

RCC § 22~~AE~~-161113. Civil action.

(a) An individual who is a victim of an offense prohibited by ~~RCC § 22-AE-1601, RCC § 22-AE-1604, RCC § 22-AE-1605, RCC § 22-AE-1606, RCC § 22-AE-1607, RCC § 22-AE-1608, or RCC § 22-AE-1609~~ RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, and 22E-1608 may bring a civil action in the Superior Court of the District of Columbia. The court may award actual damages, compensatory damages, punitive damages, injunctive relief, and any other appropriate relief. A prevailing plaintiff shall also be awarded attorney's fees and costs. Treble damages shall be awarded on proof of actual damages where a defendant's acts were willful and malicious.

(b) ~~Any statute of limitation imposed for the filing of a civil suit under this section shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a violation of RCC § 22-AE-1603, RCC § 22-AE-1604, RCC § 22-AE-1605, RCC § 22-AE-1606, RCC § 22-AE-1607, RCC § 22-AE-1608, or RCC § 22-AE-1609 or until a minor plaintiff has reached the age of majority, whichever is later.~~ Any action for recovery of damages arising out of an offense in this chapter may not be brought after 5 years from when the victim knew or reasonably should have known, of any act constituting an offense in this chapter, or if the offense occurred while the victim was less than 35 years of age, the date that the victim turns 40, whichever is later.

(c) If a person entitled to sue is imprisoned, insane, or similarly incapacitated at the time the cause of action accrues, so that it is impossible or impracticable for him or her to bring an action, then the time of the incapacity is not part of the time limited for the commencement of the action.

(d) A defendant is estopped to assert a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the filing of the action.

RCC § 22~~AE~~-161202. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.

(a) ~~*Merger*. Multiple convictions for two or more offenses in Chapter 16 arising from the same course of conduct shall merge, in accordance with the rules and procedures established in RCC § 2142 (d)-(e).~~

(b) (a) *Accomplice Liability for Victims of Trafficking*. A person shall not be charged as an accomplice to the commission of an offense under this chapter if, prior to commission of the offense, the person was himself or herself a victim of an offense under this chapter by the principal.

(c) (b) *Conspiracy Liability for Victims of Trafficking*. A person shall not be charged with conspiracy to commit an offense under this chapter if, prior to the conspiracy, the person was himself or herself a victim of an offense under this

chapter by a party to the conspiracy. ~~Any parent, legal guardian, or other person who has assumed the obligations of a parent who requires his or her child under the age of 18 to perform common household chores under threat of typical parental discipline shall not be liable for such conduct under sections 22A-1603, 1022A-1605, and 22A-1609 of this Chapter, provided that the threatened discipline did not include:~~

~~(1) Burning, biting, or cutting;~~
~~(2) Striking with a closed fist;~~
~~(3) Shaking, kicking, or throwing; or~~
~~(4) Interfering with breathing.~~

RCC § 22E-2001. Aggregation to Determine Property Offense Grades.

When a single scheme or systematic course of conduct could give rise to multiple charges of the same offense, the government instead may bring one charge and aggregate the values, amounts of damage, or quantities of the property involved in the scheme or systematic course of conduct to determine the grade of the offense. This rule applies to the following offenses:

(a) RCC § 22E-2101 Theft;
(b) RCC § 22E-2105 Unlawful Creation or Possession of a Recording;
(c) RCC § 22E-2201 Fraud;
(d) RCC § 22E-2202 Payment Card Fraud;
(e) RCC § 22E-2203 Check Fraud;
(f) RCC § 22E-2204 Forgery;
(g) RCC § 22E-2205 Identity Theft;
(h) RCC § 22E-2206 Unlawful Labeling of a Recording;
(i) RCC § 22E-2208 Financial Exploitation of a Vulnerable Adult;
(j) RCC § 22E-2301 Extortion;
(k) RCC § 22E-2401 Possession of Stolen Property;
(l) RCC § 22E-2402 Trafficking of Stolen Property;
(m) RCC § 22E-2403 Alteration of Motor Vehicle Identification Number; and,
(n) RCC § 22E-2503 Criminal Damage to Property.

RCC § 22E-2002. Definition of "Person" for Property Offenses.[125]

Notwithstanding the definition of "person" in D.C. Code § 45-604, in Subtitle III of this Title, "person" means an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity.

RCC § 22E-2101. Theft.

[125] No prior draft RCC statutory language.

(a) ~~*Offense*~~ *First Degree*. A person commits ~~the offense of~~ first degree theft ~~if~~ when that person:

(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;

~~(2) The property of another;~~

(2) Without the consent of an owner; ~~and~~

(3) With intent to deprive ~~that person~~ that owner of the property~~.~~; and

(4) In fact, the property has a value of $250,000 or more.

(b) *Second Degree*. A person commits second degree theft when that person:

(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;

(2) Without the consent of an owner; ~~and~~

(3) With intent to deprive that owner of the property; and

(4) In fact:

(A) The property has a value of $25,000 or more; or

(B) The property is a motor vehicle, and has a value of $25,000 or more.

(c) *Third Degree.* A person commits third degree theft when that person:

(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;

(2) Without the consent of an owner; ~~and~~

(3) With intent to deprive that owner of the property; and

(4) In fact:

(A) The property has a value of $2,500 or more;

(B) The property is a motor vehicle; or

(C) The property is taken from a complainant who:

(i) Holds or carries the property on his or her person; or

(ii) Has the ability and desire to exercise control over the property and it is within his or her immediate physical control.

(d) *Fourth Degree.* A person commits fourth degree theft when that person:

(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;

(2) Without the consent of an owner; ~~and~~

(3) With intent to deprive that owner of the property; and

(4) In fact, the property has a value of $250 or more.

(e) *Fifth Degree.* A person commits fifth degree theft when that person:

(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;

(2) Without the consent of an owner; ~~and~~

(3) With intent to deprive that owner of the property; and

(4) In fact, the property, has any value.

(f) *Exclusions from Liability.* A person shall not be subject to prosecution under this section for conduct constituting a violation of D.C. Code § 35-252, Failure to pay established fare or to present valid transfer.

(g) ~~*Gradations and*~~ *Penalties*.

(1) ~~*Aggravated Theft.* A person is guilty of aggravated theft if the person commits theft and the property, in fact, has a value of $250,000 or more.~~

~~Aggravated~~ First degree theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*First Degree Theft*~~.

~~(A) A person is guilty of first degree theft if the person commits theft and:~~

~~(i) The property, in fact, has a value of $25,000 or more; or~~

~~(ii) The property, in fact: is a motor vehicle, and the value of the motor vehicle is $25,000 or more.~~

~~(B) First~~ Second degree theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Theft.*~~

~~(A) A person is guilty of second degree theft if the person commits theft and:~~

~~(i) The property, in fact, has a value of $2,500 or more; or~~

~~(ii) The property, in fact, is a motor vehicle.~~

~~(B) Second~~ Third degree theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) ~~*Third Degree Theft.*~~

~~(A) A person is guilty of third degree theft if the person commits theft and:~~

~~(i)~~The property, in fact, has a value of $250 or more; or

~~(ii) The property, in fact, is taken from the immediate actual possession of another person.~~

~~(B)~~ ~~Third~~ Fourth degree theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) ~~*Fourth Degree Theft.* A person is guilty of fourth degree theft if the person commits theft and the property, in fact, has any value. Fourth~~ Fifth degree theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Definitions.* ~~The term "possess" has the meaning specified in § 22A-202, t~~The terms "knowingly" and "intent" have the meanings specified in § 22E-206~~,~~; the term "in fact" has the meaning specified in § 22E-207~~,~~; ~~and~~ the terms "consent," "deprive," "motor vehicle," "owner," "property," "property of another," ~~"owner,"~~ and "value" have the meanings specified in § 22E-~~2001~~701.; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2102. Unauthorized Use of Property.

(a) *Offense*. A person commits ~~the offense of~~ unauthorized use of property ~~if~~ when that person:

(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;

~~(2) The property of another;~~

(2) Without the effective consent of ~~the~~ an owner.

(b) *Exclusions from Liability.* A person shall not be subject to prosecution under this section for conduct constituting a violation of D.C. Code § 35-252, Failure to pay established fare or to present valid transfer.

(c) *Penalty.* Unauthorized use of property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* ~~The term "possess" has the meaning specified in § 22A-202, t~~The term "knowingly" has the meaning specified in § 22E-206~~,~~; ~~and~~ the terms "effective consent," ~~"consent,"~~ "property," "property of another," and "owner," have the meanings specified in § 22E-~~2001~~701.; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

(a) Offense. A person commits ~~the offense of~~ unauthorized use of a motor vehicle ~~if~~ when that person:

(1) Knowingly operates ~~or rides as a passenger in~~ a motor vehicle;

~~(2) A motor vehicle;~~

(2) Without the effective consent of an owner.

(b) ~~*Gradations and Penalties*~~ *Penalty*. Unauthorized use of a motor vehicle is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

~~(1) *First Degree Unauthorized Use of a Motor Vehicle*. A person is guilty of first degree unauthorized use of a motor vehicle if the person commits unauthorized use of a motor vehicle by knowingly operating the motor vehicle. First degree unauthorized use of a motor vehicle is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.~~

~~(2) *Second Degree Unauthorized Use of a Motor Vehicle*. A person is guilty of first degree unauthorized use of a motor vehicle if the person commits unauthorized use of a motor vehicle by knowingly operating or riding as a passenger in the motor vehicle. Second degree unauthorized use of a motor vehicle is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.~~

~~*(c) No Multiple Convictions for Unauthorized Use of a Rented or Leased Motor Vehicle or Carjacking*. No person may be convicted of unauthorized use of a motor vehicle and either unauthorized use of a rented or leased motor vehicle, D.C. Code § 22-3215, or carjacking, RCC § 22A-1XXX based on the same act or course of conduct. A person may be found guilty of any combination of these offenses, but only one judgment of conviction may be entered pursuant to the procedural requirements in RCC § 22A-2003(c).~~

(c) Definitions. The term "knowingly" has the meaning specified in RCC § 22E-206~~,~~; ~~and~~ the terms ~~"motor vehicle,"~~ "effective consent," "motor vehicle," ~~"consent,"~~ and "owner," have the meanings specified in RCC § 22E-~~2001~~701.; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2104. Shoplifting.

(a) *Offense*. A person commits ~~the offense of~~ shoplifting ~~if~~ when that person:

(1) Knowingly:

(A) Conceals or ~~takes possession of~~ holds or carries on one's person;

(B) Removes, alters, or transfers the price tag, serial number, or other identification mark that is imprinted on or attached to; or

(C) Transfers from one container or package to another container or package;

(2) Personal property of another that is ~~displayed, held, stored, or offered for sale;~~:

(A) Displayed or offered for sale; or

(B) Held or stored on the premises in reasonably close proximity to the customer sales area, for future display or sale;

(3) With intent to take or make use of the property without complete payment.

(b) ~~*No Attempt Shoplifting Offense*~~ *Exclusion from Attempt Liability*. It is not an offense to attempt to commit the offense described in this section.

(c) *Penalty*. Shoplifting is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Qualified Immunity.* A person who displays, holds, stores, or offers for sale personal property as specified in subsection (a)(2), or an employee or agent of such a person, who detains or causes the arrest of a person in a place where such property is displayed, held, stored, or offered for sale shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest, in any proceeding arising out of such detention or arrest, if:

(1) The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed ~~in that person's presence,~~ an offense described in this section;

(2) The manner of the detention or arrest was reasonable;

(3) Law enforcement authorities were notified ~~within a reasonable time~~ as soon as practicable; and

(4) The person detained or arrested was released ~~within a reasonable time~~ as soon as practicable after the detention or arrest, or was surrendered to law enforcement authorities ~~within a reasonable time~~ as soon as practicable.

(e) *Definitions.* ~~The term "possess" has the meaning specified in § 22A-202, t~~The terms "knowingly" and "intent" have the meanings specified in RCC § 22E-206~~,~~; ~~and~~ the terms "property" and "property of another" have the meanings specified in RCC § 22E-~~2001~~701~~.~~; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

(a) ~~*Offense*~~ *First Degree*. A person commits ~~the offense of~~ first degree unlawful creation or possession of a recording ~~if~~ when that person:

(1) Knowingly makes, obtains, or possesses either~~;~~:

~~(2) Either:~~

(A) A sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972, or

(B) A sound recording or audiovisual recording of a live performance;

(2) Without the effective consent of ~~the~~ an owner;

(3) With intent to sell, rent, or otherwise use the recording for commercial gain or advantage~~.~~; and

(4) In fact, the number of unlawful recordings made, obtained, or possessed was 100 or more.

(b) *Second Degree*. A person commits second degree unlawful creation or possession of a recording when that person:

(1) Knowingly makes, obtains, or possesses either:

(A) A sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972, or

(B) A sound recording or audiovisual recording of a live performance;

(2) Without the effective consent of an owner;

(3) With intent to sell, rent, or otherwise use the recording for commercial gain or advantage; and

(4) In fact, any number of unlawful recordings were made, obtained, or possessed.

~~*Definitions*. In this section:~~

~~(1) "Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any;~~

~~(2) "Sound recording" means a material object in which sounds, other than those accompanying a motion picture or other audiovisual recording, are fixed by any method now known or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device; and~~

~~(3) The term "possess" has the meaning specified in § 22A-202, the terms "knowingly," and "intent," have the meanings specified in § 22A-206, and the terms "property" "property of another," and "owner," have the meanings specified in § 22A-2001.~~

(c) *Exclusions from Liability.* Nothing in this section shall be construed to prohibit:

(1) Copying or other reproduction that is in the manner specifically permitted by Title 17 of the United States Code; or

(2) Copying or other reproduction of a sound recording that is made by a licensed radio or television station or a cable broadcaster solely for broadcast or archival use.

~~(d) *Permissive Inference.* A fact finder may, but is not required to, infer that a person had an intent to sell, rent or otherwise use the recording for commercial gain or advantage if the person possesses 5 or more unlawful recordings either of the same original sound recording or the same live performance.~~

(~~c~~d) ~~*Gradations and*~~ *Penalties*.

(1) ~~*First Degree Unlawful Creation or Possession of a Recording*. A person is guilty of first degree unlawful creation or possession of a recording if the person commits the offense and, in fact, the number of unlawful recordings made, obtained, or possessed was 100 or more.~~ First degree unlawful creation or possession of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree Unlawful Creation or Possession of a Recording*. A person is guilty of second degree unlawful creation or possession of a recording if the person commits the offense and, in fact, any number of unlawful recordings were made, obtained, or possessed.~~ Second degree unlawful creation or possession of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(~~f~~e) *Forfeiture.* Upon conviction under this section, the court may ~~shall~~, in addition to the penalties provided by this section, 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.

(~~g~~f) *Definitions*. The term "possesses" has the meaning specified in RCC § 22E-701; the terms "knowingly," and "intent" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in § 22E-207; the terms "audiovisual recording," "court," "effective consent," "sound recording," and "owner," have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater. [126]

(a) *Offense*. A person commits unlawful operation of a recording device in a motion picture theater when that person:
  (1) Knowingly operates a recording device within a motion picture theater;
  (2) Without the effective consent of an owner of the motion picture theater; and
  (3) With the intent to record a motion picture.

(b) *Penalty*. Unlawful operation of a recording device in a motion picture theater is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Qualified Immunity*. An owner of the motion picture theater specified in subsection (a), or his or her employee or agent, who detains or causes the arrest of a person in, or immediately adjacent to, the motion picture theater, shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest in any proceeding arising out of such detention or arrest, if:
  (1) The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed, or attempted to commit, an offense described in this section;
  (2) The manner of the detention or arrest was reasonable;
  (3) Law enforcement authorities were notified as soon as practicable; and
  (4) The person detained or arrested was released as soon as practicable after the detention or arrest, or was surrendered to law enforcement authorities as soon as practicable.

(d) *Forfeiture.* Upon conviction under this section, the court may, in addition to the penalties provided by this section, 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.

(e) *Definitions.*
  (1) The terms "knowingly," and "intent," have the meanings specified in RCC § 22E-206; the terms "court," "effective consent," and "owner" have the meanings specified in RCC § 22E-701; the term "person" has the meaning specified in RCC § 22E-2002;

[126] No prior draft RCC statutory language.

(2) In this section, "motion picture theater" means a theater, auditorium, or other venue that is being utilized primarily for the exhibition of a motion picture to the public; and
(3) In this section, "recording device" means a photographic or video camera, audio or video recorder, or any other device not existing, or later developed, which may be used for recording sounds or images.

RCC § 22E-2201. Fraud.

(a) ~~*Offense*~~. *First Degree* ~~*Fraud*~~. A person commits ~~the offense of~~ first degree fraud ~~if~~ when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
~~(2) The property of another;~~
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive that ~~person~~ owner of the property~~.~~; and
(4) In fact:
(A) The property, other than labor or services, has a value of $250,000 or more; or
(B) The property is 2080 hours or more of labor or services.

(b) *Second Degree*. A person commits second degree fraud when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive that owner of the property; and
(4) In fact:
(A) The property, other than labor or services, has a value of $25,000 or more; or
(B) The property is 160 hours or more of labor or services.

(c) *Third Degree*. A person commits third degree fraud when that person and either:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive that owner of the property; and
(4) In fact:
(A) The property, other than labor or services, has a value of $2,500 or more; or
(B) The property is 40 hours or more of labor or services.

(d) *Fourth Degree*. A person commits fourth degree fraud when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive that owner of the property; and
(4) In fact:
(A) The property, other than labor or services, has a value of $250 or more; or
(B) The property is 8 hours or more of labor or services.

(e) *Fifth Degree*. A person commits fifth degree fraud when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive that owner of the property; and
(4) In fact, the property has any value.

~~(f) *Definitions*. The terms "intent" and "knowingly," and "intent" have the meanings specified in § 22AE-206,. tThe term "in fact" has the meaning specified in § 22-AE-207. and tThe terms "property," "property of another," "consent," "deception," "deprive," "person," "property," "property of another," "services," and "value" have the meanings specified in § 22AE-2001701.~~

(g) ~~*Gradations and*~~ *Penalties*.

(1) ~~*Aggravated Fraud*. A person is guilty of aggravated fraud if the person commits fraud and the property, in fact, has a value of $250,000 or more.~~ Aggravated fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*First Degree Fraud*. A person is guilty of first degree fraud if the person commits fraud and the property, in fact, has a value of $25,000 or more.~~ First degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Fraud*. A person is guilty of second degree fraud if the person commits fraud and the property, in fact, has a value, of $2,500 or more.~~ Second degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) ~~*Third Degree Fraud*. A person is guilty of third degree fraud if the person commits fraud and the property, in fact, has a value of $250 or more.~~ Third degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) ~~*Fourth Degree Fraud*. A person is guilty of fourth degree fraud if the person commits fraud and the property, in fact, has any value.~~ Fourth degree fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) (g) *Definitions*. The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "consent," "deception," "deprive," "property," "property of another," "services," and "value" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2202. Payment Card Fraud.

(a) ~~*Offense*~~ *First Degree*. A person commits ~~the offense of~~ first degree payment card fraud ~~if~~ when that person:

(1) Knowingly obtains or pays for property by using a payment card:

(A) Without the effective consent of the person to whom the payment card was issued;

(B) After the payment card was revoked or cancelled;

(C) When the payment card was never issued; or

(D) For the employee's or contractor's own purposes, when the payment card was issued to or provided to an employee or contractor for the employer's purposes; and

(2) In fact, the property has a value of $250,000 or more.

(b) *Second Degree*. A person commits second degree payment card fraud when that person:

(1) Knowingly obtains or pays for property by using a payment card:

(A) Without the effective consent of the person to whom the payment card was issued; or

(B) After the payment card was revoked or cancelled; or

(C) When the payment card was never issued; or

(D) For the employee's or contractor's own purposes, when the payment card was issued to or provided to an employee or contractor for the employer's purposes; and

(2) In fact, the property has a value of $25,000 or more.

(c) *Third Degree*. A person commits third degree payment card fraud when that person:

(1) Knowingly obtains or pays for property by using a payment card:

(A) Without the effective consent of the person to whom the payment card was issued; or

(B) After the payment card was revoked or cancelled; or

(C) When the payment card was never issued; or

(D) For the employee's or contractor's own purposes, when the payment card was issued to or provided to an employee or contractor for the employer's purposes; and

(2) In fact, the property has a value of $2,500 or more.

(d) *Fourth Degree.* A person commits fourth degree payment card fraud when that person:

(1) Knowingly obtains or pays for property by using a payment card:

(A) Without the effective consent of the person to whom the payment card was issued; or

(B) After the payment card was revoked or cancelled; or

(C) When the payment card was never issued; or

(D) For the employee's or contractor's own purposes, when the payment card was issued to or provided to an employee or contractor for the employer's purposes; and

(2) In fact, the property has a value of $250 or more.

(e) Fifth Degree. A person commits fifth degree payment card fraud when that person:

(1) Knowingly obtains or pays for property by using a payment card:

(A) Without the effective consent of the person to whom the payment card was issued; or

(B) After the payment card was revoked or cancelled; or

(C) When the payment card was never issued; or

(D) For the employee's or contractor's own purposes, when the payment card was issued to or provided to an employee or contractor for the employer's purposes; and

(2) In fact, the property has any value.

~~(f) *Definitions.* In this section:~~

~~(1) The terms "effective consent," "person," "property," "payment card," "Revoked or canceled" and "value" have the meaning specified in RCC § 22E-701. 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.~~

~~(2) The term "knowingly" has the meaning specified in RCC § 22AE-206, the term "in fact" has the meaning specified in § 22AE-207, and the terms "payment card," and "property" have the meanings specified in §22A-2001.~~

(g) *[Jurisdiction.* An offense under this section shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:

(1) The person to whom a payment card was issued or in whose name the payment card was issued is a resident of, or located in, the District of Columbia

(2) The person who was the target of the offense 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; or

(4) Any part of the offense takes place in the District of Columbia.]

(h) ~~*Gradations and*~~ *Penalties*.

(1) ~~*Aggravated Payment Card Fraud.* A person is guilty of aggravated payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $250,000 or more.~~ ~~Aggravated~~ First degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*First Degree Payment Card Fraud.* A person is guilty of first degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $25,000 or more.~~ ~~First~~ Second degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Payment Card Fraud* . A person is guilty of second degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $2,500 or more.~~ ~~Second~~ Third degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4)~~*Third Degree Payment Card Fraud* . A person is guilty of third degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has a value of $250 or more.~~ ~~Third~~ Fourth degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) ~~*Fourth Degree Payment Card Fraud* . A person is guilty of fourth degree payment card fraud if the person commits payment card fraud and obtains or pays for property that, in fact, has any value.~~ ~~Fourth~~ Fifth degree payment card fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

~~(i) *Jurisdiction.* An offense under this section shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:~~

~~(1) The person to whom a payment card was issued or in whose name the payment card was issued is a resident of, or located in, the District of Columbia;~~

~~(2) The person who was the target of the offense 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; or~~

~~(4) Any part of the offense takes place in the District of Columbia.~~

(j) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206. The term "in fact" has the meaning specified in RCC § 22E-207; the terms "effective consent," "property," "payment card," "revoked or canceled" and "value" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2203. Check Fraud.

(a) ~~*Offense*~~ *First Degree* ~~*Check Fraud*~~. A person commits ~~the offense of~~ first degree check fraud ~~if~~ when that person:

(1) Knowingly obtains or pays for property by using a check;

(2) ~~By using a check;~~ With intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon; and

(3) ~~Which will not be honored in full upon its presentation to the bank or depository institution drawn upon.~~ The amount of loss to the check holder is, in fact, $2,500 or more.

(b) *Second Degree*. A person commits second degree check when that person:

(1) Knowingly pays for property by using a check;

(2) With intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon; and

(3) The amount of loss to the check holder is, in fact, any amount.

~~(c) *Permissive Inference.* Unless the check is postdated, a fact finder may, but is not required to, infer that subsection (a)(3) is satisfied if:~~

~~(1) The person who obtained or paid for property;~~

~~(2) Failed to repay the amount not honored by the bank or depository institution and any associated fees;~~

~~(3) To the holder of the check;~~

~~(4) Within 10 days of receiving notice in person or writing that the check was not paid by the financial institution.~~

~~(d) *Definitions.* In this section:~~

~~(1) "Credit" means an arrangement or understanding, express or implied, with the bank or depository institution for the payment of such check.~~

~~(2) The terms "knowingly," and "intent" have the meanings specified in § 22AE-206, the term "in fact" has the meaning specified in § 22AE-207, and the terms "property," "check," and "credit," and "value" have the meanings specified in §22A-2001 22E-701.~~

(e) ~~*Gradations and*~~ *Penalties*.

(1) ~~*First Degree Check Fraud*.~~ ~~A person is guilty of first degree check fraud if the person commits check fraud and, in fact: the amount of the loss to the check holder is $2,500 or more.~~ First degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree Check Fraud*.~~ ~~A person is guilty of second degree check fraud if the person commits check fraud and, in fact: the amount of the loss to the check holder is any amount.~~ Second degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*. The terms "intent," and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "check," and "property" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2204. Forgery.

(a) ~~*Offense*~~ *First Degree*. A person commits ~~the offense of~~ first degree forgery ~~if~~ when that person:

(1) Commits third degree forgery; and

(2) The written instrument appears to be, in fact:

(A) A stock certificate, bond, or other instrument representing an interest in or claim against a corporation or other organization of its property;

(B) A public record, or instrument filed in a public office or with a public servant;

(C) A written instrument officially issued or created by a public office, public servant, or government instrumentality;

(D) A deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or

(E) A written instrument having a value of [$25,000 or more].

(b) *Second Degree*. A person commits second degree forgery when that person:

(1) Commits third degree forgery; and

(2) The written instrument appears to be, in fact:

(A) A token, fare card, public transportation transfer certificate, or other article manufactured for use as a symbol of value in place of money for the purchase of property or services;

(B) A prescription of a duly licensed physician or other person authorized to issue the same for any controlled substance or other instrument or devices used in the taking or administering of controlled substances for which a prescription is required by law; or

(C) A written instrument having a value of [$2,500 or more].

(c) *Third Degree*. A person commits third degree forgery when that person:

(1) Knowingly does any of the following:

(A) ~~Knowingly~~ alters a written instrument without authorization, and the written instrument is reasonably adapted to deceive a person into believing it is genuine;

(i) ~~A written instrument~~

(ii) ~~Without authorization; and~~

(iii) ~~The written instrument is reasonably adapted to deceive a person into believing it is genuine; or~~

(B) ~~Knowingly~~ makes or completes a written instrument

(i) ~~A written instrument; t~~That appears to be:

(ii) ~~That appears:~~

(I) To be the act of another who did not authorize that act, or

(II) To have been made or completed at a time or place or in a numbered sequence other than was in fact the case, or

(III) To be a copy of an original when no such original existed; and

(iii) (ii) The written instrument is reasonably adapted to deceive a person into believing the written instrument is genuine; or

(C) ~~Knowingly~~ ~~t~~Transmits or otherwise uses a written instrument that was made, signed, or altered in a manner specified in subparagraphs (c)(1)(A) or (c)(1)(B);

(i) ~~A written instrument;~~

(ii) ~~That was made, signed, or altered in a manner specified in subsections (a)(1) or (a)(2); (c)(1) or (c)(2);~~

(2) With intent to:

(A) Obtain property of another by deception; or

(B) Harm another person.

~~(d) *Definitions*. The terms "knowingly," and "intent" having the meanings specified in § 22AE-206, the term "in fact" has the meaning specified in 22AE-207, and the~~ The terms "deception," "property," "property of another," and "value" ~~have the meanings specified in §22A-2001~~ have the meaning specified in § 22E-701.

(e) ~~*Gradations and*~~ *Penalties.*

(1) ~~*First Degree Forgery.*~~ First degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

~~(A) A person is guilty of first degree forgery if the person commits forgery and the written instrument appears to be, in fact:~~

~~(i) A stock certificate, bond, or other instrument representing an interest in or claim against a corporation or other organization of its property;~~

~~(ii) A public record, or instrument filed in a public office or with a public servant;~~

~~(iii) A written instrument officially issued or created by a public office, public servant, or government instrumentality;~~

~~(iv) A deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or~~

~~(v) A written instrument having a value of [$10,000 or more].~~

~~(B) First degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.~~

~~(2) *Second Degree Forgery.*~~ Second degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

~~(A) A person is guilty of second degree forgery if the person commits forgery and the written instrument appears to be, in fact:~~

~~(i) A token, fare card, public transportation transfer certificate, or other article manufactured for use as a symbol of value in place of money for the purchase of property or services;~~

~~(ii) A prescription of a duly licensed physician or other person authorized to issue the same for any controlled substance or other instrument or devices used in the taking or administering of controlled substances for which a prescription is required by law; or~~

~~(iii) A written instrument having a value of [$1,000 or more].~~

~~(B) Second degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.~~

(3) ~~*Third Degree Forgery.* A person is guilty of third degree forgery if the person commits forgery of any written instrument.~~ Third degree forgery is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*. The terms "intent," and "knowingly" having the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "deception," "property," "property of another," "value," and "written instrument" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2205. Identity Theft.

(a) ~~*Offense*~~ *First Degree*. A person commits ~~the offense of~~ identity theft ~~if~~ when that person:

(1) Commits fifth degree identity theft; and

(2) 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 $250,000 or more.

(b) *Second Degree*. A person commits second degree identity theft when that person:

(1) Commits fifth degree identity theft; and

(2) 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 $25,000 or more.

(c) *Third Degree*. A person commits third degree identity theft when that person:
(1) Commits fifth degree identity theft; and
(2) 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 $2,500 or more.

(d) *Fourth Degree*. A person commits fourth degree identity theft when that person:
(1) Commits fifth degree identity theft; and
(2) 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 $250 or more.

(e) *Fifth Degree*. A person commits fifth degree identity theft when that person:
(1) Knowingly creates, possesses, or uses personal identifying information belonging to or pertaining to another person;
~~(2) Personal identifying information belonging to or pertaining to another person;~~
(3) Without that other person's effective consent; and
(4) With intent to use the personal identifying information to:
(A) Obtain property of another by deception;
(B) Avoid payment due for any property, fines, or fees by deception; or
(C) 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.

(f) *Definitions.*
~~(1) In this section, the term "identifying information" shall include, but is not limited to, the following:~~
~~(A) Name, address, telephone number, date of birth, or mother's maiden name;~~
~~(B) Driver's license or driver's license number, or non-driver's license or non-driver's license number;~~
~~(C) Savings, checking, or other financial account number;~~
~~(D) Social security number or tax identification number;~~
~~(E) Passport or passport number;~~
~~(F) Citizenship status, visa, or alien registration card or number;~~
~~(G) Birth certificate or a facsimile of a birth certificate;~~
~~(H) Credit or debit card, or credit or debit card number;~~
~~(I) Credit history or credit rating;~~
~~(J) Signature;~~
~~(K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information;~~
~~(L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;~~
~~(M) Place of employment, employment history, or employee identification number; and~~

~~(N) Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property.~~

~~(2) The term "possess" has the meaning specified in § 22AE-202, the terms "knowingly," and "intent" have the meanings specified in § 22AE-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "consent," "deception," "financial injury," "identifying information," "property," "property of another," and "value." have the meanings specified in § 22A-2001 22E-701.~~

(g) ~~*Gradations and*~~ *Penalties.*

(1) ~~*Aggravated Identity Theft*~~. ~~A person is guilty of aggravated identity theft if the person commits identity theft and 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 $250,000 or more.~~ ~~Aggravated~~ First degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*First Degree Identity Theft.*~~ ~~A person is guilty of first degree identity theft if the person commits identity theft and 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 $25,000 or more.~~ ~~First~~ Second degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Identity Theft.*~~ ~~A person is guilty of second degree identity theft if the person commits identity theft and 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 $2,500 or more.~~ ~~Second~~ Third degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) ~~*Third Degree Identity Theft.*~~ ~~A person is guilty of third degree identity theft if the person commits identity theft and 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 $250 or more.~~ ~~Third~~ Fourth degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) ~~*Fourth Degree Identity Theft.*~~ ~~A person is guilty of fourth degree identity theft if the person commits identity theft and 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 of any amount.~~ ~~Fourth~~ Fifth degree identity theft is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Unit of Prosecution and Calculation of Time to Commence Prosecution of Offense.* Creating, possessing, or using a person's personal identifying information in violation of this section shall constitute a single course of conduct for purposes of determining the applicable period of limitation under D.C. Code § 23-113(b). The applicable time limitation under § 23-113 shall not begin to run until after the day after the course of conduct has been completed, or the victim

knows, or reasonably should have known, of the identity theft, whichever occurs earlier.

(i) *[Jurisdiction.* The offense of identity theft shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:

(1) The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia; or

(2) Any part of the offense takes place in the District of Columbia.]

(j) *Police reports*. The Metropolitan Police Department shall make a report of each complaint of identity theft and provide the complainant with a copy of the report.

(k) *Definitions*. The terms "intent," and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "consent," "deception," "effective consent," "financial injury," "personal identifying information," "possess," "property," "property of another," and "value." have the meanings specified in § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2206. Identity Theft Civil Provisions.

(a) When a person is convicted, adjudicated delinquent, or found not guilty by reason of insanity of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of RCC § 22E-2206.

(b) In all other cases, a person who alleges that he or she is a victim of identity theft may petition the court for an expedited judicial determination that a District of Columbia public record contains false information as a result of a violation of RCC § 22E-2206. Upon a finding of clear and convincing evidence that the person was a victim of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of RCC § 22E-2206.

(c) Notwithstanding any other provision of law, District of Columbia agencies shall comply with orders issued under subsection (a) of this section within 30 days of issuance of the order.

(d) For the purposes of this section, the term "District of Columbia public record" means any document, book, photographic image, electronic data recording, paper, sound recording, or other material, regardless of physical form or characteristic, made or received pursuant to law or in connection with the transaction of public business by any officer or employee of the District of Columbia.

RCC § 22E-2207. Unlawful Labeling of a Recording.

(a) *First Degree.* A person commits ~~the offense of~~ first degree unlawful labeling of a recording ~~if~~ when that person:

(1) Knowingly possesses sound recordings or audiovisual recordings that, in fact number 100 or more, and that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets;

(2) ~~A sound recording or audiovisual recording~~;

~~(3) That does not clearly and conspicuously disclose the true name and address of the manufacturer on its label, cover, or jacket;~~

(4) With intent to sell or rent the sound recordings or audiovisual recordings.

(b) *Second Degree.* A person commits second degree unlawful labeling of a recording when that person:

(1) Knowingly possesses one or more sound recordings or audiovisual recordings that does not clearly and conspicuously disclose the true name and address of the manufacturer on its label, cover, or jacket;

(2) With intent to sell or rent the sound recordings or audiovisual recordings.

(c) *Exclusions from Liability.* Nothing in this section shall be construed to prohibit:

(1) Any broadcaster who, in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation, transfers any sounds or images recorded on a sound recording or audiovisual work; or

(2) Any person who, in his own home, for his own personal use, transfers any sounds or images recorded on a sound recording or audiovisual work.

(d) ~~*Definitions.* In this section:~~

~~(1) "Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any;~~

~~(2) "Sound recording" means a material object in which sounds, other than those accompanying a motion picture or other audiovisual recording, are fixed by any method now known or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device; and~~

~~(3) "Manufacturer" means the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording.~~

~~(4) The term "possess" has the meaning specified in § 22E-202. The terms "knowingly," and "intent" have the meanings specified in § 22A-206 22E-206. tThe term "in fact" has the meaning specified in § 22A-207 22E-207, and the term "possess" has the meaning specified in § 22A-202.~~

(e) ~~*Exclusion from Liability.* Nothing in this section shall be construed to prohibit:~~

~~(1) Any broadcaster who, in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation, transfers any sounds or images recorded on a sound recording or audiovisual work; or~~

~~(2) Any person who, in his own home, for his own personal use, transfers any sounds or images recorded on a sound recording or audiovisual work.~~

(f) ~~*Permissive Inference.* A fact finder may, but is not required to, infer that a person had an intent to sell, rent, or otherwise use the recording commercial advantage if~~

~~the person possesses 5 or more recordings of the same sound or audiovisual material that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets.~~

(g) ~~*Gradations and*~~ *Penalties*.

(1) ~~*First Degree Unlawful Labeling of a Recording*.~~ ~~A person is guilty of first degree unlawful labeling of a sound and audiovisual recording if the person commits the offense by possessing, in fact, 100 or more recordings.~~ First degree unlawful labeling of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree Unlawful Labeling of a Recording*.~~ ~~A person is guilty of second degree unlawful labeling of a recording if the person commits the offense by possessing, in fact, any number of recordings.~~ Second degree unlawful labeling of a recording is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) (e) *Forfeiture.* Upon conviction under this section, the court may, in addition to the penalties provided by this section, 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.

(i) (f) *Definitions*.

(1) The terms "intent" and "knowingly" have the meanings specified in § 22E-206; the term "in fact" has the meaning specified in § 22E-207; the terms "audiovisual recording," "possess," and "sound recording" have the meanings specified in § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

(2) The term "manufacturer" as used in this section means the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording.

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

(a) *First Degree*. A person ~~is guilty of~~ commits first degree financial exploitation of a vulnerable adult or elderly person ~~if~~ when that person:

(1) Commits fifth degree financial exploitation of a vulnerable adult or elderly person, and

(2) The value of the property or of the amount of the financial injury, whichever is greater, in fact, is $250,000 or more

(b) *Second Degree*. A person commits second degree financial exploitation of a vulnerable adult or elderly person when that person:

(1) Commits fifth degree financial exploitation of a vulnerable adult or elderly person, and

(2) The value of the property or of the amount of the financial injury, whichever is greater, in fact, is $25,000 or more

(c) *Third Degree*. A person commits third degree financial exploitation of a vulnerable adult or elderly person when that person:

(1) Commits fifth degree financial exploitation of a vulnerable adult or elderly person, and

(2) The value of the property or of the amount of the financial injury, whichever is greater, in fact, is $2,500 or more

(d) *Fourth Degree*. A person commits fourth degree financial exploitation of a vulnerable adult or elderly person when that person:

(1) Commits fifth degree financial exploitation of a vulnerable adult or elderly person, and

(2) The value of the property or of the amount of the financial injury, whichever is greater, in fact, is $250 or more

(e) *Fifth Degree*. A person commits fifth degree financial exploitation of a vulnerable adult or elderly person when that person:

(1) Knowingly takes, obtains, transfers, or exercises control over property of another;

~~(A) Takes, obtains, transfers, or exercises control over;~~

~~(B) Property of another;~~

(C) With consent of an owner obtained by undue influence;

~~(D) Who is a vulnerable adult or elderly person;~~

~~(E) The consent being obtained by undue influence;~~

(F) With recklessness as to the fact that the owner is a vulnerable adult or elderly person; and

(G) With intent to deprive ~~that person~~ an owner of the property; or

(2) Commits theft, extortion, forgery, fraud, or identity theft ~~knowing~~ with recklessness that the victim ~~to be~~ is a vulnerable adult or elderly person.

~~(f) *Definitions.* In this section:~~

~~(1) The terms "knowingly," and "intent" have the meanings specified in § 22A-206 22E-206,. tThe term "in fact" has the meaning specified in § 22A-207 22E-207,. and the terms "property," "property of another," "coercion," "consent," "deprive," "elderly person," "financial injury," "property," "property of another," "value," and "vulnerable adult," "elderly person," and "value" have the meanings specified in §22A-2001 § 22E-701.~~

~~(2) The term "undue influence" means 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.~~

(g) ~~*Gradations and*~~ *Penalties.*

(1) ~~*Aggravated Financial Exploitation of a Vulnerable Adult or Elderly Person.* A person is guilty of aggravated financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or of the amount of the financial injury, whichever is greater, in fact, is $250,000 or more. Aggravated~~ First degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*First Degree Financial Exploitation of a Vulnerable Adult or Elderly Person.* A person is guilty of first degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is $25,000 or more.~~ ~~First~~ Second degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Financial Exploitation of a Vulnerable Adult or Elderly Person.* A person is guilty of second degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is $2,500 or more.~~ ~~Second~~ Third degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) ~~*Third Degree Financial Exploitation of a Vulnerable Adult or Elderly Person.* A person is guilty of third degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is $250 or more.~~ ~~Third~~ Fourth degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) ~~*Fourth Degree Financial Exploitation of a Vulnerable Adult or Elderly Person.* A person is guilty of fourth degree financial exploitation of a vulnerable adult or elderly person if the person commits financial exploitation of a vulnerable adult or elderly person and the value of the property or the amount of the financial injury, whichever is greater, in fact, is of any amount.~~ ~~Fourth~~ Fifth degree financial exploitation of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Restitution.* In addition to the penalties set forth in ~~paragraphs (c)(1)-(5)~~ subsection (g) of this section, a person shall make restitution, before the payment of any fines or civil penalties.

(i) *Definitions.*

(1) The terms "intent," "knowingly," and "reckless" have the meanings specified in § 22E-206; the term "in fact" has the meaning specified in § 22E-207; the terms "coercion," "consent," "deprive," "elderly person," "financial injury," "owner," "property," "property of another," "value," and "vulnerable adult," have the meanings specified in § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

(2) The term "undue influence" means: 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.

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions.

(a) *Additional Civil Penalties.* In addition to other penalties provided by law, a person who violates § ~~22A-2207~~ 22E-2208 shall be subject to the following civil penalties:
  (1) A fine of up to $5,000 per violation;
  (2) Revocation of all permits, certificates, or licenses issued by the District of Columbia authorizing the person to provide services to vulnerable adults or elderly persons; and
  (3) A temporary or permanent injunction.
  (4) Restitution under § ~~22A-2207~~ 22E-2208 shall be paid before the payment of any fines or civil penalties under this section.

(b) *Petition for Injunctive Relief and Protections.* Whenever the Attorney General or the United States Attorney has reason to believe that a person has engaged in financial exploitation of a vulnerable adult or elderly person in violation of Section § ~~22A-2207~~ 22E-2208, the Attorney General or the United States Attorney may petition the court, which may be by ex-parte motion and without notice to the person, for one or more of the following:
  (1) A temporary restraining order;
  (2) A temporary injunction;
  (3) An order temporarily freezing the person's assets; or
  (4) Any other relief the court deems just.

(c) *Standard for Court Review of Petition.* The court may grant an ex-parte motion authorized by subsection (b) of this section without notice to the person against whom the injunction or order is sought if the court finds that facts offered in support of the motion establish that:
  (1) There is a substantial likelihood that the person committed financial exploitation of a vulnerable adult or elderly person;
  (2) The harm that may result from the injunction or order is clearly outweighed by the risk of harm to the vulnerable adult or elderly person if the inunction or order is not issued; and
  (3) If the Attorney General or the United States Attorney has petitioned for an order temporarily freezing assets, the order is necessary to prevent dissipation of assets obtained in violation of § ~~22A-2207~~ 22E-2208.

(d) *Effect of Order to Temporarily Freeze Assets.* (1) An order temporarily freezing assets without notice to the person pursuant to subsections (b)(3) and (c) of this section shall expire on a date set by the court, not later than 14 days after the court issues the order unless, before that time, the court extends the order for good cause shown.

(2) A person whose assets were temporarily frozen under paragraph (1) of this subsection may move to dissolve or modify the order after notice to the Attorney

General for the United States Attorney. The court shall hear and decide the motion or application on an expedited basis.

(e) *Appointment of Receiver or Conservator.* The court may issue an order temporarily freezing the assets of the vulnerable adult or elderly person to prevent dissipation of assets; provided, that the court also appoints a receiver or conservator for those assets. The order shall allow for the use of assets to continue care for the vulnerable adult or elderly person, and can only be issued upon a showing that a temporary injunction or temporary restraining order authorized by this section would be insufficient to safeguard the assets, or with the consent of the vulnerable adult or elderly person or his or her legal representative.

RCC § 22E-2301. Extortion.

(a) ~~*Offense*~~ *First Degree.* A person commits ~~the offense of~~ first degree extortion ~~if~~ when that person:
- (1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
- ~~(2) The property of another;~~
- (3) With the consent of ~~the~~ an owner;
- (4) The consent being obtained by ~~coercion~~ coercive threat; and
- (5) With intent to deprive that ~~person~~ owner of the property~~.~~; and
- (6) The property, in fact, has a value of more than $250,000.

(b) *Second Degree.* A person commits second degree extortion when that person:
- (1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
- (2) With the consent of an owner;
- (3) The consent being obtained by coercive threat;
- (4) With intent to deprive that owner of the property; and
- (5) The property, in fact, has a value of more than $25,000.

(c) *Third Degree.* A person commits third degree extortion when that person:
- (1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
- (2) With the consent of an owner;
- (3) The consent being obtained by coercive threat;
- (4) With intent to deprive that owner of the property; and
- (5) The property, in fact, has a value of more than $2,500.

(d) *Fourth Degree.* A person commits fourth degree extortion when that person:
- (1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
- (2) With the consent of an owner;
- (3) The consent being obtained by coercive threat;
- (4) With intent to deprive that owner of the property; and
- (5) The property, in fact, has a value of more than $250.

(e) *Fifth Degree.* A person commits fifth degree extortion when that person:
- (1) Knowingly takes, obtains, transfers, or exercises control over the property of another;

(2) With the consent of an owner;
(3) The consent being obtained by coercive threat;
(4) With intent to deprive that owner of the property; and
(5) The property, in fact, has any value.

(f) ~~*Definitions.* The terms "knowingly," and "intent," have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the terms "property," "property of another," "consent," "coercion," "deprive," and "value" have the meanings specified in § 22A-2001.~~

(g) ~~*Gradations and*~~ *Penalties*.

(1) ~~*Aggravated Extortion.* A person is guilty of aggravated extortion if the person commits extortion and the property, in fact, has a value of $250,000 or more.~~ ~~Aggravated~~ First degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*First Degree Extortion.* A person is guilty of first degree extortion if the person commits extortion and the property, in fact, has a value of $25,000 or more.~~ ~~First~~ Second degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Extortion.* A person is guilty of second degree extortion if the person commits extortion and the property, in fact, has a value of $2,500 or more.~~ ~~Second~~ Third degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) ~~*Third Degree Extortion.* A person is guilty of third degree extortion if the person commits extortion and the property, in fact, has a value of $250 or more.~~ ~~Third~~ Fourth degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) ~~*Fourth Degree Extortion.* A person is guilty of fourth degree extortion if the person commits extortion and the property, in fact, has any value.~~ ~~Fourth~~ Fifth degree extortion is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Definitions.* The terms "knowingly," and "intent," have the meanings specified in § 22E-206; the term "in fact" has the meaning specified in § 22E-207; the terms "consent," "coercive threat," "deprive," "property," "property of another," and "value" have the meanings specified in § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2401. Possession of Stolen Property.

(a) ~~*Offense*~~ *First Degree*. A person commits ~~the offense of receiving~~ first degree possession of stolen property ~~if~~ when that person:

(1) Knowingly buys or possesses property;
(2) ~~Property~~;
(3) With intent that the property be stolen; ~~and~~
(4) With intent to deprive an owner of the property; and
(5) The property, in fact, has a value of $250,000 or more.

(b) *Second Degree.* A person commits second degree possession of stolen property when that person:

(1) Knowingly buys or possesses property;

(2) With intent that the property be stolen;

(3) With intent to deprive an owner of the property; and

(4) The property, in fact, has a value of $25,000 or more.

(c) *Third Degree.* A person commits third degree possession of stolen property when that person:

(1) Knowingly buys or possesses property;

(2) With intent that the property be stolen;

(3) With intent to deprive an owner of the property; and

(4) The property, in fact, has a value of $2,500 or more.

(d) *Fourth Degree.* A person commits fourth degree possession of stolen property when that person:

(1) Knowingly buys or possesses property;

(2) With intent that the property be stolen;

(3) With intent to deprive an owner of the property; and

(4) The property, in fact, has a value of $250 or more.

(e) *Fifth Degree.* A person commits fifth degree possession of stolen property when that person:

(1) Knowingly buys or possesses property;

(2) With intent that the property be stolen;

(3) With intent to deprive an owner of the property.

~~(f) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, the term "possess" has the meaning specified in § 22A-202, and the terms "property" and "deprive" have the meaning specified in §22A-2001.~~

(g) ~~*Gradations and*~~ *Penalties*.

(1) ~~*Aggravated Possession of Stolen Property.* A person is guilty of aggravated possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value of $250,000 or more. Aggravated~~ First degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*First Degree Possession of Stolen Property.* A person is guilty of first degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value, of $25,000 or more.~~ Second degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Possession of Stolen Property.* A person is guilty of second degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value, of $2,500 or more. Second~~ Third degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) ~~*Third Degree Possession of Stolen Property.* A person is guilty of third degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has a value of $250 or more.~~ ~~Third~~ Fourth degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) ~~*Fourth Degree Possession of Stolen Property*. A person is guilty of fourth degree possession of stolen property if the person commits possession of stolen property and the property, in fact, has any value. Fourth~~ Fifth degree possession of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(i) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "deprive," "person," "possess," "property," and "value" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2402. Trafficking of Stolen Property.

(a) ~~*Offense*~~*First Degree*. A person commits ~~the offense of~~ first degree trafficking of stolen property ~~if~~ when that person:

(1) Knowingly buys or possesses property on two or more separate occasions;

(2) ~~Property~~;

~~(3) On two or more separate occasions;~~

(4) With intent that the property be stolen; ~~and~~

(5) With intent to sell, pledge as consideration, or trade the property~~.~~; and

(6) The property, in fact, has a value of $250,000 or more.

(b) *Second Degree.* A person commits second degree trafficking of stolen property when that person:

(1) Knowingly buys or possesses property on two or more separate occasions;

(2) With intent that the property be stolen;

(3) With intent to sell, pledge as consideration, or trade the property; and

(4) The property, in fact, has a value of $25,000 or more.

(c) *Third Degree.* A person commits third degree trafficking of stolen property when that person:

(1) Knowingly buys or possesses property on two or more separate occasions;

(2) With intent that the property be stolen;

(3) With intent to sell, pledge as consideration, or trade the property; and

(4) The property, in fact, has a value of $2,500 or more.

(d) *Fourth Degree.* A person commits fourth degree trafficking of stolen property when that person:

(1) Knowingly buys or possesses property on two or more separate occasions;

(2) With intent that the property be stolen;

(3) With intent to sell, pledge as consideration, or trade the property; and

(4) The property, in fact, has a value of $250 or more.

(e) *Fifth Degree.* A person commits fifth degree trafficking of stolen property when that person:

(1) Knowingly buys or possesses property on two or more separate occasions;

(2) With intent that the property be stolen;

(3) With intent to sell, pledge as consideration, or trade the property.

~~(f) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, the term "possess" has the meaning specified in § 22A-202, and the term "property" has the meaning specified in §22A-2001.~~

(g) ~~*Gradations and*~~ *Penalties.*

(1) ~~*Aggravated Trafficking of Stolen Property.* A person is guilty of aggravated trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $250,000 or more.~~ ~~Aggravated~~ First degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*First Degree Trafficking of Stolen Property.* A person is guilty of first degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $25,000 or more.~~ ~~Third~~ Second degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Trafficking of Stolen Property.* A person is guilty of second degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $2,500 or more.~~ ~~Second~~ Third degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) ~~*Third Degree Trafficking of Stolen Property.* A person is guilty of third degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has a value of $250 or more.~~ ~~Third~~ Fourth degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) ~~*Fourth Degree Trafficking of Stolen Property.* A person is guilty of fourth degree trafficking of stolen property if the person commits trafficking of stolen property and the property, in fact, has any value.~~ ~~Fourth~~ Fifth degree trafficking of stolen property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Definitions.* The terms and "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "possess," "property," and "value" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2403. Alteration of a Motor Vehicle Identification Number.

(a) *First Degree.* A person commits ~~the offense of~~ first degree ~~altering~~ alteration of a vehicle identification number ~~if~~ when that person:

(1) Knowingly alters an identification number of a motor vehicle or motor vehicle part;

~~(2) An identification number;~~

~~(3) Of a motor vehicle or motor vehicle part;~~

(4) With intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part~~.~~;

(5) And the value of such motor vehicle or motor vehicle part, in fact, is $2,500 or more.

(b) *Second Degree.* A person commits second degree alteration of a vehicle identification number when that person:

(1) Knowingly alters an identification number of a motor vehicle or motor vehicle part;

(2) With intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part.

~~(c) *Definitions.* In this section, "identification number" 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. The terms "knowingly," and "intent" have the meanings specified in § 22A-206, the term "in fact" has the meaning specified in § 22A-207, and the term "motor vehicle" has the meaning specified in § 22A-2001.~~

(d) ~~*Gradations and*~~ *Penalties*.

(1) ~~*First Degree Alteration of a Vehicle Identification Number.* A person is guilty of first degree altering a vehicle identification number if the person commits the offense and the value of the motor vehicle or motor vehicle part, in fact, is $1,000 or more.~~ First degree ~~altering~~ alteration of a vehicle identification number is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree Alteration of a Vehicle Identification Number.* A person is guilty of second degree altering a vehicle identification number if the person commits the offense and the value of the motor vehicle or motor vehicle part, in fact, has any value.~~ Second degree ~~altering~~ alteration of a vehicle identification number is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The terms "intent," and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "identification number," "motor vehicle," and "value" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2404. Alteration of Bicycle Identification Number.

(a) *Offense.* A person commits ~~the offense of~~ ~~altering~~ alteration of a bicycle identification numbers ~~if~~ when that person:

(1) Knowingly alters an identification number of a bicycle or bicycle part;
~~(2) An identification number;~~
~~(3) Of a bicycle or bicycle part;~~
(4) With intent to conceal or misrepresent the identity of the bicycle or bicycle part.

~~(b) *Definitions.* The terms "knowingly," and "intent" have the meanings specified in § 22A-206. Definitions for the terms "bicycle" and "identification number" are provided in section D.C. Code § 50-1609.~~

~~(c)~~ (b) *Penalty*. Alteration of a bicycle identification number is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(a) (c) *Definitions.*

(1) The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "person" has the meaning specified in RCC § 22E-2002; and
(2) In this section, the terms "bicycle" and "identification number" have the meanings provided in section D.C. Code § 50-1609.

RCC § 22E-2501. Arson.

(a) ~~*Offense*~~ *First Degree*. A person commits ~~the offense of~~ first degree arson ~~if~~ when that person:

(1) Knowingly starts a fire or causes an explosion that damages or destroys a dwelling or building;
~~(2) That damages or destroys;~~
~~(3) A dwelling, building, business yard, watercraft, or motor vehicle.;~~
(2) Reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building; and
(3) The fire or explosion, in fact, causes death or serious bodily injury to any person
who is not a participant in the crime.

(b) *Second Degree*. A person commits second degree arson when that person:

(1) Knowingly starts a fire or causes an explosion that damages or destroys a dwelling or building;
(2) Reckless as to the fact that the fact that a person who is not a participant in the crime is present in the dwelling or building.

(c) *Third Degree*. A person commits third degree arson when that person knowingly starts a fire or causes an explosion that damages or destroys a dwelling or building.

(d) *Affirmative Defense.* It is an affirmative defense to the commission of ~~second~~ third degree arson, ~~that~~ which the ~~defendant~~ actor must prove by a preponderance of the evidence, that ~~he or she~~ the actor had a valid blasting permit issued by the District Of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.

(e) ~~*Gradations and*~~ *Penalties.*

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

~~*Aggravated Arson.*~~

~~(A) A person is guilty of aggravated arson if that person commits arson:~~

~~(i) Of what the person knows to be a dwelling or building;~~

~~(ii) Reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building; and~~

~~(iii) The fire or explosion, in fact, causes death or serious bodily injury to any person who is not a participant in the crime.~~

~~(B) Aggravated arson is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.~~

(2) ~~*First Degree Arson.*~~

~~(A) A person is guilty of first degree arson if that person commits arson:~~

~~(i) Of what the person knows to be a dwelling or building; and is~~

~~(ii) Reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building.~~

~~(B)~~ ~~First~~ Second degree arson is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Arson.* A person is guilty of second degree arson if that person commits arson.~~ ~~Second~~ Third degree arson is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The terms "knowingly" and "reckless~~ly~~" have the meanings specified in § 22E-206~~;~~; the term "in fact" has the meaning specified in RCC § 22E-207~~;~~; the terms "actor," "building," "dwelling," and "serious bodily injury" have the meanings specified in RCC § 22E-701 ~~"dwelling," "building," "business yard," and "motor vehicle," have the meanings specified in § 22A-2001, and the term "serious bodily injury" has the meaning specified in §22A-XXXX.~~; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2502. Reckless Burning.

(a) *Offense.* A person commits ~~the offense of~~ reckless burning ~~if~~ when that person:

(1) Knowingly starts a fire or causes an explosion;

(2) With recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building.~~;~~

~~(3) A dwelling, building, business yard, watercraft, or motor vehicle.~~

(b) *Affirmative Defense.* It is an affirmative defense to the commission of reckless burning, ~~that~~ which the ~~defendant~~ actor must prove by a preponderance of the evidence, that ~~he or she~~ the actor had a valid blasting permit issued by the District Of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.

(c) *Penalty.* Reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions.* The terms "knowingly" and "recklessness~~ly~~" have the meanings specified in RCC § 22E-206~~,~~; ~~and~~ the terms "actor," "building," and "dwelling" ~~"building," "business yard," and "motor vehicle,"~~ have the meanings specified in RCC § 22E-~~2001~~701~~.~~; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2503. Criminal Damage to Property.

(a) ~~*Offense*~~ *First Degree*. A person commits ~~the offense of~~ first degree criminal damage to property ~~if~~ when that person:
(1) Knowingly ~~recklessly~~ damages or destroys the property of another;
~~(2) What the person knows to be property of another;~~
(2) Without the effective consent of ~~the~~ an owner~~.~~; and
(3) In fact, the amount of damage is $250,000 or more.
(b) *Second Degree.* A person commits second degree criminal damage to property when that person:
(1) Knowingly damages or destroys the property of another;
(2) Without the effective consent of an owner; and
(3) In fact, the amount of damage is $25,000 or more.
(c) *Third Degree.* A person commits third degree criminal damage to property when that person:
(1) Either:
(A) Knowingly damages or destroys the property of another;
(B) Without the effective consent of an owner; and
(C) In fact:
(i) The amount of damage is $2,500 or more;
(ii) The property is a cemetery, grave, or other place for the internment of human remains; or
(iii) The property is a place of worship or a public monument;
(2) Or
(A) Recklessly damages or destroys property;
(B) Knowing that it is the property of another;
(C) Without the effective consent of an owner; and
(D) In fact, the amount of damage is $25,000 or more.
(d) *Fourth Degree Criminal Damage to Property.* A person commits fourth degree criminal damage to property when that person:
(1) Recklessly damages or destroys property;
(2) With knowledge that it is property of another;
(3) Without the effective consent of an owner; and
(4) In fact, the amount of damage is $250 or more.
(e) *Fifth Degree Criminal Damage to Property.* A person commits fifth degree criminal damage to property when that person:
(1) Recklessly damages or destroys property;
(2) With knowledge that it is property of another;
(3) Without the effective consent of an owner; and

(4) In fact, the amount of damage is any amount.

(f) ~~*Gradations and*~~ *Penalties*.

(1) ~~*Aggravated Criminal Damage to Property.*~~ ~~A person is guilty of aggravated criminal damage to property if the person commits criminal damage to property by knowingly damaging or destroying property and, in fact, the amount of damage is $250,000 or more.~~ ~~Aggravated~~ First degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*First Degree Criminal Damage to Property.*~~ ~~A person is guilty of first degree criminal damage to property if the person commits criminal damage to property by knowingly damaging or destroying property and, in fact, the amount of damage is $25,000 or more.~~ ~~First~~ Second degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Second Degree Criminal Damage to Property.*~~

~~(A) A person is guilty of second degree criminal damage to property if the person commits criminal damage to property and:~~

~~(i) Knowingly damages or destroys property and, in fact, the amount of damage is $2,500 or more;~~

~~(ii) Knowingly damages or destroys property that, in fact: is a cemetery, grave, or other place for the internment of human remains;~~

~~(iii) Knowingly damages or destroys property that, in fact: is a place of worship or a public monument; or~~

~~(iv) Recklessly damages or destroys property and, in fact, the amount of damage is $25,000 or more.~~

~~(B) Second~~ Third degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) ~~*Third Degree Criminal Damage to Property.*~~ ~~A person is guilty of third degree criminal damage to property if the person commits criminal damage to property and, in fact, the amount of damage is $250 or more. Third~~ Fourth degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) ~~*Fourth Degree Criminal Damage to Property.*~~ ~~A person is guilty of fourth degree criminal damage to property if the person commits criminal damage to property and, in fact, the amount of damage is any amount. Fourth~~ Fifth degree criminal damage to property is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions*. The terms "knowing," "knowingly," and "recklessly" have the meanings specified in RCC § 22E-206~~,~~; the term "in fact" has the meaning specified in RCC § 22E-207~~,~~; ~~and~~ the terms ~~"consent,"~~ "effective consent," "property," "property of another," and "owner" have the meanings specified in RCC § 22E-~~2001~~701~~.~~; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2504. Criminal Graffiti.

(a) *Offense.* A person commits ~~the offense of~~ criminal graffiti ~~if~~ when that person:

(1) Knowingly places any inscription, writing, drawing, marking, or design on the property of another;

~~(2) Any inscription, writing, drawing, marking, or design;~~

~~(3) On property of another;~~

~~(4) That is visible from a public right-of-way;~~

(5) Without the effective consent of ~~the~~ an owner.

(b) *Penalty.* Criminal graffiti is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both. ~~However,~~

(c) *Definitions.* ~~In this section, "minor" means a person under 18 years of age.~~ The term "knowingly" has the meaning specified in RCC § 22E-~~XXX~~206~~,~~; ~~and~~ the terms "effective consent," "owner," "property," and "property of another," ~~"consent," "effective consent," and "owner"~~ have the meanings specified in RCC § 22E-~~2001~~701~~.~~; and the term "person" has the meaning specified in RCC § 22E-2002.

~~(d) *Mandatory Restitution.* The court shall order the person convicted to make restitution to the owner of the property for the damage or loss caused, directly or indirectly, by the graffiti, in a reasonable amount and manner as determined by the court.~~

~~(e) *Parental Liability.* 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.~~

RCC § 22E-2601. Trespass.

(a) *First Degree ~~Offense~~*. Except as provided in subsection (d), a ~~A~~ person commits ~~the offense of~~ first degree trespass when that person:

(1) Knowingly enters or remains in~~; (2) A~~ a dwelling, ~~building, land, or watercraft,~~ or part thereof;

(2) Without a privilege or license to do so under civil law ~~the effective consent of the occupant or, if there is no occupant, the owner~~.

(b) *Second Degree*. Except as provided in subsection (d), a person commits second degree trespass when that person:

(1) Knowingly enters or remains in a building, or part thereof;

(2) Without a privilege or license to do so under civil law.

(c) *Third Degree*. Except as provided in subsection (d), a person commits third degree trespass when that person:

(1) Knowingly enters or remains in or on land, a watercraft, or a motor vehicle, or part thereof;

(2) Without a privilege or license to do so under civil law.

(d) *Exclusions from Liability.*

(1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575.

(2) A person shall not be subject to prosecution under this section for violation of a District of Columbia Housing Authority barring notice,

unless the barring notice was lawfully issued pursuant to 14 DCMR § 9600 et seq., on an objectively reasonable basis.

(3) A person shall not be subject to prosecution under this section for conduct constituting a violation of D.C. Code § 35-252, Failure to pay established fare or to present valid transfer.

(e) *Permissive Inference.* A factfinder ~~jury~~ may, but is not required to, infer that a person lacks a privilege or license to enter or remain ~~effective consent of the occupant or owner if the person enters or remains~~ in or on a location ~~dwelling, building, land, or watercraft~~ that:

(1) Is otherwise vacant;

(2) Shows signs of a forced entry; and

(3) Is either:

(A) Secured in a manner that reasonably conveys that it is not to be entered; or

(B) Displays signage that is reasonably visible ~~from~~ prior to or outside the ~~person's~~ location's points of entry, and that sign says "no trespassing" or ~~reasonably~~ similarly indicates that ~~the~~ a person may not enter.

(f) *Jury Trial.*

(1) ~~If the District of Columbia or federal government is alleged to be the occupant of the building or land entered upon, then the~~ A defendant charged with committing this offense or attempting to commit this offense in a location that is owned or occupied by a government, government agency, or government-owned corporation may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

(2) A defendant charged with committing this offense or attempting to commit this offense by violating a District of Columbia Housing Authority barring notice may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

(g) ~~*Gradations and*~~ *Penalties.*

(1) ~~*First Degree Trespass.* A person is guilty of first degree trespass if that person commits trespass knowing the location is a dwelling.~~ First degree trespass is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree Trespass.* A person is guilty of second degree trespass if the person commits trespass.~~ Second degree trespass is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

(3) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206~~;~~, the term "in fact" has the meaning specified in RCC § 22E-207; the terms "building," "court," "dwelling," ~~"effective consent,"~~ and "motor vehicle" ~~"occupant," "owner,"~~ have the meanings specified in RCC § 22E-~~2001~~701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-2701. Burglary.

(a) *First Degree ~~Offense~~*. An actor ~~person~~ commits ~~the offense of~~ first degree burglary when that actor ~~person~~:

(1) Reckless as to the fact that a person who is not a participant in the burglary is inside or is entering with the actor;

(2) Knowingly and fully enters or surreptitiously remains in~~; (2) A~~ a dwelling, ~~building, watercraft, or business yard,~~ or part thereof;

(3) Without a privilege or license to do so under civil law; ~~Without the effective consent of the occupant or, if there is no occupant, the owner; and~~

(4) With intent to commit inside one or more District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property ~~a crime therein~~.

(b) *Second Degree*. An actor commits second degree burglary when that actor:

(1) Knowingly and fully enters or surreptitiously remains in:

(A) A dwelling, or part thereof, without a privilege or license to do so under civil law; or

(B) A building, or part thereof, without a privilege or license to do so under civil law;

(i) That is not open to the general public at the time of the offense;

(ii) Reckless as to the fact that a person who is not a participant in the burglary is inside and directly perceives the actor or is entering with the actor;

(2) With intent to commit inside a one or more District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.

(c) *Third Degree*. An actor commits third degree burglary when that actor:

(1) Knowingly and fully enters or surreptitiously remains in:

(A) A building or business yard, or part thereof, without a privilege or license to do so under civil law;

(B) That is not open to the general public at the time of the offense;

(2) Without a privilege or license to do so under civil law;

(3) With intent to commit inside one or more District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.

(d) ~~*Gradations and*~~ *Penalties.*

(1) ~~*First Degree Burglary.* A person is guilty of first degree burglary if that person commits burglary, knowing the location is a dwelling and, in fact, a person who is not a participant in the crime is present in the dwelling.~~ First degree burglary is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree Burglary.* A person is guilty of first degree burglary if that person commits burglary, either: knowing the location is a dwelling; or~~

~~knowing the location is a building and, in fact, a person who is not a participant in the crime is present in the building.~~ Second degree burglary is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) ~~*Third Degree Burglary.* A person is guilty of third degree burglary if the person commits burglary.~~ Third degree burglary is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The terms "knowingly" and "intent" have the meanings specified in RCC § 22E-206~~,~~; the term "in fact" has the meaning specified in RCC § 22E-207~~,~~; and the terms "actor," "bodily injury" "building," "business yard," "dwelling," "open to the general public," "property," "sexual act," and "sexual contact" ~~"property of another," "consent," "coercion," "deprive," and "value"~~ have the meanings specified in RCC § 22E-~~2001~~701.

RCC § 22E-2702. Possession of ~~Burglary and Theft~~ Tools to Commit Property Crime.

(a) *Offense.* A person commits ~~the offense of~~ possession of ~~burglary and theft~~ tools to commit property crime ~~if~~ when that person:

(1) Knowingly possesses a tool, or tools, ~~created~~ designed or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;

(2) With intent to use the tool or tools to commit a District crime involving the trespass, misuse, taking, or damage of property.

(b) *No Attempt Possession of ~~Burglary and Theft~~ Tools to Commit Property Crime Offense.* It is not an offense to attempt to commit the offense described in this section.

(c) *Penalty.* Possession of ~~burglary and theft~~ tools to commit property crime is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* The terms "knowingly" and "intent" have the meanings specified in RCC § 22E-206; the terms "possesses" and "property" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

RCC § 22E-3401. Escape from a Correctional Facility ~~Institution~~ or Officer.

(a) *First Degree ~~Escape from Institution or Officer~~.* A person commits first degree escape from a correctional facility ~~institution~~ or officer when that person:

(1) In fact,~~:~~ ~~I~~is subject to a court order that authorizes the person's confinement in a correctional facility or secure juvenile detention facility; or

(2) Knowingly, without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth

Rehabilitation Services ~~correctional facility or law enforcement officer,:~~ ~~(A) L~~leaves the correctional facility or juvenile detention facility ~~custody;~~

~~(A) Fails to return to custody; or~~

~~(B) Fails to report to custody~~.

(b) *Second Degree*. Except as provided in subsection (d), a person commits second degree escape from an institution or officer when that person:

(1) In fact, ~~I~~is in the lawful custody of a law enforcement officer of the District of Columbia or of the United States; and

(2) Knowingly, without the effective consent of the law enforcement officer, leaves custody.

(c) *Third Degree*. A person commits third degree escape from an institution or officer when that person:

(1) In fact, is subject to a court order that authorizes the person's confinement in a correctional facility or halfway house; and

(2) Knowingly, without the effective consent of Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services:

(A) Fails to return to the correctional facility or halfway house;

(B) Fails to report to the correctional facility or halfway house; or

(C) Leaves a halfway house.

(d) *Exclusions from Liability*. A person shall not be subject to prosecution under subsection (b) of this section when that person is within a correctional facility, juvenile detention facility, or halfway house.

(e) ~~*Gradations and*~~ *Penalties*.

(1) ~~*First Degree.* A person commits first degree escape from institution or officer when that person violates subsection (a)(2)(A).~~ First degree escape from a correctional facility ~~institution~~ or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree.* A person commits second degree escape from institution or officer when that person violates subsection (a)(2)(B) or (C).~~ Second degree escape from a correctional facility ~~institution~~ or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree escape from a correctional facility or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) *Consecutive Sentencing*. If the person is serving a sentence of secure confinement at the time escape from a correctional facility ~~institution~~ or officer is committed, the sentence for the offense ~~escape from institution or officer~~ shall run consecutive to the sentence that is being served at the time of the offense ~~escape from institution or officer~~.

(f) *Definitions*.

(1) The term "knowingly" has the meaning specified in § 22E-206; "in fact" has the meaning specified in § 22E-207; and the terms "correctional facility," "custody," "effective consent," "halfway house," "law

enforcement officer," and "secured juvenile detention facility" have the meanings specified in RCC § 22E-701.

(2) In this section, "custody" means full submission after an arrest or substantial physical restraint after an arrest.

(3) ~~In this section:~~

(4) ~~The term "knowingly" has the meaning specified in § 22E-206; "in fact" has the meaning specified in § 22E-207;~~

(5) ~~The term "effective consent" has the meaning specified in § 22E-1001;~~

(6) ~~The terms "law enforcement officer" and "building" have the meanings specified in § 22E-2001; and~~

(7) ~~The term "correctional facility" means:~~

~~(A) 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;~~

~~(B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or~~

~~(C) 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.~~

RCC § 22E-3402. Tampering with a Detection Device.

(a) ~~*Tampering with a Detection Device*~~ *Offense*. A person commits tampering with a detection device when that person:

(1) Knows he or she is required to wear a detection device while:

(A) Subject to a District of Columbia protection order;

(B) On pretrial release in a District of Columbia case;

(C) On presentence or predisposition release in a District of Columbia case;

(D) ~~c~~Committed to the Department of Youth Rehabilitation Services or ~~i~~incarcerated, in a District of Columbia case; or

(E) On supervised release, probation, or parole, in a District of Columbia criminal case; and

(2) Purposely:

(A) Removes the detection device or allows an unauthorized person to do so; or

(B) ~~Alters, masks, or i~~Interferes with the operation of the detection device or allows an unauthorized person to do so.

(b) *Penalt~~yies~~*. Tampering with a detection device is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* The terms "knows" and "purposely" have the meaning specified in RCC § 22E-206; and the terms "detection device," and "protection order" have the meanings specified in RCC § 22E-701. ~~In this section:~~

~~(1) The terms "knows" and "purposely" have the meaning specified in § 22E-206; and~~
~~(2) The term "detection device" means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology; and~~
~~(3) The term "protection order" means an order issued pursuant to D.C. Code § 16-1005(c).~~

RCC § 22E-3403. Correctional Facility Contraband.

(a) *First Degree.* Except as provided in subsection (c) ~~(d)~~, a person commits first degree correctional facility contraband when that person:
(1) With intent that an item be received by someone confined to a correctional facility or secure juvenile detention facility:
(A) Knowingly brings the item to a correctional facility or secure juvenile detention facility;
(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and
(C) The item, in fact, is Class A contraband ~~or Class B contraband~~; or
(2) In fact, is someone confined to a correctional facility or secure juvenile detention facility and:
(A) Knowingly possesses an item in a correctional facility or secure juvenile detention facility;
(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and
(C) The item, in fact, is Class A contraband ~~or Class B contraband~~.

(b) *Second Degree.* Except as provided in subsection (c), a person commits second degree correctional facility contraband when that person:
(1) With intent that an item be received by someone confined to a correctional facility or secure juvenile detention facility:
(A) Knowingly brings the item to a correctional facility or secure juvenile detention facility;
(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and
(C) The item, in fact, is Class B contraband; or
(2) In fact, is someone confined to a correctional facility or secure juvenile detention facility and:
(A) Knowingly possesses an item in a correctional facility or secure juvenile detention facility;
(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and

(C) The item, in fact, is Class B contraband.

(c) *Exclusions from Liability.*

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

(2) A person shall not be subject to prosecution under this section ~~does not commit correctional facility contraband~~ when ~~the item~~ that person possesses:

(A) ~~Is a~~ A portable electronic communication device, ~~used by an attorney~~ during the course of a legal visit; ~~or~~

(B) ~~Is a~~ A controlled substance that is prescribed to that ~~the~~ person and medically necessary to have immediately or constantly accessible; or

(C) A syringe, needle, or other medical device, that is medically necessary to have immediately or constantly available.

(d) *Detainment Authority*. If there is probable cause to suspect a person of ~~possession of~~ correctional facility contraband under paragraph (a)(1) or (b)(1) of this section, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to ~~a police officer with~~ the Metropolitan Police Department or a law enforcement agency acting pursuant to D.C. Code § 10-509.01.

(e) ~~*Gradations and*~~ *Penalties.*

(1) ~~*First Degree.* A person commits first degree correctional facility contraband when the item is Class A contraband.~~ First degree correctional facility contraband is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) ~~*Second Degree.* A person commits second degree correctional facility contraband when the item is Class B contraband.~~ Second degree correctional facility contraband is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The terms "knowingly" and "intent" have the meanings specified in § 22E-206; the term "in fact" has the meaning specified in § 22E-207; and the terms "Class A contraband," "Class B contraband," "correctional facility," "effective consent," "law enforcement officer," "possesses," and "secure juvenile detention facility" have the meanings specified in RCC § 22E-701. ~~In this section:~~

~~(1) The terms "knowingly" and "intent" have the meanings specified in § 22E-206; "in fact" has the meaning specified in § 22E-207;~~

~~(2) The terms "effective consent," "dangerous weapon," and "imitation dangerous weapon" have the meanings specified in § 22E-1001;~~

~~(3) The term "building" has the meaning specified in § 22E-2001;~~

~~(4) The term "possession" has the meaning specified in § 22E-202; and~~

~~(5) The term "correctional facility" means:~~

~~(A) 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;~~

~~(B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or~~

~~(C) 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.~~

~~(6) The term "Class A contraband" means:~~

~~(A) A dangerous weapon or imitation dangerous weapon;~~

~~(B) Ammunition or an ammunition clip;~~

~~(C) Flammable liquid or explosive powder;~~

~~(D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;~~

~~(E) A shank or homemade knife;~~

~~(F) Tear gas, pepper spray, or other substance capable of causing temporary blindness or incapacitation;~~

~~(G) A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;~~

~~(H) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;~~

~~(I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool capable of cutting through metal, concrete, or plastic;~~

~~(J) Rope; or~~

~~(K) A correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, or any other uniform.~~

~~(7) The term "Class B contraband" means:~~

~~(A) Any controlled substance listed or described in [Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01];~~

~~(B) Any alcoholic liquor or beverage;~~

~~(C) A hypodermic needle or syringe or other item that can be used for the administration of a controlled substance; or~~

~~(D) A portable electronic communication device or accessories thereto.~~

RCC § 22E-4201. Disorderly Conduct.

(a) *Offense*. Except as provided in subsection (b), a ~~A~~ person commits disorderly conduct when that person:

(1) ~~While that person is in a location that, i~~In fact, is in a location that is:

(A) Open to the general public at the time of the offense; or

(B) A communal area of multi-unit housing~~.~~; and

(2) ~~Recklessly e~~Engages in any of the following conduct ~~that~~:

(A) Recklessly, by conduct other than speech, 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;

(B) Purposely 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;

(C) Purposely directs abusive speech to any person present, reckless as to the fact that such conduct is likely to provoke immediate, retaliatory criminal harm involving bodily injury, taking of property, or damage to property; or

(D) Knowingly continues or resumes fighting with another person after receiving a law enforcement officer's order to stop such fighting.

~~(A) Causes another person to reasonably believe that there is likely to be an immediate and unlawful:~~

~~(i) Bodily injury to another person;~~

~~(ii) Damage to property; or~~

~~(iii) Taking of property; and~~

~~(B) Is not language or gestures directed at a law enforcement officer in the course of his or her official duties;~~

(b) *Exclusions from Liability.*

(1) Nothing in this section shall be construed to prohibit conduct ~~permitted~~ protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575.

(2) A person shall not be subject to prosecution for committing disorderly conduct as provided in subparagraph (a)(2)(A) when the other person present is a law enforcement officer in the course of his or her official duties.

(3) A person shall not be subject to prosecution for committing disorderly conduct as provided in subparagraph (a)(2)(C) when the conduct is directed to or likely to provoke a law enforcement officer in the course of his or her official duties.

(c) *Prosecutorial Authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.

(d) *Penalty.* Disorderly conduct is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The terms "knowingly," "purposely," and "recklessly," have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "Attorney General," "bodily injury," "law enforcement officer," "open to the general public," "property," and "speech" have the meanings specified in RCC § 22E-701. ~~In this section:~~

~~(1) The term "recklessly," has the meaning specified in § 22A-206;~~

~~(2) The terms "bodily injury" and "law enforcement officer" have the meanings specified in § 22A-1001;~~

~~(3) The term "property" has the meaning specified in § 22A-2001;~~
~~(4) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave.~~

RCC § 22E-4202. Public Nuisance.

(a) *Offense*. Except as provided in subsection (b), a ~~A~~ person commits public nuisance when that person~~:~~ ~~(1) P~~purposely engages in conduct that causes a~~n unreasonable~~ significant interruption to ~~of~~:
(1) ~~(A)~~ ~~a~~A lawful ~~public gathering~~ religious service, funeral, or wedding, that is in a location that, in fact, is open to the general public at the time of the offense;
(2) ~~(B)~~ ~~t~~The orderly conduct of a meeting by a District or federal public body;
(3) ~~(D)~~ ~~a~~Any person's quiet enjoyment of his or her residence between 10:00 p.m. and 7:00 a.m., and continues or resumes such conduct after receiving oral or written notice to stop such conduct; or
(4) ~~(C)~~ ~~a~~Any person's lawful use of a public conveyance~~; or~~
~~(2) While that person is in a location that, in fact, is:~~
~~(A) Open to the general public; or~~
~~(B) A communal area of multi-unit housing~~.

(b) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct ~~permitted~~ protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575.

(c) *Prosecutorial Authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(d) *Penalty*. Public nuisance is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*. The term "purposely," has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "Attorney General," "bodily injury," "meeting," "open to the general public," "property," "public body," and "public conveyance" have the meanings specified in RCC § 22E-701. ~~In this section:~~
~~(1) The term "purposely," has the meaning specified in § 22A-206;~~
~~(2) The term "bodily injury" has the meaning specified in § 22A-1001;~~
~~(3) The term "property" has the meaning specified in § 22A-2001;~~
~~(4) The term "lawful public gathering" includes any religious service, funeral, or similar organized proceeding;~~
~~(5) The term "public building" means a building that is occupied by the District of Columbia or federal government;~~
~~(6) The term "public conveyance" means 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; and~~
~~(7) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave at the time of the offense.~~

RCC § 22E-~~2642~~03. ~~Criminal Obstruction of~~ Blocking a Public Way.

(a) *Offense*. Except as provided in subsection (b), a ~~A~~ person commits ~~the offense of criminal obstruction of~~ blocking a public way when that person:

(1) Knowingly blocks ~~obstructs; (2) A public~~ a street, ~~public~~ sidewalk, bridge, path, entrance, exit, or passageway;

(2) On land or in a building, that is owned by a government, government agency, or government-owned corporation ~~or other public way~~; and

(3) Continues or resumes such conduct ~~A~~after receiving a law enforcement officer's order that, in fact, is lawful, to stop such ~~obstruction~~ blocking.

(b) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct ~~permitted~~ protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575.

(c) *Prosecutorial Authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(d) *Penalty.* ~~Criminal obstruction of~~ Blocking a public way is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206~~.~~; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "Attorney General," "blocks," and "law enforcement officer" have the meanings specified in RCC § 22E-701. ~~In this section, the term "obstruct" means to render impassable without unreasonable hazard to any person, the term "road" includes any road, alley, or highway, and the term "walkway" includes a sidewalk, trail, railway, bridge, passageway within a public building or public conveyance, or entrance of a public or private building or business yard.~~

RCC § 22E-~~2642~~04. Unlawful Demonstration.

(a) *Offense*. Except as provided in subsection (b), ~~A~~ a person commits ~~the offense of~~ unlawful demonstration when that person:

(1) Knowingly engages in a demonstration;

(2) In a location where such demonstration, in fact, is otherwise unlawful under District or federal law; and

(3) Continues or resumes engaging in such conduct ~~A~~after receiving a law enforcement order to stop such demonstration.

(b) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct ~~permitted~~ protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575.

(c) *Prosecutorial Authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(d) [*Jury Trial*. A defendant charged with ~~violating~~ committing this offense or attempting to commit this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.]

(e) *Penalty.* Unlawful demonstration is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; and the terms "Attorney General," "court," and "demonstration" have the meanings specified in RCC § 22E-701. ~~In this section, the term "demonstration" includes any assembly, rally, parade, march, picket line, or other similar gathering by one or more persons conducted for the purpose of expressing a political, social, or religious view.~~

RCC § 22E-4301. Rioting.

(a) *Offense.* Except as provided in subsection (b), an actor ~~A person~~ commits rioting when that actor ~~person~~:

(1) Knowingly attempts to commit or commits a District crime involving bodily injury, taking of property, or damage to property;

(2) Reckless as to the fact seven or more other people are each personally and simultaneously attempting to commit or committing a District crime involving bodily injury, taking of property, or damage to property in the area perceptible to the actor

~~(1) Commits disorderly conduct as defined in § 22A-4001;~~

~~(2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct;~~

~~(3) And the conduct is committed:~~

~~(A) With intent to commit or facilitate the commission of a crime involving:~~

~~(i) Bodily injury to another person;~~

~~(ii) Damage to property of another; or~~

~~(iii)The taking of property of another;~~

~~(B) While knowingly possessing a dangerous weapon; or~~

~~(C) While knowing any participant in the disorderly conduct is using or plans to use a dangerous weapon~~.

(b) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct ~~permitted~~ protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575.

(c) *No Attempt Rioting Offense*. It is not an offense to attempt to commit the offense described in this section.

(d) [*Jury Trial.* A defendant charged with committing this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.]

(e) *Penalty~~ies~~.* Rioting is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "bodily injury," "court," and "property" have the meanings specified in RCC § 22E-701. ~~In this section:~~

~~(1) The terms "reckless", "with intent", and "knowing" have the meanings specified in § 22A-206;~~

~~(2) The terms "bodily injury" and "dangerous weapon" have the meaning specified in § 22A-1001; and~~
~~(3) The term and "property of another" has the meaning specified in § 22A-2001.~~

RCC § 22E-4302. Failure to Disperse.

(a) *Offense*. Except as provided in subsection (b), an actor ~~A person~~ commits failure to disperse when that actor ~~person~~:
(1) ~~k~~Knowingly fails to obey a law enforcement officer's dispersal order;
(2) Reckless as to the fact that eight or more people are each personally and simultaneously attempting to commit or committing District crimes involving bodily injury, taking of property, or damage to property in the area perceptible to the actor; and
(3) In fact, the actor's presence substantially impairs the ability of a law enforcement officer to safely stop or prevent the criminal conduct
~~(1) In fact:~~
~~(A) Is in the immediate vicinity a course of disorderly conduct, as defined in § 22A-4001, being committed by five or more persons;~~
~~(B) The course of disorderly conduct is likely to cause substantial harm to persons or property; and~~
~~(C) The person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct; and~~
~~(2) The person knowingly fails to obey a law enforcement officer's dispersal order;~~
~~(3) When the person could safely have done so~~.

(b) *Exclusions from Liability*. Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575.

(c) ~~*Prosecutorial Authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.~~
[*Jury Trial*. A defendant charged with ~~violating~~ committing this offense or attempting to commit this offense may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.]

(d) *Penalt~~y~~ies*. Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "court," "law enforcement officer," "person," and "property" have the meaning specified in RCC § 22E-701. ~~In this section:~~
~~(1) The term "knowingly" has the meaning specified in § 22A-206;~~
~~(2) The term "in fact" has the meaning specified in § 22A-207; and~~

~~(3) The term "law enforcement officer" has the meaning specified in § 22A-1001.~~

APPENDIX B:

TABLE OF ADVISORY GROUP DRAFT DOCUMENTS (4-15-19)

Table of CCRC Reports (Containing Draft Recommendations) To Advisory Group

Report (Draft)	Issued	Comments	Title
1	Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes, Final Recommendations Issued to Council and Mayor 5/5/17		
2 (1st)	12/21/16	2/15/17	Basic Requirements of Offense Liability
3 (1st)	3/13/17	4/27/17	Mistake, Deliberate Ignorance, and Intoxication
4 (1st)	3/13/17	4/24/17	Preliminary Provisions
5 (1st)	5/5/17	6/16/17	Offense Classes & Penalties
2 (2nd)	5/5/17	6/16/17	Basic Requirements of Offense Liability
6 (1st)	6/7/17	7/21/17	Penalty Enhancements
7 (1st)	6/7/17	7/21/17	Definition of a Criminal Attempt
8 (1st)	8/11/17	11/3/17	Property Offense Definitions, Aggregation, and Multiple Convictions
9 (1st)	8/11/17	11/3/17	Theft and Damage to Property Offenses
10 (1st)	8/11/17	11/3/17	Fraud and Stolen Property Offenses
11 (1st)	8/11/17	11/3/17	Extortion, Trespass, and Burglary Offenses
12 (1st)	11/6/17	12/11/17	Definition of a Criminal Conspiracy
2 (3rd)	12/21/17	3/2/18	Basic Requirements of Offense Liability
13 (1st)	12/21/17	3/2/18	Penalties for Criminal Attempts
14 (1st)	12/21/17	3/2/18	Definitions for Offenses Against Persons
15 (1st)	12/21/17	3/2/18	Assault & Offensive Physical Contact Offenses
16 (1st)	12/21/17	3/2/18	Robbery
17 (1st)	12/21/17	3/2/18	Criminal Menace & Criminal Threat Offenses
14 (2nd)	3/16/18	5/11/18	Definitions for Offenses Against Persons
18 (1st)	3/16/18	5/11/18	Solicitation and Renunciation
19 (1st)	3/16/18	5/11/18	Homicide
20 (1st)	3/16/18	5/11/18	Abuse & Neglect of Children, Elderly, and Vulnerable Adults
21 (1st)	5/18/18	7/13/18	Kidnapping and Related Offenses
22 (1st)	5/18/18	7/13/18	Accomplice Liability and Related Provisions
23 (1st)	7/20/18	9/14/18	Disorderly Conduct and Public Nuisance
24 (1st)	7/20/18	9/14/18	Failure to Disperse and Rioting
25 (1st)	7/20/18	9/14/18	Merger
26 (1st)	9/26/18	12/19/18	Sexual Assault and Related Provisions
27 (1st)	9/26/18	12/19/18	Human Trafficking and Related Statutes
28 (1st)	9/26/18	12/19/18	Stalking
29 (1st)	9/26/18	12/19/18	Failure to Arrest
30 (1st)	9/26/18	12/19/18	Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability
31 (1st)	12/28/18	3/1/19	Escape from Institution or Officer
32 (1st)	12/28/18	3/1/19	Tampering with a Detection Device
33 (1st)	12/28/18	3/1/19	Correctional Facility Contraband
34 (1st)	12/28/18	3/1/19	De Minimus Defense
9 (2nd)	12/28/18	3/1/19	Theft and Damage to Property Offenses
35 (1st)	3/12/19	4/12/19	Cumulative Update to Sections 201-213 of the RCC
36 (1st)	4/15/19	5/13/19 & 7/8/19	Cumulative Update to Chapters 3, 7 and the Special Part of the RCC

Table of CCRC Memoranda (No Draft Recommendations, Background Only) to Advisory Group

Memo	Issued	Title
1	11/2/16	Overview of CCRC and CRAG Draft Work Plan
2	12/21/16	Adoption of a Comprehensive General Part in the Revised Criminal Code
3	1/13/17	Copy of D.C. Sentencing Commission's Relevant Draft Statutory Language on Liability Requirements
4	1/25/17	Changes for Second Draft of Report #1 (Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes).
5	3/3/17	Changes for Voting Draft of Report #1 (Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes).
6	3/13/17	Copy of D.C. Sentencing Commission Draft Language on Preliminary Provisions, Mistake & Intoxication
7	3/13/17	Compilation of CCRC Recommendations Under Development—Statutory Text Only
8	5/5/17	Changes for Second Draft of Report No. 2
9	5/5/17	Offense Classes & Penalties
10	6/7/17	Penalty Enhancements
10C	6/7/17	Penalty Enhancements Appendix C
10D	6/7/17	Penalty Enhancements Appendix D
11	6/7/17	Definition of a Criminal Attempt
12	8/11/17	Property Offense Supplementary Materials
13r	11/6/17	Definition of a Criminal Conspiracy
14	12/21/17	Third Draft of Report #2
15	12/21/17	Supplementary Materials to the First Drafts of Reports #13-17
16	3/16/18	Supplemental Materials to the First Draft of Report #18
17	3/16/18	Supplemental Materials to the First Draft of Reports #19-20
18	5/18/18	Supplemental Materials to the First Draft of Report #21
19	5/18/18	Supplemental Materials to the First Draft of Report #22
20	9/26/18	Supplemental Materials to the First Drafts of Reports #26-30
21	3/12/19	Supplemental Materials to the First Draft of Report # 35
22	4/15/19	Supplemental Materials to the First Draft of Report # 36

APPENDIX C:

ADVISORY GROUP COMMENTS ON DRAFT DOCUMENTS (4-15-19)

Comments of U.S. Attorney's Office for the District of Columbia
on D.C. Criminal Code Commission Recommendations
for Chapter 2 of the Revised Criminal Code: Basic Requirements of Offense Liability
Submitted Feb. 22, 2017

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on the Recommendations for Chapter 2 of the Revised Criminal Code (Basic Requirements of Offense Liability) provided for Advisory Group review:

- Temporal Aspect of Possession (pages 15-17)
  - Section 22A-202(d) requires that the government prove that the defendant exercised control over property for period of time sufficient to provide an opportunity to terminate the defendant's control over the property.
  - Commission staff authors acknowledge that this approach takes a component of the "innocent or momentary possession" affirmative defense (the momentary possession component) and makes it an element that the government must now prove (versus an affirmative defense that the defendant must prove).
  - The Advisory Group should discuss this change further inasmuch as it is a substantive to D.C. law.

- Causation Requirement: § 22A-204
  - Factual Cause
    - Page 29: The Advisory Group should consider the "factual cause" definition in light of gun-battle liability, which is predicated upon "substantial factor" causation.

- Page 31 re: § 22A-204(b) (Definition of Factual Cause)

    - Commission staff authors appropriately concede that the proposed definition for "factual cause" would be a substantive change from current D.C. law. Specifically, the proposed rule would eliminate the "substantial factor" test, and would thereby appear to eliminate the basis for urban gun-battle causation as a theory of factual causation.

    - However, in cases such as *Roy* and *Fleming*, factual cause includes situations where the defendant's actions were a "substantial factor" in bringing about the harm. The D.C. Court of Appeals has stated that "[i]n this jurisdiction[,] we have held findings of homicide liability permissible where: (1) a defendant's actions contribute substantially to or are a substantial factor in a fatal injury . . . and (2) the death is a reasonably foreseeable consequence of the defendant's actions." *Fleming v. United States*, 148 A.3d 1175, 1180 (D.C. 2016) (quoting *Roy v. United States, 871 A.2d 498* (D.C. 2005) **(petition for rehearing *en banc* pending**))

    - Concerns regarding an "unnecessarily complex analysis" required by a "substantial factor" test in all cases can be addressed easily by a jury instruction (*e.g.*, if the jury finds "but for" causation, the analysis ends; where there is no "but for" causation, the jury would consider whether defendant's conduct was a "substantial factor" – and this would be unnecessary in most cases, where causation is not meaningfully at issue).

    - Of course, as noted above, the *Roy* petition for rehearing is pending and the decision of the D.C. Court of Appeals *en banc* would be decisive on this point.

o Legal Cause

- Page 29: Delete the "or otherwise dependent upon an intervening force or act" language. An intervening force or act does not negate legal causation if that intervening force or act is reasonably foreseeable.

- Similar/conforming revisions should be made at page 35 (to the text that immediately precedes footnote 31) and at page 38 (to the text that immediately precedes footnote 49).

- Culpable Mental State Requirement: § 22A-205

    - Regarding mens rea as to results and circumstances (the last sentence of page 42), USAO-DC notes that, more recently, the D.C. Court of Appeals has held in *Vines* that "it is clear that a conviction for ADW can be sustained by proof of reckless conduct alone. If reckless conduct is sufficient to establish the requisite intent to convict a defendant of ADW, it necessarily follows that it is enough to establish the intent to convict him of simple assault." *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), as amended (Sept. 19, 2013). By "reckless conduct," the D.C. Court of Appeals meant that the defendant was reckless as to the possibility of causing injury*, i.e.*, the defendant was reckless as to the result.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: February 22, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt

On page 1, the Report begins with § 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt. Subparagraph (c)(2) defines a result element. It states that a "Result element" means any consequence that must have been caused by a person's conduct in order to establish liability for an offense." The problem is that while "Conduct element" is defined on page 1 in 22A-201

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(c)(1)[2] and "Conduct Requirement" is defined on page 9 in 22A-202 (a), the word "conduct," itself, is not defined. It appears that the interpreter is left to assume that the word takes on the meanings associated with their usage in those separate definitions (or at least the one in 22A-201 (c)(1)). The need for the word "conduct" to be replaced, or defined, is highlighted by the Report's observations on page 6. There it recognizes that conduct includes an action or omission. To make § 22A-201 (c) (2) clearer, we propose incorporating the concepts from pages 6 and substituting them for the word "conduct" in 22A-201(c)(2) The definition would then read "Result element" means any consequence that must have been caused by a person's act or omission in order to establish liability for an offense." The advantage of this definition is that the terms "act" and "omission" are defined in 22A-202.

§ 22A-202, Conduct Requirement

On page 9, in paragraph (c) the term "Omission" is defined. It states ""Omission" means a failure to act when (i) a person is under a legal duty to act and (ii) 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…" Neither the text of the proposed Code nor the Commentary explains what is meant by the term "culpably unaware." The Code should define this term, or at least, the Commentary should focus on this term and give examples of when a person is "culpably unaware" that a legal duty to act exists as opposed to merely being unaware that there is a legal duty to act.

In § 22A-202 (d) the term "Possession" is defined. Included in that definition is a requirement that the person exercise control over the property "for a period of time sufficient to allow the actor to terminate his or her control of the property." As noted in the Report, this is a departure from current District law. On page 15 of the Report it states "The latter temporal limitation dictates that a person who picks up a small plastic bag on the floor in a public space, notices that it contains drug residue, and then immediately disposes of it in a nearby trash can has not "possessed" the bag for purposes of the Revised Criminal Code…." What this definition of possession misses, or at least what the Commentary does not address, is that there are times when a person may be culpable for possession even in less time than it would take to "immediately dispose[] of it in a nearby trash." Consider the following hypothetical. Two people walk over to a person who is selling heroin. One of them hands the seller money in exchange for the drug. As soon as the transaction is completed, the other person, who is an undercover police officer, arrests both the buyer and the seller. In that case, though the buyer literally had possession of the heroin for a fraction of a second, there is no question that the buyer knew that he or she possessed illegal drugs and intended to do so. In this situation, there is

[2] Subparagraph (1) states that a "Conduct element" means any act or omission, as defined in § 22A-202, that is required to establish liability for an offense."

no reason why there should be a temporal limitation on how long the heroin must have been in the buyer's possession before a law violation would have occurred.

§ 22A-203, Voluntariness Requirement

On page 20, the Report defines the scope of the voluntariness requirement. Subsection (b)(1) states that an act is voluntary if the "act was the product of conscious effort or determination" or was "otherwise subject to the person's control." Based on the associated Commentary, it seems to be designed to capture circumstances, such as intoxication or epilepsy, when someone with a condition that can cause dangerous involuntary acts knowingly enters circumstances in which that condition may endanger others. The theory seems to be that, for example, driving while intoxicated is "subject to [a] person's control" because the person can prevent it by not drinking and driving in the first instance. The same analysis applies to an accident that could arise due to an epileptic seizure. This makes sense; a person cannot willfully expose others to a risk at point X, and when the actual act that would constitute the offense takes place, insist that the act was not voluntary so that they cannot be held responsible for it. The question is whether there is some threshold of risk to trigger voluntariness here; otherwise, any involuntary act that was brought about in circumstances that were voluntarily chosen would be considered to be voluntary. Is this what was intended? If not, what is the threshold of risk that would "trigger" voluntariness here – and how would a court make that determination? Take the epilepsy example. Suppose a person knows that there is a .05% (or .005%) chance that he or she will experience an epileptic seizure if they don't take their medication, but drives that way anyway. If a crash occurs, will driving the vehicle have been enough to trigger the "otherwise subject to the person's control" prong of voluntariness or is it too remote? The Commentary should address this issue.

§ 22A-204, Causation Requirement

On page 29, the Report defines the "Causation Requirement." In paragraph (a) it states "No person may be convicted of an offense that contains a result element unless the person's conduct was the factual cause and legal cause of the result." Paragraphs (b) and (c) then define the terms "Factual cause" and "Legal cause." Section 22A-204 (b) states ""Factual cause" means:

> (1) The result would not have occurred but for the person's conduct; or
>
> (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result."

On pages 30 and 31, the Commentary addresses "Factual cause." It states:

> In the vast majority of cases, factual causation will be proven under § 22A-204(b)(1) by showing that the defendant was the logical, but-for cause of a result. The inquiry required by subsection 22A-204(b)(1) is essentially empirical, though also

> hypothetical: it asks what the world would have been like if the accused had not performed his or her conduct. In rare cases, however, where the defendant is one of multiple actors that independently contribute to producing a particular result, factual causation may also be proven under § 22A-204(b)(2) by showing that the defendant's conduct was sufficient—even if not necessary—to produce the prohibited result. Although in this situation it cannot be said that but for the defendant's conduct the result in question would not have occurred, the fact that the defendant's conduct was by itself sufficient to cause the result provides a sufficient basis for treating the defendant's conduct as a factual cause.

While much of this explanation is intuitive, what may be more difficult for people to understand is how factual causation works when the result element is satisfied by a person's omission to act. Consider the following hypothetical. A father takes his toddler to the pool. He sees the child crawl to the deep end of the pool and fall in. The father sits there, doesn't move, and watches the child drown. In this situation it is awkward to think about the father's lack of movement as "performing" conduct, as opposed to doing nothing. The Commission should review whether there needs to be a third definition of "factual cause" that addresses acts of omission or whether merely an explanation and example in the Commentary about how to apply factual causation in cases of omission is sufficient. Clearly in this example, the father had a duty to perform the omitted act of saving his child. See § 22A-202 (c)(2).

§ 22A-206, Hierarchy of Culpable Mental States

On page 49, the Report defines the Hierarchy of Culpable Mental States. In paragraph (c) Recklessness is defined. It states

> RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:
>
> (1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result.
>
> (2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists.
>
> (3) In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation.
>
> (4) In order to act recklessly as to a result or circumstance "under circumstances manifesting extreme indifference" to the interests protected by an offense, the

person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.[3]

While it is meaningful to say that recklessly means … "With respect to a result, being aware of a substantial risk that one's conduct will cause a result, it is not meaningful to say that recklessly means "In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation." The formulation of paragraphs (3) and (4) do not flow from the lead in language. It lacks symmetry. While it appears that paragraph (3) relates in a meaningful way to paragraph (1), as paragraph (4) relates in a meaningful way to paragraph (2), the text does not explain how each of these sets of definitions relate to each other internally. A tenant of a well written definition for use in a Code provision is that, niceties of grammar aside, the definition should be able to be substituted for the defined term in the substantive offense and the sentence should retain its meaning. One cannot do that with the definition of recklessness.[4] We propose that the definition of recklessness be redrafted so that the terms have more exacting meanings within the context of an offense. [5] One way to accomplish this is to redraft the definition as follows:

RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:

(1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result and that either the person's conduct *viewed as a whole* grossly deviates from the standard of care that a reasonable person would observe in the person's situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.[6]

[3] It is unclear why the term" under circumstances manifesting extreme indifference" is in quotes in paragraph 4.

[4] Similarly, it is unclear at this time whether the definition of "Factual Cause" in § 22A-204 suffers from the same infirmity. After seeing how this term is actually used in the revised Code it may need to be amended. At this time, the definition appears not to define "factual cause" as such, rather it appears to operate more like an if-then ("A person's is a factual cause of a result if the result would not have occurred without the conduct"). We will be able to evaluate this definition when we are able to take the phrase "the result would not have occurred but for the person's conduct" and substitute it for the term "factual cause" in the text of the Code. If the sentence has meaning than the definition works.

[5] The same issues concerning the definition of Recklessness exists in the definition of Negligence.

[6] In the proposed text we added, in italics the phrase "viewed as a whole." Italics was used to show that the phrase was not in the original Code text. This language is taken from the explanation of the gross deviation analysis on page 68 of the Report. Given the importance of this statement, we propose that it be added to the actual definition of Recklessness.

> (2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists and that either the person's conduct *viewed as a whole* must grossly deviate from the standard of care that a reasonable person would observe in the person's situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.

On page 58, in regard to § 22A-206(c)(3) it states "In many cases where a person consciously disregarded a substantial risk of prohibited harm, it is likely to be obvious whether the person's conduct constituted a "gross deviation" from a reasonable standard of care under § (c)(3). In these situations, further elucidation of this broad phrase to the factfinder is unnecessary. Where, however, it is a closer call, the discretionary determination reflected in § 22A-206(c)(3) is intended to be guided by the following framework."[7] If this definition is to remain, the comment should be expanded to explain which part of (c)(3) the Commission believes is discretionary or otherwise explain this point. Paragraph (c)(3) does not contain the word "discretionary" nor does it use a term that would lead the reader to believe that any part of it could be discretionary.

Of perhaps greater concern is that the Commentary elucidates a precise three-factor test to determine whether something is a "gross deviation" but does not actually incorporate that test into the codified text. The Commission should consider whether a legal standard of that nature should be codified.

The definition of recklessness states that in order for someone to act recklessly, his or her conduct must "grossly deviate from the standard of care that a reasonable person would observe in the person's situation," and in order for that conduct to take place "under circumstances manifesting extreme indifference" to the interests protected by a particular offense, the conduct must be an "extreme deviation from the standard of care that a reasonable person would observe in the person's situation." The difference between "grossly deviating" and an "extreme deviation" is not clear, and the Report does not clarify it. On page 58 the Report states that "[t]he difference between enhanced recklessness [requiring extreme deviation] and normal recklessness [requiring gross deviation] is . . . one of degree." This does not sufficiently illuminate the distinction. Whether through additional explanations, examples, or a combination of the two, the Commentary should make clear the distinction between a gross deviation and an extreme deviation.

There is another aspect of the recklessness definition: being "aware of a substantial risk" which should be further explained. The Report maintains that "recklessness entails awareness of a

[7] While we suspect the word "discretionary" means not that a court can choose whether to apply it, but rather that its application in any particular case requires significant case-specific judgment, the Report does not actually say that.

risk's substantiality, but not its unjustifiability." The language, however, is not altogether clear in that respect. Being aware of a substantial risk doesn't necessarily mean being aware that the risk is substantial – the very same kind of ambiguity that inspired element analysis to begin with. Take the following hypothetical. Suppose a person drives down a little used street at 150 miles an hour at 3:00 am. In order to be considered reckless, does the person have to be aware that there is a substantial risk that he will hit and kill someone or that if he hits someone they will be killed.

§ 22A-207 Rules of Interpretation Applicable to Culpable Mental State Requirement

On page 73, in § 22A-207 (b)(2), the proposed text states one of two ways that the Council can indicate that an element is subject to strict liability. It states that a person is strictly liable for any result or circumstance in an offense "[t]o which legislative intent explicitly indicates strict liability applies." This language is subject to multiple interpretations. If the phrase "legislative intent " is meant to include indicia from legislative history, it's not clear what it means for the legislative history to "explicitly indicate" something (leaving aside the tension in the phrase "explicitly indicate"). Does this provision mean that if a committee report explicitly says "strict liability should apply to X," that's good enough? What if there are contrary statements at the hearing, by a witness or a councilmember? If, alternatively, the phrase was meant to simply mean "when another statutory provision can fairly be read to indicate that strict liability should apply" the language should be modified to refer to other statutory provisions explicitly indicating that strict liability applies, rather than the "legislative intent explicitly" so indicated.

In the Commentary following the Rules of Interpretation Applicable to Culpable Mental State Requirement there are a few examples that demonstrate how the "rule of distribution" works. We believe that two additional examples are needed to fully explain how it works in situations of strict liability.

The first example in the Commentary explains how to interpret "knowingly causing bodily injury to a child" and the second, in the footnote, contrasts that explanation with the explanation for how to interpret "knowingly causing injury to a person, negligent as to whether the person is a child. Given the rule that strict liability only applies to the element specified (and does not follow through to subsequent elements), we suggest that the Commentary add two additional examples. The first would be where there is a mental state provided for the first element, the second element is modified by the phrase "in fact", and where there is no mental state associated with the third element. The purpose of that example would be to show that the mental state associated with the first element would also apply to the third element. The second example would contrast the previous examples with one where there is a mental state stated for the first element, the second element is modified by the phrase "in fact", and the third element is also modified with the phrase "in fact."

The following examples could be used, "Knowingly causing injury to a person, who is, in fact, a child, with a knife. Under the rules of interpretation the mental state of "knowingly" would apply not only to the causing injury to a person, but would also apply to the circumstance of the knife. This illustration could be contrasted with "Knowingly causing injury to a person, who is, in fact, a child, with what is, in fact, a knife." We leave it to the Commission to decide where in the presentation of the Commentary it would be most informative to place these additional examples.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: April 24, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Mistake, Deliberate Ignorance, and Intoxication

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-208, Principles of Liability Governing Accident, Mistake, and Ignorance.

On page 3, the Report discusses § 22A-208, Principles of Liability Governing Accident, Mistake, and Ignorance. We believe that the Commentary, if not the provision itself, should clarify the types of mistakes or ignorance of law, if any, to which this applies.[2] For example, it is our

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

[2] While the Commentary, at the top of page 5 of the Report does have a brief discussion concerning mistake of fact or non-penal law, we do not believe that that explanation is sufficient to address the issues raised here. Similarly while, footnote 20, on page 8, quotes LaFave that

understanding from the meetings that this provision does not mean that the government would have to prove that the defendant was aware that the act itself was illegal or the exact parameters of the prohibition. Two examples may be helpful. First, a person would be guilty of distribution of a controlled substance even if what the government proved was that the defendant thought that she was selling heroin, but she was really selling cocaine. Second, the government would not need to prove that a person knew that he was a mandatory reporter and that mandatory reporters must report child abuse in order to secure a conviction for failing to report child abuse.[3]

Section 22A-208 (b) is entitled "Correspondence between mistake and culpable mental state requirements. Subparagraph (3) states, "Recklessness. Any reasonable mistake as to a circumstance negates the recklessness applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the recklessness applicable to that element if the person did not recklessly make that mistake." [Emphasis added] Subparagraph (4) states, "Negligence. Any reasonable mistake as to a circumstance negates the existence of the negligence applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the negligence applicable to that element if the person did not recklessly or negligently make that mistake. " [Emphasis added] At the meeting the Commission staff explained why these two subparagraphs are not parallel and why the inclusion of the word "recklessly" logically follows from the rules of construction already agreed upon. To be parallel, subparagraph (b)(4) on "Negligence" would not include the phrase "recklessly or." If the Commission is going to keep this nonparallel structure then the Commentary should explain the reason why a reference to "recklessness' is included in the statement on "negligence." This is not a concept that may be intuitive to persons who will be called upon to litigate this matter.

§ 22A-209, Principles of Liability Governing Intoxication

On page 25, the Report discusses § 22A-209, Principles of Liability Governing Intoxication. Paragraph (b) is entitled "Correspondence between intoxication and culpable mental state requirements." The subparagraphs explain the relationship between a person's intoxication and the culpable mental states of purpose, knowledge, and recklessness. However, there is a forth mental state. Section 22A-205, Culpable mental state definitions, in addition to defining purpose, knowledge, and recklessness, also defines the culpable mental state of "negligently." [4] To avoid needless arguments in litigation over the relationship between intoxication and the culpable mental state of negligently, § 22A-209 should include a statement that explicitly states

"mistakes or ignorance as to a matter of penal law typically was not, nor is currently, recognized as a viable defense since such issues rarely negate the mens rea of an offense…" this provision is speaking in terms of the current law and not what the law would be if § 22A-208 were enacted. The Commentary should make it clear that no change in the law is intended.

[3] See D.C. Code §§ 4-1321.01 through 4-1321.07.

[4] On page 26 of the Report there is a statement that says, "Notably absent from these rules, however, is any reference to negligence, the existence of which generally cannot be negated by intoxication."

that a person's intoxication does not negate the culpable mental state of negligence. A litigator should not have to go to the Commentary to find the applicable law.
On page 28 of the report it states, "Subsections (a) and (b) collectively establish that evidence of self-induced (or any other form of) intoxication may be adduced to disprove purpose or knowledge, while § (c) precludes exculpation based on self-induced intoxication for recklessness or negligence." However, § (c) is entitled "Imputation of recklessness for self-Induced intoxication." While referring to a person being "negligent" as a factor in determining if there should be imputation of recklessness for self-induced intoxication, that paragraph does not, as written, appear to actually preclude exculpation of negligence (probably because it is not needed for the reasons stated above). This portion of the Commentary should be rephrased.

Section 22A-209 was clearly drafted to explain the relationship between intoxication and culpable mental states in general and not when the offense itself includes the requirement that the government prove – as an element of the offense - that the person was intoxicated at the time that the offense was committed.[5] The Commentary should note this.

[5] For example, it would be an ineffectual offense statute that permitted a person's self-induced intoxication to negate the mental state necessary to prove driving while impaired (intoxicated).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: April 24, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 4, Recommendations for Chapter 1 of the Revised Criminal Code: Preliminary Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 4, Recommendations for Chapter 1 of the Revised Criminal Code: Preliminary Provisions [1]

COMMENTS ON THE DRAFT REPORT

§ 22A-102, Rules of Interpretation

On page 3, the Report discusses § 22A-102, Rules of Interpretation. Paragraph (a) states, "(a) GENERALLY. To interpret a statutory provision of this title, the plain meaning of that provision shall be examined first. If necessary, the structure, purpose, and history of the provision also may be examined." [Emphasis added]. The provision does not state "necessary for what." The Commentary, does include the statement that "However, in addition to its plain meaning, a provision also may be interpreted based on its structure, purpose, and history when necessary to determine the legislative intent." To make the Code clearer, we suggest that the phrase "to determine the legislative intent" be added to the text of § 22A-102 (a). The amended provision would read "(a) GENERALLY. To interpret a statutory provision of this title, the

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

plain meaning of that provision shall be examined first. If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined."

§ 22A-102, Interaction of Title 22A with other District Laws

On page 7, the Report discusses § 22A-103, Interaction of Title 22A with civil provisions in other laws. Paragraph (b) states, "The provisions of this title do not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action.". The Commentary says that this is intended to mean, for instance, that "the conviction or acquittal of a defendant for a crime will not affect subsequent civil litigation arising from the same incident, unless otherwise specified by law." [Emphasis added] We have two concerns about that statement, both of which suggest that the language needs to be clarified or changed. First, it is unclear if paragraph (b) means what the Commentary says that it does. Paragraph (b) says simply that the "provisions of this title" – i.e., the existence and interpretation of the criminal offenses listed in this title – does not alter any right or liability to damages. However, that statement is different from saying that being convicted of any one of those crimes will not alter someone's right or liability to damages. Despite the statement in the Commentary that "Relation to Current District Law. None," saying that conviction of a crime will not "affect" any civil action for the same conduct seems to be a significant change to existing law. Being convicted of a crime for certain conduct can collaterally estop someone, or otherwise prevent them from relitigating the issue of liability based on that same conduct. For example see *Ross v. Lawson*, 395 A.2d 54 (DC 1978) where the Court of Appeals held that having been convicted by a jury of assault with a dangerous weapon and that conviction having been affirmed on appeal, appellee, when sued in a civil action for damages resulting from that assault, could not relitigate the issue of liability for the assault. [2] So the Commentary is not correct when it says that "the conviction… will not affect subsequent litigation…" Unfortunately, the phrase in the Commentary that "unless otherwise specified by law" actually compounds the issue. The question then becomes whether the example, of *Ross,* falls under the "unless otherwise specified by law" statement in the Commentary. It is not clear whether the caveat is a reference to statutory law or common-law. An argument could be made that for common-law purposes, there is no impact because this is the result that the common-law actually requires.

[2] It is true, however, that an "acquittal" is less likely to have an impact on civil cases because the acquittal simply allows the conduct at issue to be re- litigated in a subsequent civil proceeding. But note that an "acquittal" or "dismissal for want of prosecution" is one key requirement for a malicious tort claim (plaintiff must show that he or she prevailed on the underlying claim – in this case a criminal matter—that was instituted in bad faith or for malicious purposes).

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: April 24, 2017

Re: Comments on First Draft of Report No. 3: Recommendations for Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication

In general, the Public Defender Service approves the recommendations in the First Draft of Report No. 3. However, PDS has the following concerns and makes the following suggestions:

1. With respect to the Principles of Liability Governing Accident, Mistake, and Ignorance -- Although the Report explains that mistake and accident are not defenses but are "conditions that preclude the government from meeting its burden of proof" with respect to a mental state,[1] the proposed statutory language at §22A-208 does not make that point clear. This is particularly important because, in the view of PDS, judges and practitioners too often incorrectly (whether mistakenly or accidentally) view "accident" or "mistake" as "defenses," creating a serious risk of burden shifting, a risk, as the Report notes, the DCCA has warned against.

   PDS proposes adding language to subsection (a) of § 22A-208 that states plainly that accident and mistake are not defenses and that is explicit with regard to how accident and mistake relate to the *government's* burden of proof. Specifically, PDS proposes changing §22A-208(a) to read as follows:

[1] "Viewing claims of mistake or accident through the lens of offense analysis has, on occasion, led Superior Court judges to treat issues of mistake and accident as true defenses, when, in fact, they are simply conditions that preclude the government from meeting its burden of proof with respect to an offense's culpability requirement. In practical effect, this risks improperly shifting the burden of proof concerning an element of an offense onto the accused—something the DCCA has cautioned against in the context of both accident and mistake claims." First Draft of Report No. 3, March 13, 2017, at page 7. (footnotes omitted)

> Effect of Accident, Mistake, and Ignorance on Liability. A person is not liable for an offense when that person's accident, mistake, or ignorance as to a matter of fact or law negates the existence of a culpable mental state applicable to a result or circumstance in that offense. Accident, mistake and ignorance are not defenses. Rather, accident, mistake, and ignorance are conditions that may preclude the government from establishing liability.

This proposal exposes another problem however. While the above proposal refers to the government establishing liability, the Revised Criminal Code General Provisions are silent with respect to the government having such burden. Indeed, all of the proposed General Provisions are written in the passive voice. There is no clear statement that the government bears the burden of proving each element beyond a reasonable doubt. Certainly the constitutional principle is itself beyond any doubt and therefore including it in the Code might seem superfluous. The problem is that a statute explaining the effect of mistake or accident on liability, without a statement about who bears the burden of proving liability, allows confusion about whether it is the government or the defense that has the burden of proof with the (mistakenly termed) "mistake and accident *defenses*."

PDS further notes that the General Provisions frequently speak in terms of a person's "liability." For example -- § 22A-201(b): "'Offense element' includes the objective elements and culpability requirement necessary to establish *liability*;" §22A-203(b)(1): "Where a person's act provides the basis for *liability*, a person voluntarily commits the conduct element of an offense when that act was the product of conscious effort…;" §22A-204(c): "'Legal cause' means the result was a reasonably foreseeable consequence of the person's conduct. A consequence is reasonably foreseeable if its occurrence is not too remote, accidental, or otherwise dependent upon an intervening force or act to have a just bearing on the person's *liability*." However, the most important subsection in the General Provision Chapter, §22A-201(a), Proof of Offense Elements Beyond a Reasonable Doubt, speaks only in terms of *convicting* a person and not at all in terms of the person's *liability*. Thus, PDS strongly believes the General Provisions generally should make more explicit the connection between the proof beyond a reasonable doubt requirement and a person's liability for an offense. Therefore, PDS proposes the following change to §22A-201(a):

> Proof of Offense Elements Beyond a Reasonable Doubt. No person may be convicted of an offense unless the government establishes the person's liability by proving each offense element ~~is proven~~ beyond a reasonable doubt.

The above proposed statement that the government bears the burden of establishing the person's liability now provides an express link for PDS's proposed language that accident, mistake and ignorance may preclude the government from establishing that liability. Together, these proposals should correct the too common misconception that mistake and accident are "defenses" and will prevent the unconstitutional burden shifting that can result from such misconception.

2. With respect to the Imputation of Knowledge for Deliberate Ignorance, at §22A-208(c) – PDS proposes a higher threshold before knowledge can be imputed to a person. Specifically, PDS proposes the following change to §22A-208(c):

> When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if: …
>
> (1) The person was reckless as to whether the circumstance existed; and
>
> (2) The person avoided confirming or failed to investigate whether the circumstance existed with the primary purpose of avoiding criminal liability.

The central problem, and PDS's main concern, with the willful indifference doctrine is that it permits culpability under a diluted *mens rea* standard. The willful indifference doctrine will allow convictions for offenses where knowledge of a circumstance is required when the person, in fact, did not have knowledge of the particular circumstance or when the government fails to prove that the person had the required knowledge. If the Revised Criminal Code is going to allow a backdoor for the government to use to convict someone for a crime serious enough that its *mens rea* is knowledge, then the backdoor should be difficult to open. Or more formally phrased, the Revised Criminal Code should distinguish between willfully blind actors who are more like knowing actors from those who are merely negligent or reckless. *See* Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not an Element of Willful Blindness, 121 Harv. L. Rev. 1245, 1248-49 (2008).

It is PDS's position that the language in First Draft of Report No. 3 for §22A-208(c) creates a backdoor that is too easy for the government to open; it so dilutes the knowledge requirement that it is barely a shade more onerous than requiring proof of mere recklessness. The lock on the backdoor, as it were, has two parts that work together – sub-subsections (1) and (2) of §22A-208(c). Focusing on the first part, the required level of circumstance-awareness the person must have, PDS proposed for discussion at the April 5, 2017 meeting of the Advisory Group that the appropriate standard, instead of the reckless standard, should be the "high probability" standard used in the Model Penal Code at § 2.02(7); that is, our Code would read "the person was aware of a high probability that the circumstance existed." As was noted at that meeting and more fully explained in the Commission's Report No. 2: Basic Requirements of Offense Liability, the

difference between awareness to a practical certainty (the Revised Criminal Code proposed language) and awareness of a high probability (MPC's willful blindness language) might be so narrow that the distinction is not worth recognizing.[2] PDS acknowledges that if the Revised Criminal Code is to have a deliberate ignorance provision at all, then it cannot be worded so as to require the same level of awareness as that required for knowledge.

If PDS is agreeing not to create a new level of awareness that would be less than knowledge but more than recklessness, then the strength of the "lock on the backdoor" must come from the second part. That is, if to satisfy the knowledge requirement, the government need only prove the reckless-level of awareness of the circumstance, then the purpose the person had for avoiding confirming the existence of the circumstance has to be a stringent enough test that it significantly distinguishes the deliberate avoider from the merely reckless person. Therefore, PDS proposes that to hold the person liable, the person must have avoided confirming the circumstance or failed to investigate whether the circumstance existed with the *primary* purpose of avoiding criminal liability. A primary purpose test embeds a *mens rea* element in that in order to have a primary purpose of avoiding criminal liability, a person must have had something approaching knowledge that the circumstance existed. Adding the requirement that avoiding liability was the person's primary purpose sufficiently separates the more culpable from those who were merely negligent or reckless.

3. With respect to § 22A-209, Principles of Liability Governing Intoxication – PDS recommends stating the correspondence between intoxication and negligence. The correspondence for this culpable mental state may be obvious or self-evident, but explaining the correspondence between three of the culpable mental state requirements and failing to explain the last comes across as a negligent (or even reckless) omission. PDS recommends the following language:

> (4) *Negligence*. A person's intoxication negates the existence of the culpable mental state of negligence applicable to a result or circumstance when, due to the person's intoxicated state, that person failed to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists, and the person's intoxication was not self-induced.

4. With respect to §22A-209(c), Imputation of Recklessness for Self-Induced Intoxication, PDS strongly recommends defining the term "self-induced intoxication." The imputation of recklessness for self-induced intoxication turns on whether the intoxication is self-induced. The outcome of some cases, perhaps of many cases, will depend entirely on whether the defendant's intoxication was "self-induced." The term will have to be defined; the only question is who should define it. While perhaps only a few of the modern recodifications have codified such

[2] First Draft of Report No. 2, dated December 21, 2016 at page 57.

general definitions and those that have codified intoxication definitions have drafted flawed ones,[3] the Commission cannot duck its responsibility to recommend the District's legislature proscribe criminal laws and define the terms used. The purpose of modernizing the District's Code is to reduce significantly the need for courts to create law by interpretation.

PDS recommends a definition that is based on the Model Penal Code definition at § 2.08. PDS's proposed definition differs from that of the Model Penal Code in how it treats substances that are introduced into the body pursuant to medical advice. PDS would agree to differentiate between individuals who abuse prescription drugs in order to induce intoxication and individuals who suffer unforeseen intoxicating consequences from prescribed medication. PDS does not disagree with treating the former as "self-induced intoxication," even if the substance was originally prescribed for a legitimate medical purpose. The latter, however, is <u>not</u> self-induced.

Specifically, PDS recommends the following definition:

> <u>"Self-induced intoxication" means intoxication caused by substances the person knowingly introduces into the body, the tendency of which to cause intoxication the person knows or ought to know, unless the person introduces the substances under such circumstances as would afford a defense to a charge of crime. Intoxication is not "self-induced" if it occurs as an unforeseen result of medication taken pursuant to medical advice.</u>

[3] First Draft of Report No. 3, March 13, 2017, at page 40.

Comments of U.S. Attorney's Office for the District of Columbia on D.C. Criminal Code Commission Recommendations for Chapter 2 (Mistake, Deliberate Ignorance, and Intoxication) (1st Draft of Report No. 3) and for Chapter 1 (Preliminary Provisions) (1st Draft of Report No. 4) Submitted April 24, 2017

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on these materials provided for Advisory Group review:

COMMENTS ON RECOMMENDATIONS FOR CHAPTER 2 (MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION) (First Draft of Report No. 3)

- Section 22A-208: PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND IGNORANCE

  - In discussing the imputation of knowledge for deliberate ignorance (at 3), the Report states that the required culpable mental state is established if, among other things, "[t]he person avoided confirming or failed to investigate whether the circumstance exited with **the purpose of avoiding criminal liability**" (emphasis added).

  - This phrase could be misinterpreted as to require proof that a defendant knew that his/her actions would be against the law. In fact, what is relevant is a defendant's awareness of the circumstances, not the legality of his/her actions in that circumstance.

  - This language should be revised so that "criminal liability" is replaced with "knowledge of whether the circumstance existed." Thus, prong (2) would read: The person avoided confirming or failed to investigate whether the circumstance exited with the purpose of avoiding knowledge of whether the circumstance existed."

  - This revised language also would avoid the problem identified in the Commentary (at 23); that is, for example, the incurious defendant.

- Section 22A-209: PRINCIPLES OF LIABILITY GOVERNING INTOXICATION (at 25-40)

    - As footnote 27 indicates (at 29), for certain non-conforming offenses (*i.e.*, "those offenses that the [D.C. Court of Appeals] has classified as "general intent" crimes, yet has also interpreted to require proof of one or more purpose of knowledge-like mental states"), the Commission, staff, and Advisory Group will need to re-visit this principle as substantive offenses are addressed.

COMMENTS ON RECOMMENDATIONS FOR CHAPTER 1 OF THE REVISED CRIMINAL CODE: PRELIMINARY PROVISIONS (First Draft of Report No. 4)

- § 22A-102: RULES OF INTERPRETATION

  - Rule of Lenity

    The current language proposed (at 3) allows for an arguably broader application of the rule of lenity than under current D.C. Court of Appeals case law. USAO-DC proposes rephrasing as follows: "If ~~two or more reasonable interpretations~~ the meaning of a statutory provision remains genuinely in doubt after examination of that provision's plain meaning, structure, purpose, and history, then the interpretation that is most favorable to the defendant applies." *See United States Parole Comm'n v. Noble*, 693 A.2d 1084, 1104 (D.C. 1997).

  - Effect of Headings and Captions

    - The draft commentary regarding Section 102(c) is incorrect in saying (at 7) that "There appears to be no case law in in the District assessing the significance of headings and captions for interpreting criminal statutes." In fact, the proposed language reflects the current practice of the D.C. Court of Appeals, , i.e., the D.C. Court of Appeals is willing to look at titles, captions, and headings, but the Court of Appeals recognizes that they may not always be illuminating. S*ee In re: J.W.*, 100 A.3d 1091, 1095 (D.C. 2014) (interpreting the offense captioned "possession of implements of crime").

    - Also, the commentary text that precedes footnote 36 is misleading in suggesting that the proposed language is consistent with national trends. Specifically, the commentary is imprecise in saying that several jurisdictions have provisions "describing the relevance" of captions and headings. In fact, all of the jurisdictions cited in footnote 36 (Illinois, New Jersey, and Washington) expressly prohibit reliance on headings, as does South Carolina. *See* S.C. Stat. § 2-13-175 ("Catch line heading or caption not part of Code section."). And although the commentary notes that "two recent code reform efforts have adopted a similar provision," those reform efforts were not adopted, and instead both jurisdictions at issue expressly prohibit reliance upon captions or headings (*i.e.,* Illinois, (discussed *supra*) and Delaware (*see* 1 Del. C. § 306 ("titles, parts, chapters, subchapters and sections of this Code, and the descriptive headings or catchlines . . . do not constitute part of the law. All derivation and other notes set out in this Code are given for the purpose of

convenient reference, and do not constitute part of the law"). Thus, it appears that no jurisdiction has enacted a provision authorizing reliance on titles, captions, and headings.

- If the goal is to be consistent with current case law, USAO-DC proposes that Section 102(c) be revised as follows: EFFECT OF HEADINGS AND CAPTIONS. Headings and captions that appear at the beginning of chapters, subchapters, sections, and subsections of this title, may aid the interpretation of otherwise ambiguous statutory language. *See Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013) ("The significance of the title of the statute should not be exaggerated. The Supreme Court has stated that the title is of use in interpreting a statute only if it "shed[s] light on some ambiguous word or phrase in the statute itself." *Carter v. United States*, 530 U.S. 255, 267, 120 S. Ct. 2159, 147 L.Ed.2d 203 (2000). It "cannot limit the plain meaning of the text," *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998), although it may be a "useful aid in resolving an ambiguity" in the statutory language. 359 U.S. 385, 388–89, 79 S. Ct. 818, 3 L.Ed.2d 893 (1959). We agree with the Supreme Court of Arizona that in determining the extent and reach of an act of the legislature, the court should consider not only the statutory language, but also the title, *Maricopa County v. Douglas*, 69 Ariz. 35, 208 P.2d 646, 648 (1949), and we shall do so here.").

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 15, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-206, Hierarchy of Culpable Mental States

On page 3, the Report defines the Hierarchy of Culpable Mental States. It states:

(a) PURPOSE DEFINED.

(1) A person acts purposely with respect to a result when that person consciously desires that one's conduct cause the result.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(2) A person acts purposely with respect to a circumstance when that person consciously desires that the circumstance exists.

(b) KNOWLEDGE & INTENT DEFINED.

(1) A person acts knowingly with respect to a result when that person is aware that one's conduct is practically certain to cause the result.

(2) A person acts knowingly with respect to a circumstance when that person is practically certain that the circumstance exists.

(3) A person acts intentionally with respect to a result when that person believes that one's conduct is practically certain to cause the result.

(4) A person acts intentionally with respect to a circumstance when that person believes it is practically certain that the circumstance exists.

Paragraphs (a)(1), (b)(1), and (b)(3) use the same sentence construction and word choice. We believe that a slight non-substantive change to each would make these sentences clearer. They each start with "A person" then refer to "that person" and then discuss "one's" conduct. By changing the word "one's" to "his or her" there would be no question that it is the same person whose mental state and conduct is being considered.[2]

To be consistent with paragraph (a) of the proposed code, and the rest of the first paragraph of the commentary, the last sentence of the first paragraph of the commentary should also be changed. The sentence currently reads,, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the actor that it is at least possible that the person's conduct will cause the requisite result or that the circumstance exists." The rest of that paragraph refers to the "person" and not the "actor." To make the commentary more clear and consistent this sentence should be modified to say, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the person that it is at least possible that his or her conduct will cause the requisite result or that the circumstance exists."

On page 4, of the Report the commentary discusses inchoate liability. While footnote 2 appropriately gives examples of hypothetical offenses, there is no footnote that shows the difference in proof if these offenses used the phrase "with intent" rather than "with knowledge." To better explain these concepts the commentary should have another footnote. That footnote

[2] For example, Section 22A-206 (a)(1) would read, "A person acts purposely with respect to a result when that person consciously desires that his or her conduct causes the result."

should contain the same hypothetical offenses as footnote 2, but with the substitution of "with intent" for "with knowledge."[3]

[3] For example, "A hypothetical receipt of stolen property offense phrased in terms of possessing property "with intent that it is stolen" suggests that the property need not have actually been stolen."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 15, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties.

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties. (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-801, Offense Classifications

On pages 3 and 4, the Report proposes offense classifications and defines the terms "felony" and "misdemeanor."

Paragraph (b) (1) states "'Felony' means an offense with an authorized term of imprisonment that is more than one (1) year or, in other jurisdictions, death ." We assume that by the inclusion of the phrase "or, in other jurisdictions, death" that the term "felony" will be used to define both

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

in jurisdiction and out of state conduct. To avoid any confusion, we suggest that the language be redrafted as follows:

> "Felony" means any offense punishable:
> (A) By an authorized term of imprisonment that is more than one (1) year; or
> (B) By death, in the case of a felony from a jurisdiction that permits capital punishment.

In addition, under current District law, there is one use of the word "felony" that does not comply with the definition in the proposal and which must be retained in the Revised Criminal Code. D.C. Official Code § 16-1022 establishes the offence of parental kidnapping. Section 22A-801 must be amended to account for offense.

Under certain circumstances the penalty for parental kidnapping is defined as a felony even though the maximum penalty is one year or less. D.C. Code § 16-1024 (b) states:

> **(b)** A person who violates any provision of § 16-1022 and who takes the child to a place outside the District or detains or conceals the child outside the District shall be punished as follows:
>
> **(1)** If the child is out of the custody of the lawful custodian for not more than 30 days, the person is guilty of a felony and on conviction is subject to a fine not more than the amount set forth in [§ 22-3571.01] or imprisonment for 6 months, or both…
>
> **(2)** If the child is out of the custody of the lawful custodian for more than 30 days, the person is guilty of a felony and on conviction is subject to a fine of not more than the amount set forth in [§ 22-3571.01] or imprisonment for 1 year, or both …

The reason why these penalties are defined as "felonies" is so that persons who are charged with parental kidnapping may be extradited. See D.C. Code 23-563.[2] To allow for parental kidnapping to be designated a felony, and for any other situations where the Council may want to create a felony offense that has a penalty of one year or less or a misdemeanor offense of more than a year, 22A-801 (a) should be amended to say "Unless otherwise provided by statute."

[2]D.C. Official Code § 23-563 states:

> **(a)** A warrant or summons for a felony under sections 16-1022 and 16-1024 or an offense punishable by imprisonment for more than one year issued by the Superior Court of the District of Columbia may be served at any place within the jurisdiction of the United States.
>
> **(b)** A warrant or summons issued by the Superior Court of the District of Columbia for an offense punishable by imprisonment for not more than one year, or by a fine only, or by such imprisonment and a fine, may be served in any place in the District of Columbia but may not be executed more than one year after the date of issuance…. [emphasis added]

Similar language should be added to the definitions of "Felony" and "Misdemeanor" found in 22A-801 (a) and (b).[3]

§ 22A-803, Authorized Terms of Imprisonment

Section 22A-803 (a) establishes the definitions for the various classes of felonies and misdemeanors. Paragraph (a) begins by saying that "… the maximum term of imprisonment authorized for an offense is ..." Except for a Class A felony, the definitions for all of the felony and misdemeanor offenses include the phrase "not more than..." The use of the term "not more than" appears redundant following that introductory language. For example, compare "the maximum term of imprisonment authorize for an offense is... for a Class 2 felony forty-five (45) years" with "the maximum term of imprisonment authorize for an offense is... for a Class 2 felony, not more than forty-five (45) years".[4]

In the commentary, in the last paragraph on page 8 of the Report, it states "Under Supreme Court precedent, offenses involving penalties of six months or more are subject to a Sixth Amendment right to jury trial…" We believe that this is a typo and that the phrase should say "Under Supreme Court precedent, offenses involving penalties of more than six months are subject to a Sixth Amendment right to jury trial…" [emphasis added][5]

RCC § 22A-804. AUTHORIZED FINES.

Section 22A-804 (c) establishes an alternative maximum fine based on pecuniary loss to the victim or gain to the defendant. This provision states:

> (c) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:
>
> (1) not more than twice the pecuniary loss,
>
> (2) not more than twice the pecuniary gain, or

[3] Additionally, for the sake of clarity, the language "except as otherwise provided by statute" should also be added to the beginning of the paragraph that lists the penalty for "attempts." See § 22A-803 (b).

[4] The repeated use of term "not more than" pertaining to fines in § 22A-804 appears also to be redundant.

[5] See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) and Lewis v. *United States*, 518 U.S. 322 (1996).

(3) not more than the economic sanction in subsection (a) that the defendant is otherwise subject to, whichever is greater. The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt.

OAG recommends that the sentence "The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt" be modified and made into its own paragraph. In addition, OAG suggests changing the paragraph structure and language in the subparagraphs from "not more than" to "Up to" to make the paragraph clearer. Paragraph (c) should be amended to read:

(c) (1) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:

(A) Up to twice the pecuniary loss;

(B) Up to twice the pecuniary gain; or

(C) Up to the economic sanction in subsection (a) that the defendant is otherwise subject to.[6]

(2) If the pecuniary loss or pecuniary gain exceeds the amount of fine authorized by subsection (a), the amount of gain or loss must be alleged in the indictment and proved beyond a reasonable doubt.

By rewording and breaking out new paragraph (c)(2) from former paragraph (c)(3) it is clear that the government only has to allege gain or loss in an indictment and prove the amount beyond a reasonable amount when it seeks an alternative maximum fine and not merely when the government wants to justify the court's imposition of a fine based on pecuniary loss or gain which is less than or equal to the statutory amount in subsection (a). This rewording makes it clear that it is only when the alternative maximum fine is sought that the government should have to allege and prove the amount of gain or loss.

OAG recommends that the Commission consider two substantive changes to § 22A-804 (d). This paragraph addresses the alternative maximum fine for organizational defendants. Paragraph (d) states, "Subject to the limits on maximum fine penalties in subsection (b) of this section, if an

[6] As there are three choices, we recommend that the word "greater" be replaced with the word "greatest." This would clarify what the court's options are if both the pecuniary loss and pecuniary gain are greater than the sanction in subsection (a), but are of unequal amounts. Under our proposed change it would be clear that the court could impose the largest sanction (not merely the greater of one of the sanctions and subsection (a)).

organizational defendant is convicted of a Class A misdemeanor or any felony, a court may fine the organizational defendant not more than double the applicable amount under subsection (a) of this section."[7] First, there is no reason why the misdemeanor portion of this paragraph should be limited to Class A misdemeanors. Organizational defendants are frequently motivated by financial gain when committing offenses and a court should be able to set a fine that acts as a deterrent to such conduct. As the Council wrote in the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012,

> The reason for imposing an unusually high fine is appropriate for certain offenses in the interest of deterring violations. Of the listed offenses many were designed to deter corporate entities from engaging in prohibited conduct… While the penalty provisions may have low imprisonment terms, the larger fine currently associated with the provision is deemed important to deterring the specified conduct. In addition, organizational defendants are subject to section 1002(b) of the legislation – which effectively doubles any fine amount authorized under the law.[8]

The court should be authorized, in appropriate circumstance, to double the fine when an organizational defendant is convicted of any misdemeanor offense – not just a Class A misdemeanor.

Second, § 22A-804 (d) limits the court's ability to "double the applicable amount under subsection (a) of this section." This paragraph does not address the courts authority to double fines for organizational defendants when the underlining fine is established in the individual offense, as an exception to the standard fine.[9] Section 22A-804 (d) should be amended to add that "… a court may fine the organizational defendant not more than double the applicable amount under subsection(a) of this section or twice the maximum specified in the law setting forth the penalty for the offense." [Proposed language underlined]

[7] OAG recognizes that this paragraph is substantially based on D.C. Official Code § 22-3571.01(c).
[8] See Section 1102 on page 15 of the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012. Section 22A-804 (d) is based upon §1002(b) of Bill 19-214
[9] The Criminal Fine Proportionality Amendment Act of 2012 exempts numerous offenses that carry higher fines than those established in the Act.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	June 16, 2017
Re:	Comments on First Draft of Report No. 5: Recommendations for Chapter 8 of the Revised Criminal Code: Offense Classes & Penalties

PDS understands that the proposed classification system and the corresponding penalties are preliminary and subject to significant revision during the final phrase of the Commission's work. Despite the preliminary nature of the proposals in Report No. 5, PDS has two grave concerns it requests the Commission consider at this time.

1. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the felony classes – PDS disagrees with the Commission's approach of aligning its proposed felony classes and corresponding maximum imprisonment terms with current District sentencing norms. PDS believes that criminal code reform is an opportunity to rationally recalibrate our criminal justice system to reflect evidence-based research about public safety and crime. To start, PDS recommends the Commission eliminate the excessive sentence of life without release and all sentences above 20 years of incarceration. Sentences of life without release, particularly where there is no "second look" provision or parole eligibility, are not supported by evidence about dangerousness of the offender and are inhumane. The association between age and general criminal behavior is well established: most crimes are committed by young people and older adults have low rates of recidivism.[1] For instance, the Justice Policy Institute reported on the release of a large number of people, mostly age 60 and up who had been convicted of homicides in Maryland but released due to an appellate ruling. As of March 2016, of the more than 100

[1] See Alfred Blumstein, Jacqueline Cohen, and P. Hsieh, *The Duration of Adult Criminal Careers*, (1982).

people who had been released, none had been convicted of a new felony offense.[2] Over the past decade, New Jersey, New York, and Michigan reduced their prison populations by a range of 20 percent through front end reforms such as decreasing sentence length and through back end reforms in their parole systems. No adverse impacts on public safety were observed in these states.[3]

The Commission, and ultimately the Council, should also consider the fiscal impact of constructing such an expensive sentencing system. Because persons convicted of felony offenses and sentenced to prison are in the legal custody of the Bureau of Prisons,[4] the fiscal impact statements that accompany legislation creating felonies or changing felony penalties have not had to assess the costs of incarceration. When the Council promulgates new felony offenses, sets mandatory minimum prison sentences or increases the maximum term of imprisonment possible for a felony offense, it need never ask itself what the additional prison time will cost the District taxpayer. Many states are considering sentence reform because of budget deficits and the cost of prison overcrowding due to long sentences.[5] The National Conference of State Legislatures estimated that the taxpayers paid approximately $24 billion dollars to incarcerate persons convicted of something other than a non-violent offense; that estimate excludes spending on county and city jails and the federal corrections budget.[6] Given the tremendous support in the District for statehood,[7] and repeated calls for more local control over prosecutions and of the District's criminal justice system, the Commission, and ultimately the Council, should be mindful about building a sentencing system it would never be able to afford. Criminal code reform presents an ideal opportunity to weigh the high cost of long prison sentences against the little to no benefit in terms of increased public safety and propose the general reduction of

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[2] *Defining Violence: Reducing Incarceration by Rethinking America's Approach to Violence*, ("Defining Violence") Justice Policy Institute, August 2016. http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report_9.7.2016.pdf.

[3] Judith Greene & Marc Mauer, *Downscaling Prisons: Lessons from Four States*, The Sentencing Project (2010).

[4] D.C. Code § 24-101.

[5] See e.g., "Skyrocketing prison costs have states targeting recidivism, sentencing practices." https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/19/skyrocketing-prison-costs-have-states-targeting-recidivism-sentencing-practices/?utm_term=.a13e38050348; "Fiscal and prison overcrowding crises could lead to Three-Strikes reform." http://www.mercurynews.com/2011/07/22/fiscal-and-prison-overcrowding-crises-could-lead-to-three-strikes-reform/.

[6] *Defining Violence* at page 20.

[7] "District voters overwhelmingly approve referendum to make D.C. the 51st state." https://www.washingtonpost.com/local/dc-politics/district-voters-overwhelmingly-approve-referendum-to-make-dc-the-51st-state/2016/11/08/ff2ca5fe-a213-11e6-8d63-3e0a660f1f04_story.html?utm_term=.5234e8fc29f3.

maximum terms of imprisonment for felonies and the elimination of the life without possibility of release penalty.

In further support of reducing the prison terms proposed for the felony classes in Report No. 5, PDS focuses on and strongly objects to the proposed 45-year term of imprisonment for the Class 2 felony. A 45-year term penultimate penalty is significantly more severe than the 20-year maximum recommended by the American Law Institute and than the 30-year maximum recommended in the Proposed Federal Criminal Code. Further, the 45-year penalty is not justified by the data included in Memorandum #9, which supplements Report No. 5.

According to Figure 1, there are nine criminal offenses in Title 22 that have a maximum penalty of 30 years imprisonment. This grouping of offenses would correspond with the proposed Class 3 felony and its recommended 30-year maximum. There are six offenses that have a maximum penalty of life without possibility of release (LWOR). This grouping corresponds with the proposed Class 1 felony. Between the 30-year maximum grouping of offenses and the LWOR maximum grouping in the D.C. Code, Figure 1 shows that there is one offense with a maximum penalty of 40 years (which I assume is armed carjacking) and one offense with a maximum penalty of 60 years (which I assume is first-degree murder).

Figure 3 is a little more complicated in that it compares the Sentencing Guidelines groups and the proposed felony classifications; the correspondence between the two is a little tricky. Category 3 on Figure 3 compares the maximum proposed penalty for Class 3 (30 years or 360 months) and the top of the box for the Master Grid Group 3 for column A and for column D. Figure 3 indicates that a maximum of 360 months for Class 3 felony offenses would more than adequately accommodates the top of the box for Column A, 180 months, and Column D, 216 months. PDS recommends lowering the penalty proposed for Class 3 to significantly less than 30 years. Category 2 in Figure 3 compares the 45-year (540 months) penalty proposed for Class 2 felony to the Master Grid Group 2 for column A and column D. Again, Figure 3 indicates that a maximum of 45 years for Class 2 felony offenses is significantly higher than top of the box for Column A, 288 months (24 years), and Column D, 324 months (27 years). PDS acknowledges that the maximum prison term for the class should be higher than the top of the box in Column D, for example to allow for aggravating circumstances of the particular incident. A maximum penalty of 45 years, however, allows for an excessive 18 years “cushion” above the top of the box for Master Grid group 2, column D. Category 1 in Figure 3 corresponds to Master Group 1, the group into which first-degree murder is ranked. Thus the one offense with a statutory maximum of 60 years (720 months), as shown on Figure 1, is the main offense (and variations of it) in Master Group 1 and the maximum penalty is 720 months for column A and column D.

Figure 4 is perhaps more helpful for recognizing the proposed penalty for Class 2 felony should be much lower than 45 years, even if that class were reserved for the most serious offense in the

Code. Figure 4 in Memo #9 shows that the average sentence and the mean sentence for Category 1 (meaning the average sentence for murder I) are both 30 years, both well below the 45-year penalty proposed for Class 2 felony. Category 2 on Figure 4 compares the 45-year (540 months) proposed for Class 2 felony to the average and mean sentences for Master Grid Group 2 offenses and also demonstrates that the 45-year penalty proposed for Class 2 could be greatly reduced and still well accommodate current sentencing practice for those offenses. The average sentence for that category is 225 months (18 years, 9 months) and the mean sentence is 228 months (19 years), lower than the proposed 45-year maximum by 26 years, 3 months and 26 years respectively.

While PDS focuses here on the maximum imprisonment terms proposed for the three most serious classes for RCC §22A-803, all of the penalties should be examined in light of the sentencing practices but also in light of evidence-based research on public safety and of the potential fiscal impact of incarceration.

2. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the Class B misdemeanor penalty – The Commission proposes in Report No. 5 to eliminate the 6-month prison term as the penultimate penalty for misdemeanor offenses and instead to have the 180-day prison term as the penultimate misdemeanor penalty.[8] The 180-day/6-month distinction is important because, as the Report notes, D.C. Code §16-705 requires a jury trial as compelled by the Constitution[9] or if the offense is punishable by imprisonment for *more than 180 days*.[10] Six months is longer than 180 days;[11] therefore offenses with a penalty of 6 months imprisonment are jury demandable; those with a penalty of 180 days are not. PDS would prefer that the maximum penalty for Class B be set at 6 months. PDS acknowledges that, under current law, a 6-month penalty would make every offense assigned to that class jury-demandable and that flexibility around this misdemeanor mid-point might have merit. Thus, to provide for such flexibility, PDS would not object to Class B having a maximum penalty of 180 days **IF** there were also a statutory provision that stated offenses categorized in Class B were jury demandable unless otherwise provided by law. Report No. 5 proposes the opposite default rule – that Class B misdemeanors would be non-jury demandable unless there were a plain statement in the offense definition that the offense was to be jury demandable. Because "trial by jury in criminal cases is fundamental to the American scheme of justice,"[12] the default should be that Class B misdemeanors are jury demandable unless there is a plain statement in the offense definition that the offense is not jury demandable.

[8] The ultimate term of imprisonment penalty for a misdemeanor is one year.

[9] D.C. Code § 16-705(a).

[10] D.C. Code § 16-705(b)(1).

[11] *Turner v. Bayly*, 673 A.2d 596, 602 (D.C. 1996).

[12] *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

Trial by jury is critical to fair trials for defendants. "The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta…. The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." [13]

Requiring jury trials is not only a acknowledgement of the core principle of American justice that a defendant should be tried by a jury of his or her peers, it also recognizes the importance to the community of serving as jurors. As the Supreme Court noted in *Batson v. Kentucky*, "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try…. [B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror."[14] Constructing a system that by default precludes jury trials harms not only the defendant but the community as a whole. The ability of District residents to participate in civic life is already curtailed compared to residents of States; the Commission should not restrict that participation further by default.

When the Commission engages in the work of adjusting penalties and gradation of offenses to provide for proportionate penalties[15] and when the D.C. Council promulgates new misdemeanors, they should have to explicitly decide to deprive the defendant and the community of a jury trial and they should have to publicly declare they made that decision, not hide behind a default rule buried in a penalty classification system.

[13] *Id*. at 151, 156.

[14] *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

[15] D.C. Code § 3-152(a)(6).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 17, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code – Penalty Enhancements

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code – Penalty Enhancements (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-805, Limitations on Penalty Enhancements

Section 22A-805 (a) uses the word "equivalent" but does not define it. Because it is defined in a later section the use of the word here is confusing, if not misleading.

Section 22A-805 (a) states:

> PENALTY ENHANCEMENTS NOT APPLICABLE TO OFFENSES WITH EQUIVALENT ELEMENTS. Notwithstanding any other provision of law, an offense is not subject to a

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

penalty enhancement in this Chapter when that offense contains an element in one of its gradations which is equivalent to the penalty enhancement.

In giving definitions to undefined Code terms the Court of Appeals has looked to definitions found in Code provisions that were enacted at a different time for a different purpose. See *Nixon v. United States*, 730 A.2d 145 (D.C. 1999), where the Court applied the definition of "serious bodily injury" found in a sex offense statute to the offense of aggravated assault. Because the very next section after § 22A-805 contains a definition for the word "equivalent" it is possible that, notwithstanding the limiting language in § 22A-806 (f)(2)[2], the Court of Appeals may look to that enacted definition when determining the meaning of the earlier use of the word "equivalent" in § 22A-805 (a). Clearly this is not what the Commission intends. To avoid any confusion about what the word means, to avoid making the Court of Appeals define the term, and to avoid unnecessary litigation, OAG suggests that the word "equivalent" be defined in § 22A-805 (a), a different word be used in § 22A-805 (a), or a definition be drafted that can be used in both sections.

Section 22A-805 (a) also uses the word "gradations." This word is also not defined. OAG suggests that the sentence be rewritten so that the word "gradations" is replaced by a term that includes "lesser included offenses."[3]

On page 4 of the Report there is a discussion of the holding in *Bigelow v. United States,* 498 A.2d 210 (D.C. 1985), and its application after the enactment of § 22A-805. The discussion initially leads the reader to believe that multiple repeat offender provisions would continue to apply when the dictates of *Lagon v. United Sta*tes, 442 A.2d 166, 169 (D.C. 1982), have been met. The paragraph then concludes with the statement "However, insofar as RCC § 22A-805 is intended to reduce unnecessary overlap in statutes, courts may construe the term "equivalent" in RCC § 22A-805 more broadly than under current law." It is OAG's position that this determination not be left to the courts to resolve. Rather, the Commission should unequivocally state that the holding in *Bigelow* would apply after enactment of these provisions.

§ 22A-806, Repeat Offender Penalty Enhancements

On page 8 of the Report the term "Prior Convictions" is defined. Section 22A-806 (f)(5)(i) states, "Convictions for two or more offenses committed on the same occasion or during the same course of conduct shall be counted as only one conviction…" However, the proposed language does not clarify what is meant by the word "occasion." Unfortunately, the addition of the phrase "during the same course of conduct" does not clarify it. Take, for example, the following scenario. An in-home worker who visits an elderly patient once a week is convicted for stealing from the victim. Afterwards, the government learns that the in-home worker actually started working for the patient at an earlier time and also stole from the patient during that

[2] Section 22A-806 (f)(2) states "For the purposes of this section, 'equivalent' means a criminal offense with elements that would necessarily prove the elements of the District criminal offense."

[3] For example, § 22A-805 (a) could be rewritten to say "Notwithstanding any other provision of law, an offense is not subject to a penalty enhancement in this Chapter when that offense ~~contains an~~ or any of its lesser included offenses contains an element ~~in one of its gradations~~ which is equivalent to the penalty enhancement. "

previous time period. Would a second conviction of the in-home worker be the subject of an enhancement under § 22A-806 (f)(5)(i) or would it be considered "the same course of conduct"? Either the proposed code provision or the Commentary should address this issue. To the extent that there is current case law on this issue, it should be fleshed out in the Commentary.

In § 22A-806 (f)(5)(iv) it states "A conviction for which a person has been pardoned shall not be counted as a conviction. OAG suggests that this exception be expanded to include convictions that have been sealed by a court on grounds of actual innocence.

§ 22A-807, Hate Crime Penalty Enhancement

On page 17 of the Report the Hate Crime Penalty Enhancement is explained. Section 22A-807 (a) states:

> A hate crime penalty enhancement applies to an offense when the offender commits the offense with intent to injure or intimidate another person because of prejudice against that person's perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation. [Emphasis added]

Though not expounded upon in the Commentary, this penalty enhancement has narrower application than the current bias-related crime penalty. The definition of a "Designated act" in D.C. Code § 22-3701 includes not only injury to another person but property crimes as well. So long as the act is based upon prejudice, a bias-related crime penalty can currently be given when a defendant is guilty of injuring property, theft, and unlawful entry. See § 22-3701 (2). The Hate Crime Penalty Enhancement should be expanded to cover all of the offenses currently included under the law.

§ 22A-808, Pretrial Release Penalty Enhancement

On page 24 of the Report there are definitions for the misdemeanor, felony, and crime of violence pretrial release penalty enhancements. To be consistent with the wording of § 22A-806 (a), (b), and (c) two changes should be made to these provisions. First, the term "in fact" should be added to each of the pretrial release penalty enhancements. For example, § 22A-808 (a) should be redrafted to say "A misdemeanor pretrial release penalty enhancement applies to a misdemeanor when the offender*, in fact,* committed the misdemeanor while on release pursuant to D.C. Code § 23-1321 for another offense." [Additional term italicized] Second, penalty enhancements found in § 22A-806 refer to "the defendant" whereas the penalty enhancements found in § 22A-808 refer to "the offender." To avoid arguments about whether the difference in wording has legal significance, the same term should be used in both sections.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	July 18, 2017
Re:	Comments on First Draft of Report No. 6: Recommendations for Chapter 8 of the Revised Criminal Code: Penalty Enhancements

PDS has the following concerns and makes the following suggestions:

1. With respect to RCC § 22A-806, Repeat Offender Penalty Enhancements, PDS recommends the complete elimination of this section. Repeat offender penalty enhancements represent a triple counting of criminal conduct and work a grave miscarriage of justice for individuals who have already paid their debt to society in the form of a prior sentence. Repeat offender penalty enhancements exacerbate existing racial disparities in the criminal justice system and increase sentences that are already too long.

   The United States incarcerates more people than any other country in the world. The last forty years have seen relentless growth in incarceration.[1] The expansion in prison population is driven by greater numbers of people entering the system, less diversion, and longer sentences.[2] Enhancements create even longer sentences – beyond what the legislature originally envisioned for a particular offense committed by a broad range of potential culpable actors.

[1] The Sentencing Project, Ending Mass Incarceration: Charting a New Justice Investment, available at: http://www.sentencingproject.org/publications/ending-mass-incarceration-charting-a-new-justice-reinvestment.

[2] James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012).

The commentary to the Revised Criminal Code ("RCC") justifies, in part, the continued use of prior convictions to enhance criminal sentences on the lack of evidence on how the operation of criminal history in sentencing may affect racial disparities.[3] But evidence of the criminal justice system's disparate impact on African-Americans abounds. The Black-white "disparity-ratio" in male imprisonment rates was nearly 6:1 in 2014.[4] Hispanic-white ratios for males were 2.3:1.[5] In the District, nearly fifty percent of black males between the ages of 18-35 were under criminal justice supervision according to a study by the National Center on Institutions and Alternatives.[6] The Sentencing Commission's statement that "the number of non-black, felony offenders present too small a sample size for meaningful statistical analysis" tells the picture of who in fact is being sentenced on felony offenses.[7] While enhancements may not necessarily cause disparity in sentencing, the use of penalty enhancements has the effect of amplifying racial disparities already present in the criminal justice system.

For instance, consider the evidence of disparate prosecution for drug offenses. Although blacks and whites use drugs at roughly the same rates, African Americans are significantly more likely to be arrested and imprisoned for drug offenses.[8] "Black arrest rates are so much higher than white rates because police choose as a strategic matter to invest more energy and effort in arresting blacks. So many more blacks than whites are in prison because police officials have adopted practices, and policy makers have enacted laws, that foreseeably treat black offenders much more harshly than white ones."[9] Sentencing enhancements for multiple prior misdemeanor or felony drug offenses create a feedback effect that amplifies the existing bias, or choices, already made by the criminal justice system.

PDS is not arguing that consideration of prior convictions should have no place in our criminal justice system, but rather that the place these prior convictions hold is already sufficient. As noted in the commentary, a defendant's criminal history is a dominant feature in the Sentencing

[3] Commentary for RCC§ 22A-806 at 12.

[4] *See* Bureau of Justice Statistics, Prisoners in 2014 (2015), available at: https://www.bjs.gov/content/pub/pdf/p14.pdf; *see also*, The Sentencing Project, Fact Sheet, available at: http://www.sentencingproject.org/publications/trends-in-u-s-corrections

[5] *Id*.

[6] Eric R. Lotke, "*Hobbling a Generation*," National Center on Institutions and Alternatives, August 1997.

[7] Commentary for RCC§ 22A-806 at 12.

[8] Tonry, M., & Melewski, M. (2008), *The Malign Effects of Drug and Crime Control Policy on Black Americans*. In M. Tonry (Ed.), Crime and justice: A review of research (pp. 1-44). Chicago, IL: University of Chicago Press; James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012).

[9] *Id*.

Guidelines.[10] A prior felony conviction will often mean that probation is excluded as a guidelines-compliant sentencing option. Because it will move a defendant to a higher column on the guidelines grid, a prior felony conviction will also mean that the corresponding guidelines-compliant prison sentence the defendant will face is longer. This is important because judges overwhelmingly comply with the Sentencing Guidelines and thus already abide by a system that heavily weighs prior criminal history. [11] In addition to being determinative of which box a defendant will fall into on the Sentencing Guidelines, prior criminal history must be considered in sentencing the defendant within that box. This is the case because the D.C. Code explicitly requires judges to "impose a sentence that reflects the seriousness of the offense and the criminal history of the offender."[12] Enhancements therefore create a system that triple counts prior convictions for individuals who have already faced consequences as a direct result of the prior conviction.

While misdemeanors are not covered by the Sentencing Guidelines or by D.C. Code § 24-403.01, there is no doubt that judges consider criminal history in deciding whether to impose incarceration and in deciding the amount of incarceration to impose. Prosecutors routinely argue for a sentencing result based in substantial part on the defendant's criminal history. Penalty enhancements for misdemeanors create the same issue of over-counting criminal history for offenses where the defendant has already paid a debt to society. Further, as acknowledged in the commentary, misdemeanor enhancements exist in a tiny minority of jurisdictions. According to the commentary, only Maine, Missouri, and New Hampshire allow enhancements for prior misdemeanor convictions.[13]

There is no evidence that longer sentences for defendants who have committed multiple misdemeanors produce meaningful long-term improvements in community safety or better individual outcomes. To the contrary, many misdemeanor offenses can be addressed through comprehensive community based programming rather than ever longer periods of incarceration. For example, repeated drug possession offenses or offenses that stem from drug addiction such as theft may be successfully addressed through referrals to drug treatment. [14] Current Superior Court policies establishing specialized courts for individuals with mental illness or issues with

[10] Commentary for RCC§ 22A-806 at 12.

[11] Voluntary Sentencing Guidelines Manual (June 27, 2016) at 1. The 2015 annual report for the District of Columbia Sentencing and Criminal Code Revision Commission lists compliance as "very high" and "consistently above 90% since 2011" and 96% in 2015. Available at: https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/Annual%20Report%202015%20Website%205-2-16.pdf .

[12] D.C. Code § 24-403.01(a)(1).

[13] Commentary for RCC§ 22A-806 at 13 fn. 43.

[14] Justice Policy Institute, Substance Abuse Treatment and Public Safety January 2008 available at: http://www.justicepolicy.org/uploads/justicepolicy/documents/08_01_rep_drugtx_ac-ps.pdf.

drug addiction reflect the community sentiment that there are better solutions to crime than more incarceration.

While the RCC does not propose specific mandatory minimums for enhancements, it contemplates a structure that would force a judge to sentence a defendant to a mandatory minimum once the prosecution proves the applicability of a repeat offender enhancement.[15] PDS opposes the use of mandatory minimums in the RCC. PDS believes that judges should be trusted to exercise discretion in sentencing defendants. Judges are in the best position to review the facts in each case and the unique history of each defendant. Judges make decisions informed by a presentence report, statements of victims, the community, and sometimes medical professionals. Judges should be trusted to weigh the equities in each case and impose, consistent with the law, a fair sentence.

2. With respect to RCC § 22A-807, Hate Crime Penalty Enhancement, PDS appreciates that the causal nexus between the crime and the bias is clarified in RCC § 22A-807. However, PDS has concerns about several of the broad categories of bias listed in the RCC. As acknowledged in the commentary for RCC § 22A-807, the list of protected categories is broader than other jurisdictions and includes several characteristics many states do not recognize, such as personal appearance, matriculation, marital status, and family responsibility.[16] PDS believes that it is appropriate to include these categories in the District's human rights law which prohibits discrimination in employment, housing, public accommodation, and education.[17] However, when used in the criminal code, these categories may allow for prosecution outside of the intended scope of the hate crime statute. For instance, by including marital status and family responsibility, a defendant who kills an ex-husband because of a bitter divorce or because the ex-husband fails to take on family responsibility may be subject to a hate crime enhancement. A teenager who commits a robbery motivated by anger at a complainant's flashy personal appearance could similarly be subject to a hate crime enhancement.[18] This expansion of the hate crime categories would allow for a sentencing enhancement to apply to what the legislature likely envisioned to be within the standard range of motives for the commission of an offense. Thus, PDS recommends removing the following categories from proposed §22A-807: marital status, personal appearance, family responsibility, and matriculation.

[15] The RCC § 22A-806(e) provides for at least the possibility of mandatory minimum sentences for the commission of repeat offenses. PDS understands that sentencing will be fully considered by the Commission at a later time.

[16] Commentary for RCC§ 22A-806 at 21.

[17] D.C. Code § 2-1402.01-§2-1402.41.

[18] PDS does not disagree with treating as a hate crime a crime committed because of a prejudice against a person's appearance or dress that is or appears to be different than the person's gender but believes that bias is covered by the "gender identity or expression" term in §22A-807.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	July 18, 2017
Re:	Comments on First Draft of Report No. 7: Recommendations for Chapter 3 of the Revised Criminal Code: Definition of a Criminal Attempt

In general, the Public Defender Service approves the recommendations in the First Draft of Report No. 7. PDS has the following concerns, however, and makes the following suggestions:

1. The Commentary refers to two cases with the name "*Jones v. United States*": *(Richard C.) Jones v. United States*, 124 A.3d 127 (D.C. 2015), cited on pages 7 and 10; and *(John W.) Jones v. United States*, 386 A.2d 308 (D.C. 1978), cited on pages 13-14 and 18. We suggest that the defendants' first names be added to these citations to make it easier to distinguish between the two cases.

2. We suggest omitting two hypothetical examples from Footnotes 2 and 8 of the Commentary to avoid unnecessary confusion about the scope and application of attempt.

   ▪ The last sentence of Footnote 2, on page 4, poses the following hypothetical: "For example, to determine whether a person arrested by police just prior to pulling a firearm out of his waistband acted with the intent to kill a nearby victim entails a determination that the person planned to retrieve the firearm, aim it at the victim, and pull the trigger."

   As written, this example suggests that a defendant could be convicted of attempted assault with intent to kill where he had not yet pulled a firearm out of his waistband. We believe that this conduct, without more, would be insufficient to sustain a conviction for attempted assault with intent to kill. Moreover, the example raises complex questions that this group has yet to resolve concerning the interplay between attempt and gradations of assault offenses. We therefore propose that the footnote be deleted to avert the risk that readers will draw incorrect inferences about sufficiency.

   ▪ Footnote 8, on page 5, includes among its examples of incomplete attempts "the attempted felony assault prosecution of a person who suffers a debilitating heart attack just as he or she is

about to exit a vehicle and repeatedly beat the intended victim." We believe that these facts, without more, provide an insufficient basis for an attempted felony assault conviction. This hypothetical likewise raises questions about the type of proof necessary to establish an attempted felony assault, where felony assault requires a specific degree of harm. We propose that the hypothetical be deleted.

3. PDS proposes modifying § 22A-301(a)(3) to read as follows (alterations are underlined):

> (3) The person<u>'s conduct</u> is either:
>
> > (A) <u>Reasonably adapted to and</u> dangerously close to <u>the accomplishment of</u> that offense; or
> >
> > (B) Would be dangerously close to <u>the accomplishment of</u> that offense if the situation was as the person perceived it, provided that the person's conduct is reasonably adapted to <u>the accomplishment of</u> that offense.

First, we suggest changing the subject of (a)(3) from "the person" to "the person's conduct," to make more explicit that the jury's focus should be on the conduct of the defendant.

Second, PDS proposes modifying subsection (A) to insert the phrase "reasonably adapted to" before the phrase "dangerously close," to make clear that the requirement of conduct "reasonably adapted" to completion of the target offense applies to *all* attempt charges, and not only those that fall under subsection (B). This alteration would comport with case law from the D.C. Court of Appeals, which has held that "[t]he government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime . . . ." *Seeney v. United States*, 563 A.2d 1061, 1083 (D.C. 1989); *see also Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *(John W.) Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978). The current draft, which uses the "reasonably adapted" language only in subsection (B), creates the impression—at odds with case law—that this requirement does not exist for attempts that fall under subsection (A), and could lead the jury to conclude that the conduct requirements under subsection (A) are looser than under subsection (B). This alteration would also align the draft provision with the current Red Book instruction, which reflects current District law in this area and which requires proof that the defendant "did an act reasonably adapted to accomplishing the crime." Criminal Jury Instructions for the District of Columbia No. 7.101, Attempt (5th ed. rel. 14).

Inclusion of the "reasonably adapted" language in subsection (A) would have the additional benefit of giving some substance to the "dangerously close" requirement and ensuring that innocent conduct is not punished as an attempt. PDS supports the draft's adherence to the "dangerously close" standard for conduct, which reflects current case law. The term "dangerously close," however, is not defined. Consistent use of the "reasonably adapted" language in both (A) and (B) would help to establish a clearer limitation on the conduct that can give rise to an attempt conviction. We believe that clear and exacting conduct standards are essential in the context of attempt, because the defendant's thoughts and plans play such a critical role in the question of guilt, but must often be inferred from a defendant's actions.

Third, we suggest modifying both (A) and (B) to replace the phrases "committing that offense" and "commission of that offense" with the phrase "the accomplishment of that offense." Like the

phrase "reasonably adapted," the "accomplishment" language appears in both the current Redbook instruction on Attempt and DCCA case law. *See, e.g., Seeney*, 563 A.2d at 1083; *Williams*, 966 A.2d at 848. Maintaining that terminology in the statutory provision would thus provide continuity and consistency. It would also avert confusion about the point at which the target offense has been "committed." Just as the "dangerously close" standard requires the jury to focus on the defendant's proximity to completing the target offense, rather than his preparatory actions, the "accomplishment" language keeps the jury's focus on the completion of the target crime.

Comments of the U.S. Attorney's Office for the District of Columbia on D.C. Criminal Code Commission Recommendations

for Chapter 3 of the Revised Criminal Code: Definition of a Criminal Attempt (First Draft of Report No. 7)

and for Chapter 8 of the Revised Criminal Code: Penalty Enhancements (First Draft of Report No. 6)

Submitted July 21, 2017

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on these materials provided for Advisory Group review:

RECOMMENDATIONS FOR CHAPTER 3 OF THE REVISED CRIMINAL CODE (DEFINITION OF A CRIMINAL ATTEMPT) First Draft of Report No. 7

- Section 22A-301(a): Definition of Attempt - COMMENTARY
  - Page 3: tenant → tenet
  - Pages 5 (text accompanying footnotes 8 and 9), 14-15, 37: Advisory Group should discuss further whether the DCCA sees a meaningful distinction between the "dangerous proximity" and "substantial step" tests, considering *Hailstock*

RECOMMENDATIONS FOR CHAPTER 8 OF THE REVISED CRIMINAL CODE
(PENALTY ENHANCEMENTS)
First Draft of Report No. 6

- Section 22A-805: Limitations on Penalty Enhancements - COMMENTARY

    - Page 4: USAO-DC agrees that subsections (b) and (c) "codify procedural requirements for penalty enhancements . . . required in *Apprendi* . . . and subsequent case law."

- Section 22A-807: Hate Crime Penalty Enhancement (at page 17)

    - Section title: Labeling it a "hate" crime is a change from current law, which refers to this as a "bias-related crime."

    - (c) Definitions: (iii)-(v) should be subheadings within (ii)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

SUBJECT: First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-2001. Property Offense Definitions

RCC § 22A-2001 defines "coercion", "consent", "deceive", and "effective consent." Those definitions are then used throughout the offenses contained in the first drafts of Reports number 9, 10, and 11. When reviewing some of the offenses that use one or more of these terms it is unclear what the penalty would be for a person who meets all of the other elements of the offense except that the "victim" turns out to be law enforcement involved in a sting operation. As written it would appear that the person would only be guilty of an attempt. Assuming, that the Commission will recommend that, in general, the penalty for an attempt will be lower than the penalty for a completed offense, we believe that that penalty is insufficient in this context. Take

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

the offense of Financial Exploitation of a Vulnerable Adult or Elderly Person under RCC §22A-2208. The elements of that offense in Report #10 are:

(a) A person is guilty of financial exploitation of a vulnerable adult or elderly person if that person:

(1) Knowingly:

(A) Takes, obtains, transfers, or exercises control over;

(B) Property of another;

(C) With consent of the owner;

(D) Who is a vulnerable adult or elderly person;

(E) The consent being obtained by undue influence; and

(F) With intent to deprive that person of the property, or

(2) Commits theft, extortion, forgery, fraud, or identity theft knowing the victim to be a vulnerable adult or elderly person.[2]

Let's say that the police learn of a ring of criminals who prey on vulnerable adults. They set up a sting where the perpetrators believe that the police officer is a vulnerable adult. The perpetrators go through all of the acts to exercise undue influence[3], believe that they have excercised undue influence, and the police officer eventually gives them property. In this hypothetical, at the time that the perpetrator receives the property they "are practically certain that the police officer is a vulnerable adult and that they obtained his or her consent due to undo influence.[4] In this situation there is no reason why the perpetrators should not be subject to the same penalty as if they did the exact same things and obtained property from a person who was actually a vulnerable adult. To change the outcome, the Commission could change the definitions contained in RCC § 22A-2001 or have a general provision that states that in sting operations the person has committed the offense if the facts were as they believed it to be.

§ 22A-2003, Limitation on Convictions for Multiple Related Property Offenses.

Section 22A-2003 establishes a procedure whereby the trial court will only enter judgment of conviction on the most serious of certain specified property offenses that arise out of the same act or course of conduct. Should the Court of Appeals reverse the conviction it directs the trial court to resentence the defendant on the next most serious offense. Should the person have been found guilty at trial for multiple offenses that would merge under this standard, there could be successive appeals and resentencings.[5] Such a procedure would lead to increased litigation and

[2] See page 50 of First Draft of Report #10 – Recommendations for Fraud and Stolen Property Offenses.

[3] Undue influence is defined as "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."

[4] See the definition of "knowingly" in § 22A-205, Culpable Mental State Definitions.

[5] The charges that merge under RCC § 22A-2003 (a) are theft, fraud, extortion, stolen property, and other property damage offenses (including any combination of offenses contained in

costs and an increase in the amount of time before a conviction can be finalized. Rather than create such a system, OAG recommends that the RCC instead adopt a procedure which has already been accepted by the Court of Appeals for barring multiple convictions for overlapping offenses.

Section 22A-2003 (c) states, "Where subsections (a) or (b) prohibit judgments of conviction for more than one of two or more offenses based on the same act or course of conduct, the court shall enter a judgment of conviction for the offense, or grade of an offense, with the most severe penalty; provided that, where two or more offenses subject to subsection (a) or (b) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses." The Commentary, at page 52, states:

> The RCC limitation on multiple convictions statute does not raise double jeopardy issues or create significant administrative inefficiency… jeopardy does not attach to a conviction vacated under subsection (c), and the RCC statute does not bar subsequent entry of a judgment of conviction for an offense that was previously vacated under subsection (c)… A conviction vacated pursuant to subsection (c) of the RCC statute may be re-instated at that time with minimal administrative inefficiency. Sentencing for a reinstated charge may entail some additional court time as compared to concurrent sentencing on multiple overlapping charges at the close of a case. However, any loss to procedural inefficiency appears to be outweighed by the benefits of improving penalty proportionality and reducing unnecessary collateral consequences convictions concerning substantially overlapping offenses. [emphasis added]

Notwithstanding the Commentary's assertion that multiple appeals and resentencings would have minimal administrative inefficiency and take some additional court time, such a procedure would lead to increased court inefficiencies and increased litigation costs and times.[6] For example, a person could be found guilty of three property offenses that would merge under the provisions proposed by the RCC. At sentencing the judge would sentence the person only to the offense with the most severe penalty. The defendant's attorney would then file an appeal based solely on the issues that pertain to that count, write a brief, and argue the appeal. The prosecutors would have to respond in kind. After some amount of time, perhaps years, should the Court of Appeals

Chapters 21, 22, 23, 24, or 25 of the RCC for which the defendant satisfies the requirements for liability). The charges that merge under RCC § 22A-2003 (b) are Trespass and Burglary (and any combination of offenses contained in Chapters 26 and 27 of the RCC for which the defendant satisfies the requirements for liability.)

[6] It should be noted that the increase in litigation expenses would not only be born by the prosecution entities and by some defendants, but by the court who, under the Criminal Justice Act, must pay for court appointed attorneys to brief and argue multiple appeals and appear at multiple sentencings.

agree with the defense position on that one count, the count would be reversed and the case would be sent back to the trial court for resentencing. The process would then repeat itself with an appeal on the count with the next most severe penalty. Should the defense win again, the process would repeat again. It is more efficient to have all the issues in a case briefed and argued once before the Court of Appeals and have the judgment finalized at the earliest time.

In *Garris v. United States*, 491 A.2d 511, 514-515 (D.C. 1985), the D.C. Court of Appeals noted with approval the following practice where two or more counts merge. It suggested that the trial court can permit convictions on both counts, allowing the Court of Appeals to determine if there was an error that affected one count but not the other. *Id.* ("No legitimate interest of the defendant is served by requiring a trial court to guess which of multiple convictions will survive on appeal."). Then, if no error is found, this Court will remand the case to the trial court to vacate one conviction, and double jeopardy will be avoided. If error was found concerning one count but not the other, no double jeopardy problem will arise because only one conviction would stand. *Id.*

On a separate note, Section 22A-2003 (c) ends by saying "where two or more offenses subject to subsection (a) or (b) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses." The Commentary does not explain, however, what standards the judge should use in choosing which offense should be retained and which offense should be vacated. As the penalty is the same, the defendant has reduced interest in which offense remains and which is vacated. Given the broad authority that the prosecutor has in choosing what, if any, offenses to charge and to negotiate a plea offer that meets the state's objectives, after a sentence has been imposed, it should be the prosecutor that decides which sentences should be retained and which should be vacated.

To accomplish the more efficient procedure proposed in *Garris* and to address how the determination should be made concerning which conviction should stand and which should be vacated, OAG proposes that the following language be substituted for RCC § 22A-2003:

(a) *Theft, Fraud, Extortion, Stolen Property, or Property Damage Offenses.* A person may initially be found guilty of any combination of offenses contained in Chapters 21, 22, 23, 24, or 25 for which he or she satisfies the requirements for liability; however, pursuant to paragraph (c), following an appeal, or if no appeal following the time for filing an appeal, the court shall retain the conviction for the offense, or grade of an offense, with the most severe penalty and vacate any other offense within these chapters which is based on the same act or course of conduct.

(b) *Trespass and Burglary Offenses.* A person may initially be found guilty of any combination of offenses contained in Chapters 26 and 27 for which he or she satisfies the requirements for liability; however, pursuant to paragraph (c), following an appeal, or if no appeal following the time for filing an appeal, the court shall retain the conviction for

the offense, or grade of an offense, with the most severe penalty and vacate any other offense within these chapters which is based on the same act or course of conduct.

(c) *Judgment to be Finalized after Appeal or Appeal Time has Run.* Following a remand from the Court of Appeals, or the time for filing an appeal has run, the court shall, in addition to vacating any convictions as directed by the Court of Appeals, retain the conviction for the offense, or grade of an offense, with the most severe penalty within subsection (a) or (b) and vacate any other offense within these chapters which are based on the same act or course of conduct. Where two or more offenses subject to subsection (a) or (b) have the same most severe penalty, the court shall impose a judgment of conviction for the offense designated by the prosecutor.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

SUBJECT: First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses[1]

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses. OAG reviewed this document and makes the recommendations noted below.[2]

[1] In OAG's memo on the First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions, we argued against the proposal for successive appeals and resentencings proposed in § 22A-2003, Limitation on Convictions for Multiple Related Property Offenses. We proposed a system based upon *Garris v. United States*, 491 A.2d 511, 514-515 (D.C. 1985) were there would be a single appeal and then a remand where the court would retain the sentence for the offense with the most severe penalty and then dismiss specified offenses that arose out of the same act or course of conduct. If that proposal were adopted, conforming amendments would have to be made to the provisions in this Report. For example, RCC § 22A-2103, (e) pertaining to Multiple Convictions for Unauthorized Use of a Rented or Leased Motor Vehicle or Carjacking would have to reflect the new procedure.

[2] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

COMMENTS ON THE DRAFT REPORT

§ 22A-2103, Unauthorized Use of a Motor Vehicle

Section 22A-2103 (a) establishes that a person commits this offense if he or she knowingly operates or rides as a passenger in a motor vehicle without the effective consent of the owner. Paragraph (c) states that only the operator of the motor vehicle is guilty of First Degree Unauthorized Use of a Motor Vehicle. A person who is a passenger in a vehicle he or she knows is being operated without effective consent is only guilty of second degree Unauthorized Use of a Motor Vehicle. This is a change from current law. As the commentary notes:

> … The current UUV statute is limited to a single grade, and it is unclear whether it reaches use as a passenger. However, liability for UUV as a passenger has been upheld in case law. In the revised UUV offense, liability for a passenger is explicitly adopted as a lesser grade of the offense. Codifying UUV case law for a passenger in the RCC does not change District case law establishing that mere presence in the vehicle is insufficient to prove knowledge, such as *In re Davis* and *Stevens v. United States*. Nor does codification of UUV for a passenger change the requirement in existing case law that a passenger is not liable if he or she does not have a reasonable opportunity to exit the vehicle upon gaining knowledge that its operation is unauthorized." [internal footnotes removed]

There are at least two reasons why the current single penalty scheme should be retained. First, a person who can be charged as a passenger in a UUV is necessarily an aider and abettor to its illegal operation and, therefore, faces the same penalty as the operator.[3] In fact, driving passengers in the stolen car is frequently the reason why the operator is using the vehicle in the first place. Second, stolen cars are frequently passed from driver to driver. A person who is a driver one moment may be a passenger the next and the passenger in a UUV may soon become the driver. The penalty for unlawful use of a motor vehicle should not be dependent on the luck of when the stolen car is stopped by the police.

§ 22A-2104. Shoplifting

The shoplifting proposal contains a qualified immunity provision. One of the requirements to qualify for the immunity under § 22A-2104(e)(1) is that "The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section…" [emphasis added]

[3] See Redbook Instruction 3.200 AIDING AND ABETTING which states "To find that a defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated himself/herself with the commission of the crime, that s/he participated in the crime as something s/he wished to bring about, and that s/he intended by his/her actions to make it succeed."

However, stores frequently rely on surveillance and other technology to identify would be shoplifters and so, not all persons who are validly stopped for shoplifting committed the offense "in that person's presence." For example, stores frequently rely on video technology to observe people in the store. A security officer may be in a room on a different floor observing someone hide merchandise or exchange price tags. Without a definition of "committed in the in the person's presence" that includes the use of surveillance technology, store personnel would not have qualified immunity for stopping a person based on watching them commit the offense through a surveillance system.

Another, common anti-theft feature that stores rely on to reduce shoplifting is the use of Radio frequency (RF and RFID) tags. When someone goes through the store's doorway without paying for something, the radio waves from the transmitter (hidden in on one of the door gates) are picked up by something hidden in a label or attached to the merchandise. This generates a tiny electrical current that makes the label or attachment transmit a new radio signal of its own at a very specific frequency. This in turn sets off an alarm. People who set off the alarm are justifiably stopped to see if they have merchandise that was not paid for even though the offense, arguably, did not occur in the store employee's presence (or at least the store employee did not actually notice the merchandise being hidden. If the person, in fact, has such merchandise, and are held for the police, the store personnel should still qualify for immunity. The gravamen for having qualified immunity should not be whether the offense occurred in the store employee's presence, but whether the store employee's stop was reasonable. The Commission should either remove the requirement that the offense occur "in that person's presence" or it should define that term to include situations where the shoplifter is identified because of some technology, wherever the store employee is actually located.

RCC § 22A-2504. Criminal Graffiti

(a) RCC § 22A-2504 (a) states that "A person commits the offense of criminal graffiti if that person:
    (1) knowingly places;
    (2) Any inscription, writing, drawing, marking, or design;
    (3) On property of another;
    (4) That is visible from a public right-of-way;
    (5) Without the effective consent of the owner."

There is no reason why this offense needs to have the element that the graffiti "…is visible from a public right-of-way…" A person who paints a marking on the back of a person's house (that is not visible from a public right-of-way) has caused just as much damage to the house as if he painted something on the front of the house. In addition, to the extent that Criminal Graffiti may

be considered as a plea option for an offense that has a greater penalty, its availability should not be contingent on whether the marking is visible from a public right-of-way. In fact, it is counter-intuitive that if more people can see the marking Criminal Graffiti could be used as a plea down offense, but if fewer people can see it, because of its location, that the defendant would only be exposed to an offense with a greater penalty.

Paragraph (e) provides for parental liability when a minor commits criminal graffiti. It states, "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." While OAG appreciates that the Commission would want to include a provision that establishes parental responsibility, we request that paragraph (e) be stricken. We do this for two reasons. First, D.C. Code § 16-2320.01 authorizes the court to enter a judgment of restitution in any case in which the court finds a child has committed a 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. The inclusion of RCC § 22A-2504 (e) is, therefore, unnecessary and could cause litigation concerning whether it trumps D.C. Code § 16-2320.01 or merely provides for a separate means to make parents and guardians liable for their children's behavior. In addition, there are no fine provisions contained in the juvenile disposition (sentencing) statute and, so, the court would never be in a position to require parents and guardians to be responsible for its payment. See D.C. Code § 16-2320.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

SUBJECT: First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-2201. Fraud.

Section 22A-2201 (a) establishes the offense of Fraud. It states:

Offense. A person commits the offense of fraud if that person:
(1) Knowingly takes, obtains, transfers, or exercises control over;
(2) The property of another;
(3) With the consent of the owner;
(4) The consent being obtained by deception; and
(5) With intent to deprive that person of the property.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

In the Commentary, on page 5, it discusses what is meant by "Knowingly takes, obtains, transfers, or exercises control over…" It states, "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 defendant or received by the defendant. 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." While we agree that the statute should reach this behavior, we suggest slightly modifying the statutory language to ensure that it is clear that it does. Section 22A-2201 (a)(1) actually states, that a person commits the offense when he or she "Knowingly … transfers…" the property. Before a person can transfer something, they must possess it in some way, which is not the case presented in the hypothetical. To ensure that the activity stated there is covered by the statute, it should actually say "causes the transfer." Then it is clear that a person is guilty of fraud "whether or not the transfer is to the defendant or received by the defendant."

RCC § 22A-2205. Identity Theft.

RCC § 22A-2205 criminalizes identity theft. We suggest that two additional situations be added to paragraph (a)(4) to cover situations where a person's identity was used to harm that person and where a person uses another's identifying information to falsely identify himself when being issued a ticket, a notice of infraction, during an arrest, to conceal his commission of a crime, or to avoid detection, apprehension, or prosecution for a crime. RCC § 22A-2205 states:

(a) A person commits the offense of identity theft if that person:
    (1) Knowingly creates, possesses, or uses;
    (2) Personal identifying information belonging to or pertaining to another person;
    (3) Without that other person's effective consent; and
    (4) With intent to use the personal identifying information to:
        (A) Obtain property of another by deception;
        (B) Avoid payment due for any property, fines, or fees by deception; or
        (C) 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.

All the conditions outlined in RCC § 22A-2205 (a)(4) have to do with using somebody's identity to enrich the person committing identity theft or some third party. Unfortunately, people also use identity theft to embarrass someone or to get even with them for a perceived slight. For example, a person may setup a Facebook account, or other social media, using the identity of a person that they would like to hurt, "friend" their friends,

and then put up false or embarrassing posts and pictures.[2] While some stalking statutes might cover repeated behavior similar to what is presented here, a single use of someone's identity would not come under a stalking statute no matter how traumatizing the use of the victim's identity may be to the victim. The traumatic effects on the person whose identity was impersonated can be just as devastating to him or her as the financial loss that may occur under the statute as written. We, therefore, suggest that a paragraph (D) be added to RCC § 22A-2205 (a)(4) which states, "Harm the person whose identifying information was used."[3]

The other issue with RCC § 22A-2205 is that it narrows the scope of the current law. As noted in the Commentary, on page 39, "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.[4] Most such conduct already is criminalized under other offenses, including the obstructing justice,[5] false or fictitious reports to Metropolitan Police,[6] and false statements.[7] All such conduct is criminalized under other offenses in the RCC, including the revised obstructing justice[8] and revised false statements offenses." Contrary to the assertion made in the quoted text, giving out false identifying information belonging to or pertaining to another person to identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime is not criminalized elsewhere in the Code. OAG takes no position on whether RCC § 22A-

[2] The practice is so common that there are numerous websites that explain what a person can attempt to do to report an account for impersonation. See for example, https://www.facebook.com/help/167722253287296

[3] If the Commission accepts this suggestion, then an amendment would have to be made to paragraph (c), gradations and penalties, to establish what penalty, or penalties, this non-value based offense would have. This would could be handled similarly to how the Commission ranked a motor vehicle as a Second Degree Theft, in RCC § 22A-2101 without it having a stated monetary value.

[4] 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. [This footnote and the following three are footnotes to the quoted text.]

[5] D.C. Code § 22-722(6).

[6] D.C. Code § 5-117.05.

[7] 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.

[8] RCC § 22A-XXXX.

2205 should be amended to add back the language that is currently in D.C. Code § 22-3227.02(3) or whether there should be a stand-alone offense that covers using personal identifying information belonging to or pertaining to another person, without that person's consent, to identify himself or herself at the time of he or she is given a ticket, a notice of infraction, is arrested; or to facilitate or conceal his or her commission of a crime; or to avoid detection, apprehension, or prosecution for a crime.[9] Note that under both the current law and OAG's suggestion the giving out of a fictitious name would not be an offense. The person has to give out the personal identifying information belonging to or pertaining to another person, without that person's consent. See D.C. Code § 22-3227.02(3).

RCC §22A-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person

RCC §22A-2208 establishes an offense for the financial exploitation of a vulnerable adult or elderly person. The Commentary, on page 52, correctly notes that D.C. Code § 22-933.01. "…provides an affirmative defense if the defendant "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." Further, the statute states that "[t]his defense shall be established by a preponderance of the evidence." [internal citations omitted]. RCC §22A-2208 would change current law and would instead require the government to prove the mental state of "knowingly" about the element that the victim was a vulnerable adult or elderly person and would remove the self-defense provision. If passed, the government would frequently not be able to meet its burden. How could the government prove the mental state of "knowingly" to the element that the person was 65 years old or that a given individual met the definition of a vulnerable adult[10] when all the defendant would have to do is put on something to show that he or she thought the person was 64 years old or had limitations that impaired the person's ability but that those limitations were not "substantial"? (Note that "substantial" is not a defined term.)

The current statute correctly establishes the burdens. It requires that government prove that the victim was, in fact, a vulnerable adult or elderly person and it provides an

[9] OAG's suggested language slightly expands the current law. While under current law it is illegal for a person to give someone else's name out at time of arrest, under OAG's proposal it would also prohibit the giving of such false information when the person is given a ticket or a notice of infraction. These two additional situations may also trigger state action against an innocent person and should likewise be made criminal.

[10] RCC § 22A-2001 (25) states that a 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 his or her daily needs or safeguard his or her person, property, or legal interests."

affirmative defensive, established by a preponderance of the evidence, that would allow the person to prove that he reasonably believed the victim was not a vulnerable adult of elderly person. All of the evidence concerning the person's belief are peculiarly within that persons' possession.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 3, 2017

SUBJECT: First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT[2]

RCC § 22A-2603. Criminal Obstruction of a Public Way[3]

The offense of Criminal Obstruction of a Public Way would replace D.C. Code § 22-1307(a), crowding, obstructing, or incommoding. It omits clarifying language that was added in the

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] The Extortion statute, RCC § 22A-2301, is limited to obtaining property by coercion. We assume that the Commission is planning to draft a separate provision that criminalizes forcing a person to commit an act or refrain from committing an act by coercion, so we did not recommend changes to that proposal.
[3] To the extent that the comments and recommendations to this provision apply to RCC § 22A-2605, Unlawful Obstruction of a Bridge to the Commonwealth of Virginia, they should be considered as comments and recommendations to that provision.

Disorderly Conduct Amendment Act of 2010 (the Act). Although prior to 2010, D.C. Code § 22-1307(a) did not state a minimum number of people who had to obstruct the public way, the Court of Appeals read the common law requirement that three or more persons must act in concert for an unlawful purpose before anyone could be convicted of this offense.[4] To address this Court interpretation and to make it clear that a single person or two could arrange their bodies in such a way that they could obstruct a public way, the Act added that it was unlawful for a person to act alone or in concert with others. We, therefore, recommend that this language be added back into the lead in language contained in paragraph (a).

In addition, the current law makes it unlawful for a person to "crowd, obstruct, or incommode" the public way.[5] The proposal would limit the reach of the law to people who "render impassable without unreasonable hazard."[6] Under this formulation, it arguably would not be a crime for two people to lie down and block two lanes of a highway if police were on the scene directing traffic around them to avoid them being run over. Because of the police presence, despite the affect on traffic the two people may not be considered causing an unreasonable hazard. This despite the ensuing traffic jam and inconvenience to drivers, commuters, and pedestrians. To address this situation, and others, RCC § 22A-2603 (a) should be redrafted to state "obstruct or inconvenience. [proposed addition underlined].[7]

Finally, D.C. Code § 22-1307(a) makes it illegal to obstruct "The passage through or within any park or reservation."[8] The Commentary does not explain why RCC § 22A-2603 omits these areas. Absent a strong reason why it should be permissible to obstruct one of these areas, we suggest that they be retained in the law. To accomplish this, RCC § 22A-2603(a)(2) should be redrafted to say, "A park, reservation, public street, public sidewalk, or other public way."

[4] For example, see *Odum v. District of Columbia*, 565 A.2d 302 (D.C. 1989).

[5] D.C. Code § 22-1307 **(a)** states:

It is unlawful for a person, alone or in concert with others:

(1) To crowd, obstruct, or incommode:

(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; or
(D) The passage through or within any park or reservation; and

(2) To continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease the crowding, obstructing, or incommoding.

[6] See the definition of "obstruct" in RCC § 22A-2603 (b).

[7] The current law makes it a crime to inconvenience people and so adding this language would not expand the scope of the current law. To express this concept, D.C. Code § 22-1307(a) uses the word "incommode" which means "to inconvenience."

[8] See D.C. Code § 22-1307(a)(1)(D).

RCC § 22A-2604. Unlawful Demonstration

Paragraph (b) defines demonstration as including "any assembly, rally, parade, march, picket line, or other similar gathering by one or more persons conducted for the purpose of expressing a political, social, or religious view." D.C. § 22-1307(b)(2) describes a demonstration as "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." We believe that the current definition of a demonstration better describes the behavior that this provision is trying to reach. As the Commentary states that there is no intention to change the scope of the law on this point, we believe that RCC § 22A-2604 should be redrafted to include the current definition.

RCC § 22A-2701. Burglary

We have two suggested amendments to RCC § 22A-2701.[9] First, we agree with the basic formulation that "A person is guilty of first degree burglary if that person commits burglary, knowing the location is a dwelling and, in fact, a person who is not a participant in the crime is present in the dwelling…" However, the law should be clear that should the person enter the dwelling simultaneously with the victim or proceeds the victim by a couple of steps that those occurrences should also constitute first degree burglary. For example, it should not matter whether a person with gun forces someone to walk just a head of them into a dwelling to rape them or whether the person walks backwards with the gun on the victim into a dwelling intending on raping them; either way the statute should be clear that the person is guilty of burglary. The same should amendment should be made to second degree burglary.

Second, we suggest that the gradations and penalty section makes it clear that where a watercraft is used as a dwelling (e.g. houseboat), a person who commits the offense in paragraph (a) when a person is in the watercraft/dwelling is guilty of First Degree Burglary.

RCC § 22A-2702. Possession of Burglary and Theft Tools

Paragraph (a) states:

(a) Offense. A person commits the offense of possession of burglary and theft tools if that person:

(1) Knowingly possesses;

(2) A tool, or tools, created or specifically adapted for picking locks, cutting chains, bypassing an electronic security system, or bypassing a locked door;

(3) With intent to use the tool or tools to commit a crime.

As people are just as likely to commit a burglary by going through a window as a locked door, we suggest that RCC § 22A-2702(a)(2) be expanded to include tools created or specifically adapted for cutting glass.

[9] See RCC § 22A-2701(c)(1).

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	November 3, 2017
Re:	Comments on First Drafts of Reports 8 through 11, Property Offenses

The Public Defender Service makes the following comments.

Report #8: Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

1. Coercion.[1]

PDS makes two recommendations regarding the commentary explaining the meaning of "coercion." First, PDS recommends the modifying the explanation of sub-definition (H) of the definition at page 10 to read as follows:

> Subsection (H) covers threats to inflict wrongful economic injury on another person. It is intended to include not only causing wrongful financial losses but also situations such as threatening labor strikes or consumer boycotts when ~~. While labor activities are not inherently problematic, when~~ threats of labor or consumer activity are issued to order to personally enrich a person, and not to benefit the workers as a whole~~, such threats may constitute a criminal offense~~.

As currently written, the second sentence implies that simply threatening a labor strike or a consumer boycott may be "coercion." The rest of the paragraph, however, seems to say that such threat is only coercion if it is done for the personal enrichment of a person, rather than for the benefit of a group. The paragraph should be modified such that it is clear that a mere threat of a labor strike, without more, does not meet the definition of "coercion."

Second, PDS recommends rewriting the explanation for (J), the residual sub-definition of coercion. The residual sub-definition states that "'coercion' means causing another person to fear

[1] RCC § 22A-2001(5).

that, unless that person engages in particular conduct then another person will … perform any other act that is calculated to cause *material harm* to another person's health, safety, business, career, reputation, or personal relationships."[2] Currently, the explanation, at page 10 of Report #8, states that the conduct of threatening to lower a student's grade would fall within the provision, implying that any threat to lower any grade would necessarily constitute "material harm." PDS strongly disagrees. PDS agrees with the suggestion made during the November 1, 2017 public meeting of the Advisory Group to explain this residual sub-definition with an example that is clearly a threat of material harm, falling within the sub-definition, and an example that equally clearly is a threat of de minimis harm, falling outside the sub-definition.

2. Deceive and deception.[3]

The definition of "deceive" has unequal sub-definitions. Sub-definitions (A), (B), and (C) each have a "materiality" requirement as well as additional negative conduct. Sub-definitions (A) and (C) require a "false impression" and sub-definition (B) requires a person act to prevent another. Sub-definition (D), in contrast, makes it "deception" merely to fail to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property. Thus, it would be "deception" for a person to disclose an adverse claim to someone whom the person knows already has knowledge of the adverse claim. As was discussed at the November 2, 2017 public meeting of the Advisory Group, this sub-definition is most likely to be used when "deceive" is used in Fraud, RCC § 22A-2201, and perhaps also when used in Forgery, RCC § 22A-2205. PDS requests that the explanations for those offenses in Report #9 and the explanation of this sub-definition in Report #8, state that the deception must be causally connected to the consent. Thus to be convicted of Fraud, the person must not merely have obtained the owner's consent and failed to disclose a known lien or adverse claim, the person must have, knowingly, obtained the owner's consent *because* the person failed to disclose a known lien or adverse claim, etc.

3. Dwelling. [4]

PDS strongly recommends rewriting the definition of "dwelling" to read:

> "Dwelling" means a structure, or part of a structure, that is ~~either designed for lodging or residing overnight, or that is~~ used for lodging or residing ~~overnight~~. In multi-unit buildings, such as apartments or hotels, each residential or lodging unit is an individual dwelling.

The most significant problem with the Report #8 proposed definition is that by including structures that are "designed" for residing or lodging it is vague and if strictly applied, too broad. Across the original City of Washington, particularly in the Capitol Hill and Foggy Bottom neighborhoods, and in Georgetown, there are numerous structures that were "designed" as residences or lodgings, and were even used that way for years, that have since been converted solely for office or business use. The rooms inside some of these structures may not have even

[2] Report #8 at page 3 (emphasis added).

[3] RCC § 22A-2001(8).

[4] RCC §22A-2001(10).

changed. The kitchen and bathrooms may remain the same but the living and bedroom areas are now full of desks, bookshelves and computers.[5] To avoid the possibility that a converted house will be defined as a "dwelling" because of its original "design" and to avoid the courts defining which "design" is dispositive, the original or the redesigned interior, the definition of "dwelling" should be rewritten so that the actual use of the structure is dispositive.

Rewriting the definition to exclude "design" solves another problem. PDS does not disagree with categorizing as a "dwelling" "a car if a person is using the car as the person's primary residence." PDS does disagree, however, with categorizing as a "dwelling" a camper that is "designed" for residing or lodging but that is parked in front of a person's primary residence and used more often as a family vehicle than for camping.[6] It would be disproportionate, a result the reformed code should avoid, to treat a camper differently from a car merely because of "design."

The reason "dwelling" is distinguished from other structures in the RCC should inform the definition. The term is used in RCC arson, reckless burning, trespass, and burglary. In each, the term is used in a gradation with a higher punishment. PDS posits that this distinction is justified because "dwellings" are places where people expect privacy, where people can lock the door and feel it is safe to rest and safe to keep their possessions, where they can control who enters and who must leave. The Report #8 defines "dwelling" as a place "used for residing and lodging overnight". "Residing" and "lodging" are easy to understand terms; neither needs further modification.[7] The use of the word "overnight" is confusing. Is it to convey that even a single night could make a structure a "dwelling?" Is it meant to imply that sleep, which most people do at night, is a strong factor to consider when determining if a structure is for residing or lodging? Is it meant to exclude structures where sleeping might take place during the daytime? If someone consistently works a night shift and always sleeps in his rented room during the day, is that room not a "lodging" and therefore not a "dwelling"?

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[5] Importantly, the proposed "dwelling" definition does not allow for the reverse problem. There are also many buildings in D.C. that were originally designed for commercial or public use, such as warehouses or schools, that have since been converted to "loft" residences or condominiums, though the façade and even some internal design elements of the original building have not been changed. See for example, The Hecht Co. Warehouse, http://www.hechtwarehouse.com/. Because the Report #8 definition includes structures "used" as residences or for lodging, that the structures were "designed" for commercial use is not disqualifying. (Shockingly, see also the Liberty Crest Apartments, located on the grounds of Lorton Reformatory and their tasteless and insensitive retention of some original design elements. https://libertycrestapartments.com/).

[6] From this writer's childhood, see, the VW camper, https://en.wikipedia.org/wiki/Volkswagen_Westfalia_Camper, which the writer regularly drove in high school and college. See also, the RoadTrek, which was also parked regularly in front of a primary residence and was a family car far more often than a camping "residence." http://www.roadtrek.com/

[7] "Reside" means to settle oneself or a think in a place; to dwell permanently or continuously: have a settled abode for a time; "lodging" means a place to live, a place in which to settle or come to rest, a sleeping accommodation, a temporary place to stay. See Webster's Third New International Dictionary.

While sleeping in a place is a strong indication that the place is a "dwelling," it should not be dispositive. PDS objects to the term "dwelling" including, as Report #8 says it would, "a room in a hospital where surgeons or resident doctors might sleep between lengthy shifts." Other than the fact that people sleep there, there is nothing else about such a room that makes it a "dwelling." The people intended to sleep there do not control who else has access to the room; presumably, anyone hired by the hospital into certain positions and given certain security badges can enter the room. Such a room would not be distinguishable from a daycare center, where the infants and toddlers might sleep during their long "shifts," or from the pre-kindergarten rooms in the elementary school where those children might be expected to sleep during naptime every day. A person who enters the daycare room or the pre-k classroom with the intent to steal a computer therein has burgled a building, not a dwelling.

Finally, the definition and the explanation should make clear that in a multi-unit building, each residential or lodging unit is a separate dwelling but that also necessarily means that areas of the building that are not used for residing or lodging are not dwellings. The vestibule of the apartment building, the lounge in the college dorm, and the "party room" and the fitness room in the condominium building are not "dwellings."

4. Financial Injury. [8]

The "legal fees" sub-definition of "financial injury" is a significant and unwarranted expansion of the current law. [9] The Report #8 proposed definition's separate listing of "legal fees" is supposed to be "clarificatory" and "not intended to substantively change current District law." (See page 28.) However, the definition to which it "generally corresponds,"[10] D.C. Code § 22-3227.01, links "attorney fees" to the cost of clearing a person's credit rating, to expenses related to a civil or administrative proceeding to satisfy a debt or contest a lien, etc. Unmooring "legal fees" from those categories of losses, expands what fees could be considered part of "financial injury." For example, if the allegedly financially injured person is a witness at the criminal trial but hires an attorney because of a 5th Amendment issue that could arise tangentially, adding in the cost of that attorney could be considered "legal fees" under the Report #8 definition but definitely would not be considered "attorney fees" pursuant to D.C. Code § 22-3227.01. PDS recommends rewriting the definition to read as follows:

> "Financial injury" means all monetary costs, debts ….including, but not limited to:
>
> (A) The costs of clearing the person's credit rating, …;
>
> (B) The expenses…;
>
> (C) The costs of repairing…;
>
> (D) Lost time or wages …; and

[8] RCC §22A-2001(14).

[9] No doubt as a result of auto-formatting, the "legal fees" sub-definition of financial injury" is labeled as (J). All of the sub-definitions are mislabeled as (F) through (J). Correct formatting would label them (A) through (E), with (E) being "legal fees."

[10] Report #8 at page 28.

(E) Legal fees incurred for representation or assistance related to (A) through (D).

5. Motor vehicle. [11]

The term "motor vehicle" should more clearly exclude modes of transportation that can be propelled by human effort. A "moped" can be propelled by a small engine but it can also be pedaled, meaning it can operate simply as a bicycle. It should not qualify as a "motor vehicle." Also, the definition should be clear that it is a "truck tractor" that is a "motor vehicle;" a semitrailer or trailer, if detached from the truck tractor, is not a motor vehicle. The definition should be rewritten as follows:

> "Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, ~~moped,~~ scooter, truck, ~~truck tractor,~~ truck tractor with or without a semitrailer or trailer, bus, or other vehicle solely propelled by an internal combustion engine or electricity or both, including any such ~~non-operational~~ vehicle temporarily non-operational that is being restored or repaired.

6. Services. [12]

The definition of "services" should be rewritten as follows to except fare evasion:

> "Services" includes, but is not limited to:
> (A) Labor, whether professional or nonprofessional
> (B) …
> (C) ~~Transportation, telecommunications,~~ Telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;
> (D) Transportation, except transportation in vehicles owned and/or operated by the Washington Metropolitan Area Transit Authority or other governmental entity;
> (E) The supplying of food ….

As "services" is defined in Report #8, fare evasion could be prosecuted as theft or, potentially as fraud, both of which would be prosecuted by the U.S. Attorney's Office. There is a separate fare evasion offense in the D.C. Code, at D.C. Code §35-216. It is prosecuted by the Office of the Attorney General for D.C.[13] and because it is, it may be resolved through the post-and-forfeit

[11] RCC § 22A-2001(15).

[12] RCC § 22A-2001(22).

[13] D.C. Code § 35-253.

process.[14] Offenses prosecuted by the USAO, including theft and fraud, are categorically not eligible for resolution through post-and-forfeit.

The PDS recommendation to modify the definition of "services" would still provide for a "U.S. offense," theft, or even possibly fraud, but would make exclusively a D.C. offense that of fare evasion on a WMATA vehicle or other public transportation.

If fare evasion is criminalized as theft, it would exacerbate the consequences of the enforcement of what is really a crime of poverty. It will subject more people to the arrest, detention, criminal record and other consequences of contact with the criminal justice system as a result of failing to pay a fare that ranges from $2 to $6.

PDS supports Bill 22-0408, currently pending before the D.C. Council, to decriminalize fare evasion (D.C. Code §35-216). Even if that effort is unsuccessful, however, the Revised Criminal Code should exclude the conduct of fare evasion on WMATA or public transportation, allowing for exclusive local enforcement.

7. Limitation on Convictions for Multiple Related Property Offenses.

PDS strongly supports proposed RCC § 22A-2003, Limitation on Convictions for Multiple Related Property Offenses. The proposal represents a more thoughtful, comprehensive approach with predictable results than having to resort to the "Blockburger test" or the scattershot inclusion of offenses at D.C. Code § 22-3203. However, the grouping of theft, fraud and stolen property offenses pursuant to subsection (a) as completely separate from the grouping of trespass and burglary offenses pursuant to subsection (b) leaves one notable gap. Though likely not strictly a lesser included offense, a person necessarily commits the offense of trespass of a motor vehicle[15] every time he or she commits the offense of unauthorized use of a vehicle.[16] A person cannot knowingly operate or ride in as a passenger a motor vehicle without the effective consent of the owner without having first knowingly entered and remained in a motor vehicle without the effective consent of the owner. It may also be the case that a person necessarily commits the offense of trespass of a motor vehicle when he or she commits the offense of unauthorized use of property and the property is a motor vehicle.[17] However, because UUV and UUP are in Chapter 21 and TMV is in Chapter 26, RCC § 22A-2003 provides no limitation on convictions for these

[14] D.C. Code § 5-335.01(c). "The post-and-forfeit procedure may be offered by a releasing official to arrestees who: (1) meet the eligibility criteria established by the OAG; and (2) are charged with a misdemeanor that the OAG, in consultation with the MPD, has determined is eligible to be resolved by the post-and-forfeit procedure." Fare evasion may not have been determined eligible for resolution by the post-and-forfeit procedure and an individual arrested for it may not meet other eligibility criteria; however, because it is an OAG misdemeanor, it is an offense that the OAG could determine, in consultation with MPD, to be eligible for post-and-forfeit resolution. In contrast, no offense prosecuted by the USAO is eligible.

[15] RCC §22A-2602.

[16] RCC § 22A-2103.

[17] RCC § 22A-2102.

multiple *related* property offenses. PDS recommends amending RCC § 22A-2003 to address this problem.

Report #9: Recommendations for Theft and Damage to Property Offenses

1. Theft.[18]

PDS recommends changes to the gradations of theft[19] to make penalties for theft of labor more fair and proportionate. "Labor" as a type of property should be valued as time and not as a monetary fair market value. As currently structured, "property" is defined to include "services," which is defined to include "labor, whether professional or nonprofessional." Theft of property, therefore, includes "theft of labor." "Value" means the fair market value *of the property* at the time and place of the offense.[20] The gradations for theft are keyed to different levels of "value." For example, it is third degree theft if the person commits theft and "the property, in fact, has a value of $250 or more." Presumably, if the "property" obtained without consent of the owner were the owner's labor, the fair market value of that labor would be calculated based on the wages or salary of the owner. This would mean that stealing, to use the colloquial term, 8 hours of labor from a professional who charges $325 per hour would result in a conviction of 2nd degree theft. Second degree theft requires the property have at least a value of $2,500 (or that property be, in fact, a motor vehicle). $325 x 8 = $2,600. In contrast, stealing 8 hours of labor from a worker in the District making minimum wage would result in a charge of 4th degree theft. Fourth degree theft requires the property have any value. As of July 1, 2017, the minimum wage in the District was $ 12.50 per hour.[21] $12.50 x 8 = $100. The Fair Shot Minimum Wage Amendment Act will increase the minimum wage every year until July 1, 2020 when the wage will be set at $15 per hour. A full day's work at that top minimum wage rate still will not pass the third-degree theft threshold of $250. $15 x 8 = $120. Stealing a full days' work at the top minimum wage rate is <u>two</u> gradations lower than stealing even the rustiest of clunkers. The professional robbed of 8 hours of labor is not 26 times more victimized than the minimum wage worker robbed of 8 hours of labor. (325 ÷ 12.50 = 26.) And the person convicted of stealing 8 hours from the professional should not be punished as if his crime was categorically worse than had he or she stolen from a low-wage worker. PDS proposes that when the property is labor, the gradation should be keyed to time, specifically to hours of labor, rather than to monetary value. Thus, PDS proposes rewriting the gradations for theft as follows:

Aggravated theft -
(1) the property, in fact, has a value of $250,000 or more; <u>or</u>
<u>(2) the property, in fact, is labor, and the amount of labor is 2080 hours[22] or more.</u>

[18] RCC § 22A-2101.

[19] RCC § 22A-2101(c).

[20] RCC § 22A-2001(24)(A).

[21] See D.C. Law 21-044, the Fair Shot Minimum Wage Amendment Act of 2016.

[22] 2080 hours is fifty-two 40-hour weeks, or one year of work.

1st degree -
(1) the property, in fact, has a value of $25,000 or more; or
(2) the property, in fact, is a motor vehicle and the value of the motor vehicle is $25,000 or more; or
(3) the property, in fact, is labor, and the amount of labor is 160 hours[23] or more

2nd degree -
(1) the property, in fact, has a value of $2,500 or more; or
(2) the property, in fact, is a motor vehicle; or
(3) the property, in fact, is labor, and the amount of labor is 40 hours[24] or more

3rd degree -
(1) the property, in fact, has a value of $250 or more; or
(2) the property, in fact, is labor and the amount of labor is 8 hours[25] or more.

4th degree -
(1) the property, in fact, has any value; or
(2) the property, in fact, is labor and is any amount of time.

PDS recommends this same penalty structure be used for fraud, RCC § 22A-2201(c), and extortion, RCC §22A-2301(c).

2. Unauthorized Use of a Motor Vehicle. [26]

PDS recommends amending unauthorized use of a motor vehicle to eliminate riding as a passenger in a motor vehicle from criminal liability. Being in a passenger in a car, even without the effective consent of the owner, should not be a crime. Where the passenger is aiding and abetting the driver, the passenger can be held liable. Where the passenger and the driver switch roles, and the government can prove that the passenger has also been a driver, liability would lie. But merely riding in a car should not result in criminal liability. Decriminalizing the passenger also eliminates the problem of having to determine when the passenger knew he or she lacked effective consent of the owner and whether, after that time, the passenger had an opportunity to leave the vehicle but failed to do so. If riding as a passenger were decriminalized, there would only be a single penalty grade for the offense.

[23] 160 hours is four 40-hour weeks, or one month of work.

[24] 40 hours is five 8-hour days, or one workweek.

[25] 8 hours is one workday.

[26] RCC § 22A-2103.

3. Shoplifting.[27]

PDS recommends two amendments to the offense of shoplifting. First, element (2) should be amended to read: "personal property that is or was displayed, held, stored, or offered for sale." This change would take care of the problem of property that is still in "reasonably close proximity to the customer area"[28] but that is not presently for sale. For example, a person shoplifts[29] a seasonal item, such as a snow shovel or beach ball, that has just been moved to the back store room. Two, the qualified immunity provision at subsection (e) should be amended to replace the phrase "within a reasonable time" where it appears[30] with the phrase "as soon as practicable." Qualified immunity should only be allowed for a person who as promptly as possible notifies law enforcement, releases the individual or surrenders him or her to law enforcement. The District should not shield from liability a shop owner or agent who engages in a form of vigilante justice by locking a person in a room and taking their time to contact law enforcement.

4. Arson. [31]

PDS strongly objects to the revision of arson as proposed in Report #9. First, PDS objects to the significant lowering of the mental state for arson. While the D.C. Code may be silent as to the required mental state for a number of criminal offenses, the Code is explicit that malice is the culpable mental state for arson.[32] The D.C. Court of Appeals has held that the definition of "malice" is the same for arson and malicious destruction of property, which is the same as the malice required for murder.[33] The Court has defined malice as "(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."[34] The Court has noted that the "actual intent to cause the particular harm" corresponds to the "purposely" state of mind in the Model Penal Code and the "wanton and willful" act with "awareness of a plain and strong likelihood that such harm may result" "blends

[27] RCC § 22A-2104.

[28] Report #9 at page 36.

[29] Knowingly takes possession of the personal property of another that is *or was* offered for sale with intent to take or make use of it without complete payment.

[30] The phrase "within a reasonable time" appears once in RCC § 22A-2104(e)(3) and twice in RCC § 22A-2104(e)(4). RCC § 22A-2104(e)(4) should be rewritten: "The person detained or arrested was released ~~within a reasonable time of~~ as soon as practicable after detention or arrest, or was surrendered to law enforcement authorities ~~within a reasonable time~~ as soon as practicable.

[31] RCC § 22A-2501.

[32] D.C. Code § 22-301; "Whoever shall maliciously burn or attempt to burn any dwelling…" (emphasis added).

[33] *See Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987); *Thomas v. United States*, 557 A.2d 1296, 1299 (D.C. 1989)

[34] *Harris v. United States*, 125 A.3d 704, 708 (D.C. 2015).

the Model Penal Code's 'knowingly' and 'recklessly' states of mind."[35] The Revised Criminal Code proposes to use the mental state of "knowing" and eliminates mitigation. The effect is a significant and unjustifiable lowering of the mental state, which then greatly expands the conduct the revised offense criminalizes. PDS proposes that the mental state of "purpose" be applied to the RCC offense of arson.[36]

Second, the revised arson offense should not extend to a "business yard." A "business yard" is *land*, which is securely fenced or walled and where goods are stored or merchandise is traded.[37] It is "mainly *areas* that are surrounded by some sort of barrier, such as a fence, where goods are kept for sale."[38] While it is possible to damage land as a result of starting a fire or an explosion, it does not make sense to criminalize causing damage to land that happens to be securely fenced. If the point is to punish conduct that damages the fence or the wall, that is criminalized by criminal damage to property.[39] Similarly if the point is to punish conduct that damages the goods stored within the business yard, that too can be prosecution as a violation of the criminal damage to property offense. But there is no reason to distinguish between starting a fire that damages goods stored in a business yard and goods that happen to be within a fenced area but not for sale, or goods for sale but stored momentarily in an open parking lot. If, however, a fire set in a business yard damages the adjacent business *building*, then that is arson.

Third, the term "watercraft" is too broad. It would include canoes and rubber rafts, particularly a raft fitted for oars. Starting a fire that damages a rubber raft is not of the same seriousness as fire that damages a dwelling or building. PDS is not suggesting that damaging a canoe or a raft should not be a crime, only that it not be deemed "arson." Damaging a canoe or raft should be prosecuted as "criminal damage to property." The definition of "watercraft" should be similar to that of "motor vehicle"; it should be restricted to vessels that are not human-propelled. PDS recommends the following definition be added to RCC §22A-2001.

> "Watercraft" means a vessel for travel by water that has a permanent mast or a permanently attached engine.

Fourth, arson should require that the dwelling, building, (narrowly-defined) watercraft, or motor vehicle be *of another*. That is the current law of arson and it should remain so. Damaging one's own dwelling, building, etc. should be proscribed by the reckless burning offense.[40] Setting fire to one's own dwelling knowing that it will damage or destroy another's dwelling would be arson.

Fifth, the gradation of second degree arson should read: "A person is guilty of second degree arson if that person commits arson and the amount of damage is $2,500 or more." What is

[35] *Harris*, 125 A.3d at 708 n.3.

[36] PDS would also accept a mental state of knowing plus the absence of all elements of justification, excused or recognized mitigation.

[37] RCC § 22A-2001(3).

[38] Report #8 at page 8 (emphasis added).

[39] RCC § 22A-2503.

[40] RCC § 22A-2502.

proposed as revised second degree arson, that the person merely commits arson," should be third degree arson and it should have a misdemeanor classification. Thus, there will be four gradations of arson in total.

5. Reckless Burning. [41]

PDS recommends amending the revised reckless burning offense. First, for the reasons explained above with respect to arson, "building yard" should be removed from the offense and "watercraft" should be defined. Second, there should be gradations created as follows:

(c) *Gradations and Penalties*.
(1) *First Degree Reckless Burning*.
(A) A person is guilty of first degree reckless burning if that person commits reckless burning and the dwelling, building, watercraft, or motor vehicle, in fact, is of another.
(B) First degree reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) *Second Degree Reckless Burning*.
(A) A person is guilty of second degree reckless burning if that person commits reckless burning.
(B) Second degree reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Starting a fire to one's own building *purposely* to damage another's building would be arson. Starting a fire to one's own building *reckless* as to the fact that the fire damages another's building would be first degree reckless burning. Starting a fire that damages only one's own building would be second degree reckless burning.

6. Criminal Damage to Property. [42]

PDS strongly objects to the revision that eliminates the offense of malicious destruction of property and replaces it with the much broader offense of criminal damage to property. Like revised arson, the offense of criminal damage to property significantly and unjustifiably lowers the mental state that currently explicitly applies to the offense, thereby greatly expanding the conduct criminalized by the offense. As it does for revised arson and for the same reasons, PDS strongly recommends that the mental state for criminal damage to property be "purposely."[43]

PDS also recommends adding mental states to two of the gradations. As currently written, it is second degree criminal damage to property to knowingly damage or destroy property that, <u>in fact</u>, is a cemetery, grave, or other place for the internment of human remains,[44] or that, <u>in fact</u>, is

[41] RCC § 22A-2502.

[42] RCC § 22A-2503.

[43] PDS would also accept a knowing mental state <u>plus</u> the absence of all elements of justification, excused or recognized mitigation.

[44] RCC § 22A-2503(c)(3)(ii) (emphasis added).

a place of worship or a public monument.[45] Rather than strict liability, PDS recommends that these elements require that the person be reckless as to the fact the property is a grave, etc. or a place of worship. An object weathered and worn down over time may not appear to be grave marker. A building with a façade of a residence or a business may be used as a place of worship but because of the façade, will not appear to be a place of worship.

7. Criminal Graffiti. [46]

With respect to revised criminal graffiti, PDS recommends eliminating the mandatory restitution and parental liability provisions. Without speculating as to the reasons why, indigent people are charged with crimes in D.C. Superior Court in numbers that are grossly higher than their numbers in the District of Columbia. Requiring restitution from individuals and families that cannot afford to pay it is a waste of judicial resources. A mandatory restitution order cannot be enforced through contempt because the person is unable, not unwilling, to pay. Most such orders, therefore, will simply be unenforceable. Restitution when the person can afford it is fair and the law should provide courts the discretion to impose such an order.

Report #10: Recommendations for Fraud and Stolen Property Offenses

1. Check Fraud.[47]

PDS recommends amending the offense for clarity.

> A person commits the offense of check fraud if that person:
> (1) Knowingly obtains or pays for property;
> (2) By using a check;
> (3) Knowing at the time of its use that the check ~~which~~ will not be honored in full upon its presentation to the bank or depository institution drawn upon.

If the revised offense does not require an "intent to defraud," then it is important that it be clear that the "knowing" that the check will not be honored occur at the time the check is used. It must be clear that gaining knowledge after using the check that the check will not be honored is not check fraud.

PDS objects to the permissive inference stemming from a failure to promptly repay the bank.[48] While true that a *permissive* inference means a jury is not required to apply it, such inferences still unfairly and inappropriately point the jury towards conviction. A law that serves to highlight

[45] RCC § 22A-2503(c)(3)(iii) (emphasis added).

[46] RCC § 22A-2504.

[47] RCC § 22A-2203.

[48] This permissive inference currently exists in the Redbook Jury Instructions at §5-211, though not in D.C. Code § 22-1510 which criminalizes uttering.

certain facts and suggests how those facts should be interpreted, allows the ignoring of other facts or context. Permissive inferences operate as an explicit invitation to make one specific factual inference and not others; though nominally permissive, such inferences signal that this is *the* inference jurors should draw. The permissive inference in revised check fraud, like others of its kind, "eases the prosecution's burden of persuasion on some issue integrally related to the defendant's culpability" and "undercut[s] the integrity of the jury's verdict."[49] "By authorizing juries to "find" facts despite uncertainty, such inferences encourage arbitrariness, and thereby subvert the jury's role as a finder of fact demanding the most stringent level of proof."[50]

The permissive inference in check fraud is additionally problematic *because* the revised check fraud offense has eliminated the explicit element that the person have an "intent to defraud.". For revised check fraud, the person must knowingly obtain or pay for property by using a check, knowing at the time the person uses the check that it will not be honored in full upon its presentation to the bank. The problem with this permissive inference is that it suggests that it is check fraud to fail to make good on the check within 10 days of receiving notice that the check was not paid by the bank. The permissive inference is supposed to mean that failing to make good on the check within 10 days of notice tells jurors something about what the person was thinking at the time the person presented the check. What the permissive inference does, however, is expand the time frame by suggesting that notice (or knowledge) that the check will not be honored, has not thus far been honored, constitutes check fraud if the bank is not made whole.

2. Unlawful Labeling of a Recording.[51]

   For the reasons explained above about the unfairness of highlighting certain facts and then sanctioning by law a particular interpretation of those facts, PDS objects to the permissive inference in the revised unlawful labeling of a record offense.

3. Alteration of Motor Vehicle Identification Number.[52]

   PDS recommends amending the gradations to clarify that whether it is the value of the motor vehicle or the value of the motor vehicle part that determines the gradation depends on whether the alteration of the identification number was intended to conceal the motor vehicle or the part. If the intention was to conceal the part, then the gradation will not be decided based on the value of the motor vehicle, but rather based on the value of the part.

   PDS also has concerns that the revised alteration of motor vehicle identification number offense sets too low the value used to distinguish the first degree from second degree gradation. If set at $1,000 as currently proposed almost all alteration of VINs would be charged as a first degree offense and second degree altering a vehicle identification number would only be available after

[49] Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1216 (1979).

[50] *Id*.

[51] RCC §22A-2207.

[52] RCC §22A-2403.

a plea. If the purpose of separating the offense into degrees is to distinguish between offenses with different levels of severity, than the $1000 dollar limit will fail to do so.

Report #11 Recommendations for Extortion, Trespass, and Burglary Offenses

1. Trespass.[53]

PDS again objects to the creation of a statutory permissive inference. The prosecution can argue and prove that property was signed and demarcated in such a way that it would be clear that entry is without the effective consent of the owner. The revised offense should not be drafted in such a way that alleviates or lessens the prosecution's burden of persuasion. If the revised offense maintains this permissive inference, PDS recommends that the language regarding signage should state that the signage must be visible *prior to* or *outside of* the point of entry.

Consistent with the intent of the RCC to separate attempt to commit trespass from the trespass statute and make attempt trespass subject to the general attempt statute, revised trespass should not criminalize the partial entry of a dwelling, building, land, or watercraft.[54] A partial entry of the physical space properly should be treated as an attempt to trespass. For instance, if a person tries to squeeze under a chain link fence in order to trespass on land, but he gives up because his head and chest cannot fit under the fence, that conduct should be charged as attempted trespass, not trespass. To the extent that the partial entry is to commit another crime, for instance to take property through a hole in the fence, numerous other statutes would cover that offense. To truly treat attempted trespass differently than trespass, the revised offense cannot accept partial entry as satisfying the element of knowingly entering or remaining.

The commentary explains: "A person who has been asked to leave the premises must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass."[55] PDS believes that this provision should be added to the statutory language for the clarity of judges and practitioners.

The revised trespass offense defines the consent element of trespass as "without the effective consent of the occupant, or if there is no occupant, the owner." This element fails to address joint possession, joint occupancy, and joint ownership of property. The commentary explains that it is creating a "legal occupancy" model of trespass to address the conflicting rights of owners and occupants. This approach seems sensible when dealing with court orders barring a particular individual's access. But it leaves roommates, cohabitating spouses, and business cotenants subject to a trespass charge when they remain in a space that they lawfully occupy after an equal co-tenant demands that they vacate. It also subjects the guests of a cotentant to a trespass charge

[53] RCC § 22A-2601.

[54] See Report #11 at page 12.

[55] Report #11 at page 12.

when another tenant opposes the guest.[56] For instance, one roommate feuding with another over the upkeep of space could demand that the first roommate leave and not come back. When the messy roommate returns to occupy her rightful place in the home, pursuant to the revised offense, the messy roommate would be subject to arrest for trespass. The definition would also subject to arrest any visitor approved by one roommate but not another.

The revised offense creates this anomaly that one can be guilty of trespass on one's own land, because it discards the "entry without lawful authority" element of the unlawful entry statute.[57] To address the rights of cotenants, including their right to remain on property and have guests on property despite objections of an equal cotenant, PDS recommends rewriting the third element of the offense as follows:

> Without the effective consent of ~~the~~ an occupant, or if there is no occupant, ~~the~~ an owner.

This phrasing would establish that the accused could provide the consent to enter or remain on the property. In addition, the commentary should explicitly state that more than one person can be an occupant and that absent a superior possessory interest of the other occupant, it is not trespass for an occupant to enter or remain in a dwelling, building, land, or watercraft, or part therefore, even if the other occupant does not consent.

The commentary recognizes that trespass on public property is inherently different because of First Amendment concerns: "[T]he DCCA has long held that individual citizens may not be ejected from public property on the order of the person lawfully in charge absent some additional, specific factor establishing their lack of right to be there."[58] PDS believes that this statement should be included in the statutory language rather than in the commentary. A similar statement regarding the exclusion of liability for First Amendment activity is included in the statutory language of revised criminal obstruction of a public way,[59] and revised unlawful demonstration.[60]

2. Burglary.[61]

The revised burglary offense has the same joint occupancy problem as revised trespass does. Revised burglary, by doing away with the current burglary statute's requirement that the property

[56] Under property law, tenants and cotenants generally have a right to have invited guests on the property. Without a contractual limitation on a tenant's right to invite guests of his choosing, a landlord cannot unconditionally bar a tenant's guests from visiting the tenant or traversing common areas in order to access the tenant's apartment. *State v. Dixon*, 725 A.2d 920, 922 (Vt. 1999).

[57] *See Jones v. United States*, 282 A.2d 561, 563 (D.C. 1971), (noting entry without lawful authority is a requisite element of the offense of unlawful entry).

[58] Report #11 at page 20.

[59] RCC §22A-2603.

[60] RCC §22A-2604.

[61] RCC § 22A-2701.

is "of another," allows the burglary conviction of a joint tenant who, after being told to leave the apartment by a roommate without lawful authority to do, enters his own home with intent to steal a television belonging to the roommate. While the theft of the television would be unlawful, the conduct should not give rise to the additional, more severely punished, offense of burglary since the individual in fact had authority to enter the residence. As in trespass, the burglary definition fails to address the rights of cotenants and their guests. PDS again recommends amending the third element as follows:

> Without the effective consent of ~~the~~ an occupant, or if there is no occupant, ~~the~~ an owner.

Additionally, as with trespass, the commentary should explain that an equal occupant cannot be convicted of burglary though another occupant does not consent to the entry.

PDS strongly objects to treating partial entry the same as a full entry. Reaching in through a home's open window to steal something laying just inside is not the same as picking a lock and entering the same home at night and stealing the same object now laying on the floor of the bedroom of sleeping children. Revised burglary should distinguish between these two vastly different scenarios. To do so, PDS urges the RCC make partial entry into a dwelling or building, watercraft, or part thereof an attempt burglary rather than a completed offense. As stated in the commentary, burglary is a location aggravator. A location based aggravator makes sense because of the potential danger posed by individuals entering or remaining inside of dwellings or buildings. The danger inherent in that situation is not present when someone reaches a hand through a window or puts a stick through a chain link fence to extract an item.

PDS further proposes that, like with arson, a defendant must be *reckless* as to the fact that a person who is not a participant is present in the dwelling or building, rather than having an "in fact" strict liability standard. In the vast majority of cases when a defendant enters a home and that home happens to be occupied, the defendant will have been reckless as to occupancy. When a dwelling or building is used as a home or business, defendants can expect occupants or guests to be inside at any time, regardless of whether the lights are on or off, whether there is a car near the building, or whether there looks like there is activity from the windows. However, there will be instances, when a defendant enters a dwelling that truly appears to vacant and abandoned. For instance, if a defendant uses a crowbar to open a boarded up door in what appears to be an abandoned rowhouse in order to steal copper pipes and discovers inside this house, which lacks heat or running water, a squatter who entered through other means, without a *mens rea* applicable to the occupancy status of the home, that conduct would constitute first degree burglary. It would constitute first degree burglary although the defendant had every reason to believe that the seemingly abandoned building was unoccupied. By adding the requirement that a defendant must be reckless as to whether the dwelling is occupied, the RCC would appropriately limit the severely increased penalties of first degree burglary to situations that warrant the increased penalty. Further because recklessness could typically be proved contextually – in that the home does not appear to be boarded up – providing the mens rea does not decrease the applicability of the first degree burglary statute.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: December 18, 2017

Re: Comments on First Draft of Report No. 12: Recommendations for Chapter 3 of the Revised Criminal Code – Definition of a Criminal Conspiracy

The Public Defender Service makes the following comments on the First Draft of Report No. 12.

1. PDS recommends the offense of criminal conspiracy be applicable only to conduct that involves conspiring to commit a felony offense. It is PDS's belief that conspiracy to commit a misdemeanor offense is almost never charged by the Office of the United States Attorney. Thus, limiting liability to felony offenses would merely reflect, not restrict, current practice. The underlying rationale for a separate substantive offense of criminal conspiracy is that agreement by multiple individuals for concerted unlawful action has the potential to increase the danger of the crime and the likelihood of its successful commission.[1] If the RCC accepts the notion that a criminal agreement is a "distinct evil,"[2] that "evil" is certainly less when the object of the conspiracy is a misdemeanor offense. A conspiracy to commit a misdemeanor offense frequently lacks the complex planning and commitment to criminal enterprise that warrants the punishment of the agreement and a single overt act as a separate additional offense. For instance, an agreement to shoplift may be formed by two teenagers, one who agrees to distract the clerk by asking for something behind the counter while the other takes something from the store. This conspiracy required *de minimis* planning, and resulted in no more harm than action by one individual. Both teenagers could be found guilty of shoplifting, under a theory of liability of

[1] See Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 922, 923-924 (1959).

[2] *United States v. Recio*, 537 U.S. 270, 274 (2003) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

aiding and abetting or conspiracy, but where the societal harm did not increase as a result of the agreement itself, the teenagers should not be subject to the separate offense of conspiracy to commit shoplifting.

Misdemeanor conduct should be a line of demarcation below which separate offense liability cannot attach. This would be similar to the line of demarcation in the present statute of possession of a firearm during a crime of violence. The crime of violence serves as a demarcation line above which there can be liability for a separate offense. We do not separately punish possession of a firearm while driving recklessly or while committing disorderly conduct as a third substantive offense in addition to the possession of the firearm. Finally, allowing conspiracy liability where the underlying offense is a misdemeanor creates unfettered discretion for prosecutors. Since RCC § 22A-303 does not at this time propose penalty gradations, it appears likely that conspiracy would be criminalized as a felony; prosecutors could escalate misdemeanor conduct into a felony conviction without any showing of greater societal harm in the majority of instances when defendants act together.

2. PDS recommends technical amendments to two subsections to increase the clarity of the language of criminal conspiracy.

   A) PDS supports having the RCC continue the District's current bilateral approach to conspiracy. PDS believes, however, that the requirement that a criminal conspiracy must be bilateral or mutual could be written more clearly. To that end, PDS proposes amending to RCC § 22A-303(a)(1) to read as follows: "Purposely ~~agree~~ came to an agreement to engage in or aid the planning or commission of conduct which, if carried, out, will constitute every element of that planned [felony] offense or an attempt to commit that planned [felony] offense." Replacing "purposefully agree" with "purposefully come to an agreement" more clearly conveys the mutuality of the agreement that is the *sine quo non* of the District's current approach to conspiracy.[3]

   Clarifying that the (alleged) coconspirators must agree to engage in (or aid the planning or commission of) conduct which would constitute every element of the planned offense further bolsters the joint nature of the agreement required for criminal conspiracy liability. While "proof of a formal agreement or plan in which everyone sat down together and worked out the details"[4] is not required for conviction, liability does require that the "coconspirators" come to an agreement about the same conduct, conduct that if engaged in would result in the commission of the specific planned (charged) offense. So if the charge is conspiracy to commit a robbery and the evidence demonstrates that while coconspirator X believed the agreed upon conduct was to rob someone, coconspirator Y believed the agreed upon conduct was to assault someone, the lack of mutual agreement would result in a not guilty finding for the conspiracy to commit robbery charge. Though cited in the section explaining intent

[3] Report #12 at pages 6-7 codifying a bilateral approach to conspiracy.

[4] Report #12 at page 7, quoting D.C. Crim. Jur. Instr. § 7.102.

elevation, the Connecticut Supreme Court's opinion in *State v. Pond* is instructive here as well.[5] While the Connecticut Supreme Court in *Pond* extended its "specific intent" analysis to "attendant circumstances," its analysis began with requiring "specific intent" with respect to conduct elements, stating the "general rule" that "a defendant may be found guilty of conspiracy … only when he specifically intends that *every element of the object crime* be committed."[6]

B) PDS recommends amending the Principles of Culpable Mental State Elevation subsection, RCC §22A-303(b), to substitute "and any" where the draft uses the disjunctive "or." The commentary to the RCC makes clear that the principle of intent elevation, adopted by the RCC, requires that in forming an agreement the parties intend to cause any result required by the target offense and that the parties act with intent as to the circumstances required by the target offense.[7] The use of "or" as the bridge might wrongly suggest to a reader that the mental state elevation requirement is satisfied if applied to a required circumstance or result. PDS asserts that the proposed amendment better conveys the principle that mental state elevation applies to any required circumstance[8] and to any required result.[9]

3. Finally, PDS recommends that the RCC include language that acknowledges that where a conspiracy crosses jurisdictional lines and the conspiracy is planned in a jurisdiction where the conduct is not against the law, the legality of the conduct in the place where the agreement was formed may be relevant to the determination of whether the government has proved sections (a) and (b). As currently drafted section (e) could be read to bar the defense from arguing that the cross-jurisdiction disparity in legality is relevant to the considerations in (a) and (b).

[5] Report #12 at page 38; *State v. Pond*, 108 A.3d. 1083 (Conn. 2015).

[6] *Pond*, 108 A.3d at 463 (emphasis added).

[7] Report #12 at page 41.

[8] If an offense has more than one possible circumstance, such as whether something is dwelling or business yard, then it applies to at least one such circumstance.

[9] If an offense has more than possible result, such as damaging or destroying, then it applies to at least one such result.

Fully revised as PDS recommends, criminal conspiracy in the RCC would read as follows:

§ 22A-303 CRIMINAL CONSPIRACY

(a) DEFINITION OF CONSPIRACY. A person is guilty of ~~a~~ conspiracy to commit ~~an offense~~ a felony when, acting with the culpability required by that felony offense, the person and at least one other person:

(1) Purposely ~~agree~~ come to an agreement to engage in or aid the planning or commission of conduct which, if carried out, will constitute every element of that planned felony offense or an attempt to commit that planned felony offense; and

(2) One of the parties to the agreement engages in an overt act in furtherance of the agreement.

(b) PRINCIPLES OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO RESULTS AND CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be guilty of a conspiracy to commit ~~an offense~~ a felony, the defendant and at least one other person must intend to bring about any result ~~or~~ and any circumstance required by that planned felony offense.

(c) JURISDICTION WHEN OBJECT OF CONSPIRACY IS LOCATED OUTSIDE THE DISTRICT OF COLUMBIA. When the object of a conspiracy formed within the District of Columbia is to engage in conduct outside the District of Columbia, the conspiracy is a violation of this section if:

(1) That conduct would constitute a ~~criminal~~ felony offense under the D.C. Code performed in the District of Columbia; and

(2) That conduct would also constitute a criminal offense under:

(A) The laws of the other jurisdiction if performed in that jurisdiction; or

(B) The D.C. Code even if performed outside the District of Columbia.

(d) JURISDICTION WHEN CONSPIRACY IS FORMED OUTSIDE THE DISTRICT OF COLUMBIA. A conspiracy formed in another jurisdiction to engage in conduct within the District of Columbia is a violation of this section if:

(1) That conduct would constitute a ~~criminal~~ felony offense under the D.C. Code performed within the District of Columbia; and

(2) An overt act in furtherance of the conspiracy is committed within the District of Columbia.

(e) LEGALITY OF CONDUCT IN OTHER JURISDICTION IRRELEVANT. Under circumstances where §§ (d)(1) and (2) can be established, it is ~~immaterial and~~ no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a criminal offense under the laws of the jurisdiction in which the conspiracy was formed, however it may be relevant to whether the defendant acted with the mental states required by RCC § 22A-303(a) and (b).

(__) PENALTY. [Reserved].

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 19, 2017

SUBJECT: First Draft of First Draft of Report #12, Definition of a Criminal Conspiracy

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-303 CRIMINAL CONSPIRACY

The offense of Criminal Conspiracy would replace D.C. Code § 22-1805a. The current offense is broader than that proposed in the Draft Report. D.C. Code § 22-1805a (1) states in relevant part:

> If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined … or imprisoned … [emphasis added]

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

RCC § 22A-303 (a) states:

> DEFINITION OF CONSPIRACY. A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person:
>
> (1) Purposely agree 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; and
>
> (2) One of the parties to the agreement engages in an overt act in furtherance of the agreement.

The proposed language does not contain the underlined provision in D.C. Code § 22-1805a (1) pertaining to "defraud[ing] the District of Columbia or any court or agency thereof in any manner or for any purpose." OAG suggests that either RCC § 22A-303 be redrafted so that the Code continues to criminalize conspiracy to defraud "the District of Columbia or any court or agency thereof" or that the Commission draft a separate offense which reaches this behavior. The Commission should not recommend the repeal of D.C. Code § 22-1805a unless the replacement(s) criminalizes both conspiracy to commit a crime and conspiracy to defraud the District of Columbia or any court or agency thereof.

What is less clear is whether § 22A-303 narrows the applicability of current conspiracy law pertaining to whether a person can be prosecuted for conspiracy when that person "conspires" with an undercover law enforcement officer in a sting operation. RCC § 22A-303 (b) states, "Notwithstanding subsection (a), to be guilty of a conspiracy to commit an offense, the defendant and at least one other person must intend to bring about any result or circumstance required by that offense." Arguably a person who "conspires" with an undercover officer has not "conspired" with another person who intends to bring about a particular result or circumstance.[2] There are good reasons, however, that such behavior should be illegal. As Report #12, on page 25, quotes, an actor "who fails to conspire because her 'partner in crime' is an undercover officer feigning agreement is no less personally dangerous or culpable than one whose colleague in fact possesses the specific intent to go through with the criminal plan." [citation omitted].[3] OAG was only able to find one D.C. Court of Appeals case where a person was convicted at trial of conspiracy based upon conversations with an undercover officer. The case, however, does not discuss the issue of whether a person can be convicted of "conspiring" with a police officer. It was reversed on other grounds.[4]

[2] See footnote 7, on page 2, and related text.
[3] In addition, Report #12, on page 26, notes that the unilateral approach to conspiracy, the one that permits prosecution for conspiracy where the other party is an undercover officer, "reflects the majority practice in American criminal law…" See page 25 of Report #12 for an explanation of the "unilateral approach to conspiracy."
[4] See *Springer v. United States*, 388 A.2d 846, where the appellant was convicted by a jury of conspiracy to commit first-degree murder and of solicitation to commit a felony based upon evidence of tape recordings -- and transcripts thereof -- of conversations between the appellant and an undercover MPD detective.

OAG suggests that either RCC § 22A-303 (b) be redrafted so that a person may be convicted of conspiracy notwithstanding that the "co-conspirator" is an undercover officer working a sting operation or that the Commission draft a separate offense which reaches this behavior. The Commission should not recommend the repeal of D.C. Code § 22-1805a unless the replacement criminalizes conspiracy in a sting context or unless a separate offense is created that criminalizes this behavior.

RCC § 22A-303 (c) and (d) would narrow the current scope of the District's jurisdiction to prosecute offenses when the object of the conspiracy is located outside the District or when the conspiracy is formed outside the District. Both paragraphs contain the phrase "That conduct would constitute a criminal offense under the D.C. Code if performed in the District of Columbia."[5] [emphasis added] Unless the intent is to only encompass offenses in enacted titles (such as this one), these paragraphs should use the phrase "District law"; it should not be specific to the Code. OAG, therefore, recommends that all references to "D.C. Code" in paragraphs (c) and (d) be changed to "District law."[6]

[5] Paragraph (c)(2)(B) also contains a reference to "The D.C. Code."
[6] D.C. Code § 22-1805a (d) uses the phrase "would constitute a criminal offense." It is not limited to D.C. Code offenses.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

SUBJECT: Third Draft of Report #2, Basic Requirements of Offense Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-206 HIERARCHY OF CULPABLE MENTAL STATES

RCC § 22A-206 should separately define the term "enhanced recklessness" and account for it in the hierarchy of culpable Mental states. RCC § 22A-206, as written, includes the definitions of purpose, knowledge, intent, recklessness, and negligence, as well as the hierarchy of the culpable mental states. Proof of a greater culpable mental state satisfies the requirements for a lower state. RCC § 22A-206 (d) (1) defines recklessness with respect to a result and (d)(2) defines recklessness with respect to a circumstance. On pages 20 through 22 the Commentary explains how recklessness differs from "enhanced recklessness." The explanation of enhanced recklessness is contained in RCC § 22A-206 (d)(3). As enhanced recklessness differs from recklessness, it should not be treated as a subpart of the definition of recklessness. Instead, the

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

definition should stand on its own and should follow the formatting of the other definitions in RCC § 22A-206. In other words, RCC § 22A-206 (d)(3) should be deleted and replaced with a new paragraph. That paragraph should be entitled "ENHANCED RECKLESSNESS DEFINED" and should be followed by two paragraphs that explains how "A person acts with enhanced recklessness" with respect to a result and a circumstance. The hierarchy should make clear that proof of recklessness is satisfied by proof of enhanced recklessness.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

SUBJECT: First Draft of Report #13, Penalties for Criminal Attempts

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #13, Penalties for Criminal Attempts. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-301 CRIMINAL ATTEMPTS

RCC § 22A-301 (c) (1) establishes that general penalty scheme for attempts. It states, "An attempt to commit an offense is subject to one half the maximum imprisonment or fine or both applicable to the offense attempted, unless a different punishment is specified in § 22A-301 (c) (2)."[2] We believe that the intent of this provision is to permit a sentence to be imposed that is up to ½ the stated imprisonment amount for the completed offense, ½ the stated fine amount, or up to ½ the stated imprisonment term and up to ½ the stated fine amount. As written, it is unclear, however, if the phrase "½ the stated" only modifies the word "imprisonment" or whether it also

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] OAG believes that it cannot fully evaluate this proposal until actual penalties are assigned to the underlying offenses. We are also curious as to how this proposal will affect the percentage of trials that are jury demandable.

modifies “fine” “or both.” We believe that this needs to be clarified either in the proposal or in the Commentary. If the Commission chooses to clarify this penalty provision in the Commentary, it should give an example.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

SUBJECT: First Draft of Report #14 Recommendations for Definitions for Offenses Against Persons

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #14 Recommendations for Definitions for Offenses Against Persons. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1001. Offense Against Person's Definition

RCC § 22A-1001 (3) defines the word "Coercion." When the lead in language is read with many of the subparagraphs it is not clear which person must be affected. For example, the lead in language when read with the first subparagraph states, "'Coercion' means causing another person to fear that, unless that person engages in particular conduct, then another person will…" (A) Inflict bodily injury on another person…" It would be clearer if (A) stated, "Inflict bodily injury on that person or someone else." All other paragraphs that are phrased like (A) should be similarly amended.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

RCC § 22A-1001 (11) defines the term "Law enforcement officer." Unlike D.C. Code § 22-405(a), this definition does not include District workers who supervise juveniles. A sentence should be added that states that a law enforcement officer also means "Any officer, employee, or contractor of the Department of Youth Rehabilitation Services."[2] In addition, neither this section nor the corresponding assault offenses address the jurisdictional provision contained in current law. D.C. Code § 22-405(a) includes a provision within the definition of a law enforcement officer that includes "any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District." RCC § 22A-1001 (11) must include such a statement or the District would lose jurisdiction to prosecute offenses that occur at New Beginnings.

RCC § 22A-1001 (15) defines the term "Protected person." Within the class of people who are protected are: a law enforcement officer, public safety employee, transportation worker, and District official or employee, but only "while in the course of official duties." See RCC § 22A-1001 (15) (D)-(G). It is unclear, however, whether one of these people would fall under this definition if they were assaulted, as a direct result of action they took in their official capacity, after they clocked out of work or whether they must be working at the time of the assault. A person may be assaulted or threatened at home for actions that they took on the job. In other words, what are the limits of the term "while in the course of official duties." To clarify, this definition should be expanded to say, "while in the course of official duties or on account of those duties."

RCC § 22A-1001 (17) defines the term "Serious Bodily injury." It includes within its definition "… obvious disfigurement." The question that must be clarified is obvious to whom? For example, if a person shoots off some else's big toe, depending on what shoe the victim wears the toe being missing may – or may not – be obvious. Similarly, if someone is shot on the inner thigh and has a scar, that scar may be obvious to the victim's spouse or other family members, but not to the general public. The Commission should consider either addressing this issue in the definition itself or in the Commentary.

RCC § 22A-1001 (18) defines the term "Significant bodily injury." It is unclear, however, if the government just fails to prove serious bodily injury, RCC § 22A-1001 (17), whether it would necessarily prove significant bodily injury. To improve proportionality, etc., the definition of significant bodily injury should always include the subset of offenses that are included in the definition of serious bodily injury. To use the example from the previous paragraph, if the government proves that the person was disfigured, but doesn't prove that it was obvious, then the disfigurement should qualify as a significant bodily injury.

[2] As many Department of Youth Rehabilitation Services facilities are staffed by contractors, as opposed to employees, the proposed language is a slight expansion of current law.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

SUBJECT: First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1202. Assault[2]

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

[2] In OAG's Memorandum concerning the First Draft of Report #14, Recommendations for Definitions for Offenses Against Persons, we noted that the proposed definition did not include the grant of jurisdictional authority that exists in current law. D.C. Code § 22-405(a) contains a provision that includes within the definition of a law enforcement officer, "any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District." If the jurisdictional issue is not resolved in RCC § 22A-1001 (11) then it needs to be resolved here, and in other substantive provisions.

RCC § 22A-1202 defines the offense of "Assault." Paragraph (a) establishes the elements for aggravated assault. Paragraph (A)(4) addresses protected persons in two contexts. RCC § 22A-1202 states, in relevant part, "A person commits the offense of aggravated assault when that person…:

(4) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; and
(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
(i) Law enforcement officer;
(ii) Public safety employee;
(iii) Participant in a citizen patrol;
(iv) District official or employee; or
(v) Family member of a District official or employee;

This provision raises the question of what, in practice, it means to be reckless as to whether the complainant is a protected person. The definition of "protected person" includes a person who is less than 18 years old …and a person who is 65 years old or older.[3] As the Commentary notes, recklessly is a culpable mental state, defined in RCC § 22A-206, means that the accused must disregard a substantial and unjustifiable risk that the complainant is a "protected person." So, if a perpetrator sees a person who is 67 years old, looks her over, and decides that she looks to be in her early 60s, and then assaults the woman, is the perpetrator disregarding a substantial and unjustifiable risk that the complainant is a "protected person"? Clearly, it is inappropriate to penalize a 67-year-old victim by taking her out of the class protected persons for looking like she is in better health than her age would otherwise indicate. People who attack persons in their 60s and 70s should bear the risk that they are assaulting a protected person and will be committing an aggravated assault.

There are two ways that the Commission can clarify, or correct, this issue. The first is to directly address this issue in the Commentary making it clear that in this situation assaulting the 67-year-old woman would be an aggravated assault. The second is to change the mental state that is associated with age related offenses. To do this, the phrase "with recklessness as to whether the complainant is a protected person" would be split into two phrases. The first would be "when the person is, in fact, a protected person as defined in RCC § 22A-1001 (15) (A) and (B)" and the other would be "with recklessness as to whether the complainant is a protected person as defined in RCC § 22A-1001 (15) (C) through (H)." This would preserve the mental state of

[3] See RCC § 1001 (15) generally. The definition of "protected person" further requires that if the victim is a person who is less than 18 years old that the defendant must, in fact, be at least 18 years old and be at least 2 years older than the victim.

recklessness as an element for all non-age related protected persons, while establishing an "in fact" requirement for age related protected persons.

The elements of second degree assault are established in RCC § 22A-1202 (c). It states that:

> A person commits the offense of second degree assault when that person:
> (1) Recklessly causes bodily injury to another person by means of what, in fact, is a dangerous weapon;
> (2) Recklessly causes significant bodily injury to another person; and
> (A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
> (B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
> (i) Law enforcement officer;
> (ii) Public safety employee;
> (iii) Participant in a citizen patrol;
> (iv) District official or employee; or
> (v) Family member of a District official or employee; [emphasis added]

RCC § 22A-1202 (c)(1) enhances the penalty over third, fourth, and fifth degree assault because the perpetrator causes bodily injury by using a dangerous weapon. It addresses society's interest in discouraging the use of weapons during an assault. RCC § 22A-1202 (c)(2) enhances the penalty provision when the perpetrator causes significant bodily injury to any protected person or to certain protected persons when the injury is caused with the purpose of harming the complainant because of the person's government affiliation. It addresses society's interest in discouraging assaults against law enforcement personal, government workers, and others involved in public safety or citizen patrols, as well as family members of a District official or employees. RCC § 22A-1202 (c)(1) and (c)(2), therefore, serve different societal interests.

As these two sets of elements are both penalized as second degree assault, there is no additional penalty for a person using a gun while causing significant bodily injury to a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or a family member of a District official or employee. In other words, if the perpetrator plans on causing significant bodily injury, they may as well use a dangerous weapon. To make the penalties proportionate, a person who uses a dangerous weapon against a person listed in RCC § 22A-1202 (c)(2)(B) and causes significant bodily injury should be subject to a higher penalty than if they use a dangerous weapon in assaulting one of those persons and only cause bodily injury. The Commission should create a new degree of assault that comes between the current first and second degree assaults to accommodate this offense.[4]

[4] A similar argument can be made concerning the need to amend aggravated assault under RCC § 22A-1202 (a).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

SUBJECT: First Draft of Report #16 Recommendations for Robbery

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #16 Recommendations for Robbery. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1201. Robbery

OAG would like to memorialize an observation that it discussed with the Commission. The Commission is charged with using clear and plain language in revising the District's criminal statutes.[2] We believe that the idea is to make the Code more understandable. We have described the problem as multi-step nesting. For example, in order to determine the elements of robbery (including which degree is appropriate in a given circumstance), one has to look up the elements of criminal menacing, and in order to determine the elements of criminal menacing, one must look up the elements of assault. While there are many sound drafting principles for using this approach to criminal code reform, it does leave proposals that may not be "clear" to a person who is trying to understand the elements of this offense.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] See D.C. Code § 3-152 (a)(1).

OAG would like the Commission to clarify the amount of force that is necessary to complete a robbery. OAG understands from conversations with the Commission that a person who grabs a purse out of someone's hand or from out from under someone's arm would be guilty of third degree robbery. Specifically, the force that is needed merely to take the purse would meet the requirement in Section 1201 (d) (4)(A) that it was accomplished by "Using physical force that overpowers any other person present…" On the other hand, the force that is necessary to complete a pick pocket (where the victim is unaware of the taking), would not be sufficient to convert the taking to a robbery. To ensure that the proposal is interpreted as intended, the Commission should consider adding more hypotheticals to the Commentary.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 9, 2018

SUBJECT: First Draft of Report #17 Recommendations for Criminal Menace & Criminal Threat Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #17 Recommendations for Criminal Menace & Criminal Threat Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

Both RCC § 22A-1203 and RCC § 22A-1204. Criminal Menace and Criminal Threat

OAG would suggest that that the titles to Sections 1203 and 1204 be changed to drop the word "Criminal." Instead of calling them "Criminal Menacing" and "Criminal Threats", we believe that they should simply be called "Menacing" and "Threats." By adding the word "criminal" to the name it unnecessarily raises the question what a non-criminal menacing and non-criminal threat is. The words "menacing" and "threat" meet the requirements of D.C. Code § 3-152(a) that the Criminal Code to "Use clear and plain language."

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

In addition, the Commentary should make clear that the effective consent defense in both offenses,[2] is the consent to being menaced or threatened, not consent to the underlying conduct constituting the offenses of homicide, robbery, sexual assault, kidnapping, and assault (and for criminal threats, the offence of criminal damage to property).[3]

[2] See RCC § 22A-1203 (e) and RCC § 22A-1204 (e).
[3] See RCC § 22A-1203 (a)(3) and (b)(2) and RCC § 22A-1204 (a)(2) and (b)(2).

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	March 9, 2017
Re:	Comments on First Draft of Report 13, Penalties for Criminal Attempts

The Public Defender Service makes the following comments on Report #13, Penalties for Criminal Attempts. PDS agrees with the principle embodied in proposed RCC 22A-301 of a substantial punishment reduction between completed and attempted criminal conduct. However, PDS strenuously objects to any revision of the criminal code that will result in longer periods of incarceration for individuals convicted of crimes. While before the RCC's sentencing provisions are drafted it is difficult to say exactly how many and by how much sentences will increase under RCC § 22A-301(c), it is clear that many sentences will increase under RCC § 22A-301. The commentary itself concedes[1] that pursuant to RCC §22A-301(c) various non-violent property offenses, currently punishable as misdemeanors with a maximum imprisonment term of 180 days,[2] would become felony offenses punishable by a term of years. This would not only increase the length of incarceration, it would also have negative consequences for persons' prospects for housing, education, and employment. By making some attempt offenses felonies rather than misdemeanors, options for record sealing and diversion programs would also likely decrease. Sentences for crimes such as attempted burglary, which under D.C. Code § 22-1803 carries a statutory maximum of 5 years imprisonment, may also increase under RCC § 22-301(c). Since the District has no locally accountable control over how offenses are ultimately prosecuted, whether diversion programs are offered, and what sort of plea offers are available to defendants, the District must take exceptional care in labeling offenses felonies and establishing statutory maxima.

[1] Report #13, page 14.

[2] D.C. Code § 22- 1803.

The principal benefit of the RCC's default rule of a 50% reduction between attempted and completed criminal conduct is bringing order and uniformity to legislation that has evolved piecemeal. Increased incarceration is too high a price to pay for the benefit of a clearer statutory scheme.

Therefore, for attempts, PDS proposes: 1) maintaining the sentencing consequences of D.C. Code § 22-1803, with a maximum punishment of 180 days of incarceration, for property offenses and other non-violent offenses covered in that section and the RCC equivalent; 2) maintaining the sentencing consequences of D.C. Code § 22-1803, with a five year maximum sentence for attempted crimes of violence such as burglary, as defined in D.C. Code § 23-1331; and 3) replacing D.C. Code § 22-401 (assault with intent to kill, rob, or poison or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse) with the RCC proposal to make the statutory maximum for the attempt crime half of that for the completed offense.

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	March 9, 2017
Re:	Comments on First Drafts of Reports 14 through 17, Offenses Against Persons

The Public Defender Service makes the following comments.

Report #14: Recommendations for Definitions for Offenses Against Persons

1. PDS recommends strengthening the definition of "bodily injury." PDS supports the overall structure of assault and offensive physical contact proposed for the RCC. To reduce unnecessary overlap of offenses and to improve the proportionality of penalties, RCC creates a number of assault gradations and creates a new offense of Offensive Physical Contact. Offensive Physical Contact "punishes as a separate offense … low-level conduct that was previously not distinguished from more serious assaultive conduct in current law."[1] The offense "criminalizes behavior that does not rise to the level of causing bodily injury or overpowering physical force."[2] PDS heartily endorses that approach. However, that approach becomes hollow when "bodily injury" is defined to include fleeting physical pain. To give real meaning to the distinction between "assault" and "offensive physical contact," the definition of "bodily injury" must be rewritten to set a higher floor for "assault", thus creating a more realistic ceiling for "offensive physical contact." PDS recommends "bodily injury" require at least moderate physical pain. Specifically, the definition should read: "'Bodily injury' means moderate physical pain, illness, or any impairment of physical condition." This proposal creates a more clear progression of criminalized physical touching: offensive physical contact; bodily injury, which requires moderate physical pain; significant bodily injury, which requires a bodily injury that warrants hospitalization or immediate medical treatment to abate severe pain; and serious bodily injury,

[1] Report #15, page 52.

[2] Report #15, page 50.

which requires a substantial risk of death, protracted disfigurement, or protracted impairment of a bodily member.

2. PDS recommends clarifying in the commentary for the definition of "dangerous weapon" that the issue of whether an object or substance "in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury"[3] is a question of fact, not a question of law.

3. PDS notes that the use and definition of the umbrella term "protected person" expands the application of certain enhancements to allow for greater punishment than in current law. For example, under current law the enhancement when the complainant is a minor only applies to offenses that are "crimes of violence," which does not include simple assault;[4] however, RCC Fourth Degree Assault would allow for increased punishment for conduct that results in (mere) bodily injury of a protected person.[5] Similarly, the elderly enhancement in current law does not apply to simple assault,[6] but bodily injury assault would be punished more severely if committed against a protected person (elderly person). Under current law, there is no law enforcement enhancement for the offense of robbery in contrast with RCC section 1201 for robbery.[7] PDS does not object to this expansion only because it is included in the proposed restructuring of assaults and robbery that incorporates a number of currently free-standing penalty enhancements, thus preventing stacking of enhancements.[8]

Report # 15: Recommendations for Assault & Offensive Physical Contact Offenses

1. The commentary states that for both Section 1202(a)(4)(A) and (a)(4)(B), the complainant must be a protected person.[9] However, the statutory language does not specify that the complainant must "in fact" be a protected person. As it is currently written, the "protected person" circumstance element could be read to apply when a person causes the requisite injury reckless as to whether the complainant might be a protected person regardless of whether the complainant actually is. Thus, PDS recommends that wherever the "protected person" circumstance element

[3] See RCC § 22A-1001(4)(F).

[4] See D.C. Code §§ 22-3611, 23-1331, 22-404.

[5] RCC § 22A-1202(e)(1).

[6] See D.C. Code § 3601.

[7] Compare D.C. Code §22- 2801 and RCC § 22A-1201(a)(2)(B), (b)(2)(iii), (c)(2)(iii).

[8] See e.g., Report #15, page 22.

[9] See Report #15, page 7. Although the commentary on this point only cites "protected person" for aggravated assault, presumably the requirement that the complainant actually be a protected person extends to each gradation that has a "protected person" circumstance element.

appears, it be rewritten to clarify that the circumstance element requires that the complainant must, *in fact*, have that status. For example, aggravated assault should be rewritten as follows:

"(4) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person and the complainant, in fact, is a protected person; or

(B) (i) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

~~(i)~~(I) Law enforcement officer;

~~(ii)~~(II) Public safety employee;

…

~~(v)~~(V) Family member of a District official or employee; and

(ii) the complainant, in fact, has that status;

2. PDS recommends eliminating the use of the mental state "recklessly, under circumstances manifesting extreme indifference to human life" where it is used throughout the assault section. The added component of "under circumstances manifesting extreme indifference" means that the various gradations of RCC Assault fail to merge with (become lesser included offenses of) RCC Robbery. For example, Aggravated Robbery requires Third Degree Robbery plus recklessly causing serious bodily injury by means of a dangerous weapon. Aggravated Assault, in contrast, requires recklessly under circumstances manifesting extreme indifference to human life causing serious bodily injury by means of a dangerous weapon. Because each offense has an additional element - aggravated robbery requires 3rd degree robbery and aggravated assault requires "under circumstances manifesting extreme indifference to human life" - they do not merge. PDS recommends replacing the "reckless with extreme indifference" mental state with "knowing" for the more serious gradation and with simple "recklessness" for the less serious gradations. "Knowing" and "reckless" are easier to differentiate from each other and more of the gradations of assault will merge with gradations of robbery.

Specifically, PDS recommends rewriting the four most serious gradations of assault as follows:

"**Section 1202. Assault**

(a) *Aggravated Assault.* A person commits the offense of aggravated assault when that person:

(1) Purposely causes serious and permanent disfigurement to another person;

(2) Purposely destroys, amputates, or permanently disables a member or organ of another person's body;

(3) Knowingly ~~Recklessly, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person by means of what, in fact, is a dangerous weapon; or

(4) Knowingly ~~Recklessly, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person; and

(A) Such injury is caused knowing ~~with recklessness as to whether~~ the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(b) *First Degree Assault*. A person commits the offense of first degree assault when that person:

(1) Recklessly~~, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person by means of what, in fact, is a dangerous weapon; or

(2) Recklessly causes serious ~~significant~~ bodily injury to another person ~~by means of what, in fact, is a dangerous weapon~~; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(c) *Second Degree Assault.* A person commits the offense of second degree assault when that person:

(1) Recklessly causes significant bodily injury to another person by means of what, in fact, is a dangerous weapon;

(2) Recklessly causes serious bodily injury to another person;

(3) Recklessly causes significant bodily injury to another person; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(d) *Third Degree Assault.* A person commits the offense of third degree assault when that person:

(1) Recklessly causes significant bodily injury to another person; or

(2) Recklessly causes bodily injury to another person by means of what, in fact, is a dangerous weapon; …

3. PDS objects to increasing the severity of assault based on strict liability as to whether the object that is the means of causing the requisite injury is a "dangerous weapon."[10] For example, a person commits RCC Fifth Degree Assault when that person recklessly causes bodily injury to another person;[11] a person commits RCC Second Degree Assault when that person recklessly causes bodily injury to another person by means of what, *in fact, is a dangerous weapon*.[12] PDS recommends that the mental state of "negligence" apply to whether the object that is the means by which the requisite injury is caused is a "dangerous weapon." A series of hypotheticals will illustrate the unfairness of strict liability and the ease with which the prosecution will likely be able to prove negligence in most cases.

   A. Defendant hits complainant with a light cloth purse. Beading on the purse scratches the complainant and causes a "bodily injury" → Perhaps RCC 2nd degree offensive physical contact. Perhaps RCC 5th degree assault, if the jury finds that the defendant was aware of a substantial risk that hitting someone with a cloth purse would result in a bodily injury. But not a more severe gradation of assault because the cloth purse is not a per se dangerous weapon.[13] If the offense allowed strict liability, it's unlikely that the jury would find "in fact" that the cloth purse was a dangerous weapon, that is, that the defendant used it in a manner that was likely to cause death or serious bodily injury. A negligence standard would probably lead to the same result -- it is unlikely that the jury would find that the defendant was negligent in failing to perceive a substantial risk that the cloth purse, "in the manner of its actual use, was likely to cause death or serious bodily injury."[14]

   B. Defendant lunges at the complainant with a switchblade, nicks the complainant, causing bodily injury → perhaps 2nd degree assault, if the jury finds that the defendant recklessly caused bodily injury by means of an object -- if strict liability were the standard, the jury would find that "in fact" the switchblade was a per se dangerous weapon;[15] likely the same result if negligence were the standard as the jury would almost surely find that the

[10] This objection and corresponding recommendation applies throughout the Offenses Against Persons Chapter of the RCC, not just to the Assault Section.

[11] RCC § 22A-1202(f) at Report #15, page 4.

[12] RCC §22A-1202(c)(1) at Report #15, page 3 (emphasis added).

[13] See RCC §22A-1001(4)(A) – (E).

[14] See RCC §22A-1001(4)(F).

[15] See RCC §22A-1001(4)(B); (13)(E).

defendant was negligent in failing to perceive a substantial risk that the object in her hand was a switchblade, a per se dangerous weapon.

C. Defendant swings heavy cloth purse at complainant's derriere, the heavy object inside the purse, a Kindle tablet, causes bodily injury (physical pain) → similar to (A) but more likely than (A) to result in RCC 5th degree assault (versus just RCC 2nd degree offensive physical contact) because the jury might more easily find that the defendant was aware of a substantial risk that swinging a heavy cloth purse would cause bodily injury. But like (A), this would likely not result in a more severe assault gradation. A Kindle tablet is not a per se dangerous weapon. If the standard were negligence, it is unlikely that the jury would find that the defendant was negligent in failing to perceive a substantial risk that the manner in which she used the heavy cloth purse/Kindle tablet would likely result in death or serious bodily injury. It is similarly unlikely that strict liability has a different result; it is improbable that the jury would find, in fact, that the cloth purse/Kindle tablet, in the manner in which it was used was likely to cause death or serious bodily injury.

D. Defendant swings heavy cloth purse at complainant's derriere, the heavy object inside the purse causes bodily injury (physical pain). The heavy object is a firearm, a per se dangerous weapon.[16] If strict liability were the standard, the defendant in this scenario could be found guilty of RCC 2nd degree assault if the jury found that the defendant was aware of a substantial risk that swinging a heavy cloth purse would cause bodily injury; if the jury found that it was the heavy object in the purse that caused the bodily injury, then "in fact" the heavy object was a firearm, which is a per se dangerous weapon. Thus, the defendant is guilty of recklessly causing bodily injury by means of what, in fact, is a dangerous weapon. However, the negligence standard could lead to a different result, a result more proportionate to the previous hypos. To find the defendant guilty of RCC 2nd degree assault, the jury would have to find, much like in (C), that the defendant was aware of a substantial risk that the conduct of swinging a heavy cloth purse would result in bodily injury. Then, again, if the jury found that it was the heavy object within the cloth purse that caused the bodily injury, the jury would have to find that the defendant failed to perceive a substantial risk that the "heaviness" was a firearm (a per se dangerous weapon) or find that the defendant failed to perceive a substantial risk that the heavy object was used in a manner that was likely to cause death or serious bodily injury. It is possible that there will be evidence to show that the defendant was aware that the heaviness was a "firearm" or, more accurately, there could be evidence that would create a substantial risk that the heaviness is a firearm and the defendant was negligent in failing to perceive that risk. Even though using a firearm as a weight in a cloth purse to hit someone on their derriere is not the intended use of a firearm and is not likely to cause death or serious bodily injury, PDS does not object to applying the per se dangerous weapon to enhance assault in this way. PDS strongly objects however to enhancing

[16] See RCC § 22A-1001(4)(A).

assault to a more severe gradation based on strict liability that the mystery heavy object happens to be a firearm.

PDS recommends the dangerous weapon circumstance element be worded as follows (with modifications as necessary for the various levels of bodily injury): "recklessly causes bodily injury to another person by means of ~~what, in fact, is~~ an object and is negligent as to the object being a dangerous weapon."

4. PDS objects to Fourth Degree Assault criminalizing negligently causing bodily injury with an unloaded firearm. Criminalizing negligent conduct is severe and should be done rarely. The particular problem with Fourth Degree Assault is applying such a low mental state to conduct that is indistinguishable from conduct that would have the same result. Negligently causing bodily injury by means of an unloaded firearm is indistinguishable from negligently causing bodily injury by means of a cloth purse/Kindle tablet or by means of a rubber chicken. What sets a firearm apart from other objects or even other weapons is its use *as a firearm* (to fire a projectile at a high velocity), not its use as a heavy object or club. For this reason, PDS does not object to criminalizing negligently causing bodily injury by the discharge of a firearm. Fourth Degree Assault should be rewritten as follows: "Negligently causes bodily injury to another person by means of the discharge of what, in fact, is a firearm as defined at D.C. Code § 22-4501(2A)~~, regardless of whether the firearm is loaded~~;…"

Report #16: Recommendations for Robbery

1. PDS recommends rewriting Third Degree Robbery (on which all of the more serious gradations are based) and Second Degree Criminal Menace so that they are not circular. As currently written, one of the ways to commit Third Degree Robbery is to take property of another from the immediate actual possession or control of another by means of committing conduct constituting a Second Degree Criminal Menace.[17] Second Degree Criminal Menace can be committed when a person communicates to another person physically present that the person immediately will engage in conduct against that person constituting Robbery.[18] PDS agrees with the approach that a form of robbery could be committed by taking property of another by means of having made a communication threatening bodily injury and agrees that a form of criminal menacing could be committed by threatening to take property by use of force. Each offense statute however should be rewritten to specify culpable conduct without circular references to other offense statutes.
2. PDS objects to incorporating attempt conduct into the completed Robbery offense. Heretofore, the RCC has adopted the laudable principle of punishing attempts separately from completed

[17] RCC §22A-1201(d)(4)(C).

[18] RCC §22A-1203(b)(2)(B). Note, RCC §22A-1203(b)(2) uses the word "defendant;" this is clearly a typo and should be changed to "person."

conduct. [19] However, PDS is willing to accept incorporating attempt in this instance on two conditions. One, the commentary must include a concise statement that the attempt only applies to the element of taking or exercising control over the property; attempted or "dangerously close" conduct will not suffice for any other element of Robbery. Two, element (4) must be rewritten to eliminate the "facilitating flight" language.

RCC Robbery does not have a requirement of asportation or movement of the property.[20] That makes sense; if a completed robbery no longer requires property to have been taken – indeed, it does not require that there even be property[21] – then completed robbery cannot require property to have been moved.[22] Similarly, flight or facilitating flight is intrinsically tied to taking (controlling) the property. "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.'"[23] District case law supports the nexus between taking property and flight. *Williams v. United States*,[24] cited in Report #16 to support the notion that force after the taking constitutes "robbery,"[25] does hold that the robbery was "still in progress" when the defendant was fleeing. However, *Williams* is clear in basing its analysis on "the asportation of goods" and in examining the particular circumstances that the defendant "was acting as a principal in effecting a robbery *by carrying away the proceeds of that robbery*."[26] Because pursuant to RCC Robbery, the robbery can be completed without having exercised control of the property (or without there being property) and

[19] See e.g., Report #9, page 54, Arson; Report #9, page 70, Reckless Burning; Report #9, page 81, Criminal Destruction of Property; Report # 10, page 6, Fraud; Report # 11, page 5, Extortion.

[20] Report #16, page 12.

[21] See Report #16, page 13, n. 56 ("For example, if a person causes bodily injury to another in an attempt to take property from that person, but finds that other person does not actually possess any property …, that person could still be found guilty of robbery.")

[22] Compare robbery that requires a taking ("shall take") and has an asportation requirement, even if minimal with armed carjacking that allows "attempts to do so" and does not require asportation.

[23] Report #16, page 16, n. 80 (Quoting 4 Charles E. Torcia, Wharton's Criminal Law § 463, at 39-40 (15th ed. 1996))(emphasis added).

[24] 478 A.2d 1101 (D.C. 1984).

[25] Report #16, page 16, n. 82.

[26] *Williams*, 478 A.2d at 1105. ("The asportation under our analysis continues so long as the robber indicates by his actions that he is dissatisfied with the location of the stolen goods immediately after the crime…" (emphasis added)).

because there is no "carrying away" requirement, District law does not, in fact, support extending the duration of robbery to include flight. Thus, "robbery" should complete when the person takes, exercises control over, or attempts to take or exercise control over, the property of another from the immediate actual possession or control of another by means of [physical force that overpowers]. This construction does not mean that the intent to take the property must be formed before the force is used nor does it mean that the force must be used with the purpose of creating an opportunity to take property.[27] It does mean, however, that the force necessary to elevate the conduct from a theft from the person to a robbery must occur before or simultaneous to the taking of the property; the force must create the opportunity to take or exercise control or the attempt to take or exercise control of the property. If the force occurs after the property is taken, then it is not a robbery. The taking is a theft from person and the force might separately be an assault.

3. As noted above, PDS supports the intent embodied in the structure of proposed RCC Chapter 12 to reduce unnecessary overlap of offenses and to improve the proportionality of penalties. Though the offenses are obviously meant to stack and build on each other, various "stray" elements mean that the offenses will not merge using a strict elements analysis. In addition, the way robbery is written, a more serious gradation could be charged based on an injury to someone other than the "victim" of the robbery (the robbery victim being the person in actual possession or control of the property).[28] It would not reduce overlap of offenses nor improve the proportionality of penalties to allow a conviction of a more severe gradation of robbery based on injury to a non-robbery victim and also allow an assault conviction for injury to the non-robbery victim when if the force were used against only the robbery victim, the assault or offensive touching or menacing conduct would merge.

   To further carry out the intent of the proposed structure, PDS strongly recommends that the RCC include a section that limits convictions for multiple related offenses against persons. Modeled on RCC § 22A-2003,[29] PDS proposes the following language be added to Chapter 12 of the RCC.

   > RCC § 22A-1206. Limitation on Convictions for Multiple Related Offenses Against Persons.
   >
   > (a) *Robbery, Assault, Criminal Menacing, Criminal Threats, or Offensive Physical Contact Offenses.* A person may be found guilty of any combination of offenses

[27] See Report #16, page 12, n. 17.

[28] An example would be a person who knocks Bystander out of the way in order to take wallet sitting on table in front of "robbery victim." The overpowering force used against Bystander would raise this taking to a robbery even though the property was in the control of the "robbery victim." See also Report #16, page 6, n. 14.

[29] See Report #8, First Draft at page 49.

contained in Chapter 12[30] for which he or she satisfies the requirements for liability; however, the court shall not enter a judgment of conviction for more than one of these offenses based on the same act or course of conduct against the same complainant or based on the same act or course of conduct when the offense against one person is used to establish a gradation for an offense against another person.

(b) *Judgment to be Entered on Most Serious Offense.* Where subsection (a) prohibits judgments of conviction for more than one of two or more offenses based on the same act or course of conduct against the same complainant, the court shall enter a judgment of conviction for the offense, or grade of an offense, with the most severe penalty; provided that, where two or more offenses subject to subsection (a) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses.

Report #17: Recommendations for Criminal Menace & Criminal Threats Offenses

PDS recommends that the RCC omit the words "criminal" in the titles of criminal threats and criminal menace language. The language is redundant and could cause the offenses to be judged more harshly in the contexts of employment, housing, and education.

[30] At this time, PDS is proposing this section to apply to robbery, assault, criminal menacing, criminal threats, and offensive physical contact. PDS anticipates proposing expanding this section or proposing another one to limit multiple related offenses for those offenses and homicide, sexual assaults, and kidnapping.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

SUBJECT: First Draft of Report #18 Solicitation and Renunciation

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #18 Solicitation and Renunciation. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-304. Renunciation Defense to Attempt, Conspiracy, and Solicitation

Section 22A-304(a)(1) says that for the defendant to be able to use the affirmative defense of renunciation, the defendant must have engaged in conduct "sufficient to prevent commission of the target offense." The discussion of that provision says it was drafted that way to include situations where the defendant attempts to "persuade" a solicitee who was actually an informant not to commit a crime he or she was never going to commit in the first place. However, in order for the conduct to be "sufficient to prevent the commission of the target offense", the defendant's actions must have at least decreased the likelihood of the offense happening. But when a defendant is "persuading" an informant not to act, the defendant's actions have no effect on the probability that the criminal conduct will take place. This provision should be rewritten to specifically include both situations; where the defendant engages in conduct that is sufficient to

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

prevent the commission of the target offense, as well as where the defendant's actions would have been sufficient to prevent the offense, if the circumstances were as the defendant believed them to be. The provision could be redrafted as follows:

> (a) DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE. In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that:
>
> (1) The defendant engaged in conduct sufficient to prevent commission of the target offense or would have been sufficient to prevent the commission of the target offense if the circumstances were as the defendant believed them to be;
>
> (2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.

Section 22A-304(b)'s title states that it is the provision that defines when a renunciation is voluntary and complete. However, the paragraph that follows actually says what isn't voluntary and complete renunciation. It states, "A renunciation is not 'voluntary and complete' within the meaning of subsection (a) when it is motivated in whole or in part by… [certain circumstances]." This implies that a renunciation is voluntary and complete as long as none of the elements in (b) are satisfied.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

SUBJECT: First Draft of Report #19. Homicide

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #19, Homicide. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1101. Murder

Section 22A-1101 (a)(2)(E) makes it an aggravated murder when the requisite elements are met and "The defendant committed the murder after substantial planning…" As noted on page 6 of the memorandum, "Subsection (a)(2)(E) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The accused must have formed the intent to kill a substantial amount of time before committing the murder." The phrasing of this subparagraph raises several issues. First, the plain meaning of the term "substantial planning" sounds as if the planning has to be intricate.[2] However, the Comment portion just quoted makes it sound like the word "substantial" refers to the amount of time the intent was formed prior to the murder. These provisions should be redrafted to clarify

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] In other words, the planning was of considerable importance, size or worth.

whether the intent is to have the enhancement apply when the perpetrator plans the murder some period prior to actually committing it (even if it is a simple plan to just shoot the victim), whether the plan to commit the murder has to have many steps to it (even if it was conceived almost instantaneously with the commission of crime), or whether either will suffice.

If the term "substantial planning" refers to the time between the planning and the commission of the offense and that "Substantial planning requires more than mere premeditation and deliberation" How much more – and how will anyone know? As the discussion points out, premeditation can happen in the blink of an eye. How much more is needed for substantial planning?

Section 22A-1101 (a)(2)(I) makes it an aggravated murder when the requisite elements are met and "In fact, the death is caused by means of a dangerous weapon." However, this is a change from current District law. As noted on page 14 of the memorandum "Current D.C. Code § 22-4502 provides enhanced penalties for committing murder "while armed" or "having readily available" a dangerous weapon." While there may be arguments for not providing an enhancement for an unseen weapon that is not used, there should be enhancements for when weapons are used or brandished. For example, a perpetrator shoots a person in chest and then sits on the bleeding victim and chokes him to death. While it cannot be said that "the death was caused by means of a dangerous weapon" the use of the gun certainly prevented the victim from defending herself. Similarly, victims may be less likely to defend themselves if assailants have guns aimed at them while they are being assaulted. To take these scenarios into account, we suggest that § 22A-1101 (a)(2)(I) be redrafted such that the enhancement applies any time a weapon is displayed or used, whether or not it in fact caused the death.

Section 22A-1101 (f) establishes a mitigation defense. Subparagraph (1)(B) says one mitigation defense to murder is "[a]cting with an <u>unreasonable belief</u> that the use of deadly force was necessary…" [emphasis added] Our understanding is that this was intentional, and wasn't meant to say "<u>reasonable</u>." We ask because of the discussion of it on page 9 of the memorandum. That discussion seems to say that a reasonable belief of necessity would be a complete defense to murder, while an unreasonable belief merely mitigates murder down to manslaughter. But the leadoff sentence in the comment implies the opposite. It says that "[s]ubsection (f)(1)(B) defines mitigating circumstances to include acting under <u>a reasonable</u> belief that the use of deadly force was necessary" [emphasis added] – suggesting that a reasonable belief merely mitigates down to manslaughter. This discussion needs to be clarified.

Subparagraph (3) of § 22A-1101(f) explains the effect of the mitigation defense. It states:

> (A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant shall not be found guilty of murder, but may be found guilty of first degree manslaughter.

> (B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant shall not be found guilty of murder, but may be found guilty of aggravated manslaughter.

Paragraphs (A) and (B) dictate what the defendant is guilty of if the government fails to prove the absence of mitigation circumstances beyond a reasonable doubt. We have a few observations and suggestions concerning this provision.

First, paragraphs (A) and (B) are written in terms of what a trier of fact may do as opposed to what the law is concerning mitigation (i.e. "shall not be found guilty of murder, but may be found guilty…"). These paragraphs should be rewritten to state what the law is concerning mitigation, as follows:

> (A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant is not guilty of murder, but is guilty of first degree manslaughter.
>
> (B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant is not guilty of murder, but is guilty of aggravated manslaughter.

Second, a successful mitigation defense results in a conviction for either first degree or aggravated manslaughter not withstanding that, but for the mitigation defense, the person committed an aggravated murder, first degree murder, or second degree murder. In other words, the penalties for committing these offenses are no longer proportionate to the conduct. More egregious conduct is penalized the same as less egregious conduct. There are a number of ways that the Commission could make these offenses proportionate. For example, a successful mitigation defense could lower the offense by one level.[3]

[3] Under this proposal a person who would have been guilty of aggravated murder, but for a successful mitigation defense would be guilty of first degree murder, and a person who would have been guilty of first degree murder, but for a successful mitigation defense would be guilty of second degree murder.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

SUBJECT: First Draft of Report #20. Abuse & Neglect of Children, Elderly, and Vulnerable Adults

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #20 - Abuse & Neglect of Children, Elderly, and Vulnerable Adults.

COMMENTS ON THE DRAFT REPORT

RCC § 22A- Section 1501 and 1502. Child Abuse and Child Neglect.[1]

The Commission should consider changing the names of these proposed offenses. The terms "child abuse" and "child neglect" have long been associated with the District's child welfare system. See D.C. Code § 16-2301 (9). Calling the criminal offense and the civil offense by the same name will cause unnecessary confusion. We recommend renaming the RCC child abuse provision, "criminal cruelty to a child" and renaming RCC child neglect, "criminal harm to a child."[2]

RCC § 22A- Section 1501. Child Abuse.

[1] Third Degree Child Abuse includes "Recklessly … us[ing] physical force that overpowers a child." As noted in previous memoranda and discussions, the term "overpower" is not defined.
[2] There may be other names that the Commission may choose that avoids confusion with the child welfare system.

In establishing the offense degree, the Child abuse statute utilizes the terms "serious bodily injury" and "significant bodily injury" that were developed to distinguish between the various degrees of offenses against persons. While those definitions may be appropriate when distinguishing between injuries for adults, they are not sufficient to distinguish between injuries to a baby or small child. Either the definitions need to be expanded or additional degrees of child abuse need to be established. For example, it appears that the following injuries to a baby would not qualify as a first or second degree child abuse: regularly failing to feed the baby for 24 hours; causing a laceration that is .74 inches in length and less than a quarter of an inch deep; failing to provide medicine as prescribed, which causes the baby to suffer pain, problems breathing, or a serious rash; holding a baby's hand against a stove causing a first degree burn; and chocking the child, but not to the point of loss of consciousness.[3] As drafted, a parent who injured a child in one of the ways described in these examples would be guilty of third decree child neglect along with parents who merely "Recklessly fail[ed] to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of a child." [4]

RCC § 22A- §1501 (f)(1) establishes the parental discipline defense. Subparagraph (D) limits the defense to conduct that does not include burning, biting, or cutting the child; striking the child with a closed fist; shaking, kicking, or throwing the child; or interfering with the child's breathing. We suggest that that list be expanded to include, interfering with the child's <u>blood flow to the brain or extremities.</u>

[3] This is a representative list of injuries that someone may inflict on a baby that, under the current draft, appears either to be a third degree child abuse or not child abuse at all.
[4] Similarly, it is not clear what offense a parent would be committing if the parent intentionally blew PCP smoke into a baby's face or fed the baby food containing drugs, which did not cause a substantial risk of death or a bodily injuy.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: May 11, 2018

Re: Comments on First Draft of Report No. 18, Solicitation and Renunciation

The Public Defender Service objects to the restriction in proposed RCC § 22A-304, Renunciation Defense to Attempt, Conspiracy, and Solicitation, that the defense is only available if the target offense was not committed. PDS recommends that the District of Columbia join the "strong plurality of reform jurisdictions [that] relax the … requirement that the target of the offense attempt, solicitation, or conspiracy actually be prevented/thwarted."[1]

Specifically, PDS recommends rewriting subsection (a) of RCC §22A-304 as follows:

> (a) DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE. In a prosecution for attempt, solicitation, or conspiracy ~~in which the target offense was not committed~~, it is an affirmative defense that:
>
> (1)(A) The person ~~defendant~~ gave a timely warning to law enforcement authorities; or
>
> (B) The person made a reasonable effort to prevent the commission of the target offense; ~~engaged in conduct sufficient to prevent commission of the target offense;~~
>
> (2) Under circumstances manifesting a voluntary and complete renunciation of the person's ~~defendant's~~ criminal intent.

The PDS proposal does more to further both the incapacitating dangerous persons and the deterrence purposes of the renunciation defense.[2] For a solo criminal venture, "renouncing" the target offense,

[1] Report #18, pages 47- 48.

[2] Report # 18, page 49.

particularly when done under circumstances manifesting a voluntary and complete renunciation of the person's criminal intent, will almost always actually prevent the commission/completion of the target offense. Both the dangerousness and the deterrence purposes are served; the defendant's "reward of remission of punishment"[3] results in society benefitting from less crime. Even where the criminal venture involves more than one person, if the venture would end if one key person decides to stop participating, then the target offense will be actually prevented if that key person renounces. The problem is how to motivate a person to try to prevent or thwart the criminal venture if the venture will likely go forward whether that person continues his participation or not. The greater the chance that one of the [potential] participants will receive "the reward of remission of punishment," the greater the chance society has of benefitting from less crime. Where there is some chance that the crime will not actually be thwarted despite a person's reasonable efforts, the person's motivation to attempt renunciation then depends on the person's perception of his or her chances of being apprehended. If the person can just walk away from the venture, believing there is little chance that his involvement (solicitation or conspiracy or even steps sufficient to comprise attempt) will be prosecuted or maybe even realized by law enforcement authorities, there is more incentive to walk away and less incentive to make efforts to thwart the target offense, particularly by contacting law enforcement. Requiring that a person give timely warning to law enforcement or make other reasonable efforts to prevent the commission of the target offense encourages renunciation, encourages a person to take steps that might be sufficient to prevent the target offense and to take those steps even when they cannot guarantee they will be sufficient. Society benefits more from encouraging a potential participant to take a chance on preventing the crime rather than taking a chance on getting away with the crime (the crime of attempt, solicitation and/or conspiracy).

[3] Report #18, page 49.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	The Public Defender Service for the District of Columbia
Date:	May 11, 2018
Re:	Comments on First Draft of Report No. 19, Homicide

PDS has the following comments and suggestions for the RCC's homicide offenses.

1. Elimination of Aggravated Murder and Reconsideration of Aggravating Circumstances

PDS proposes that the RCC eliminate the offense of aggravated murder, RCC § 22A-1101(a). One problem with RCC § 22A-1101(a), identified by PDS at the May 2nd public meeting of the CCRC, is its inclusion of "in fact, the death was caused by means of a dangerous weapon" as a circumstance element sufficient to raise first degree murder to aggravated murder. The use of a dangerous weapon is exceedingly common in homicides – it is how most murders are committed. According to the Metropolitan Police Department Annual Report for 2016[1], during the previous five year period, 91% of homicides were committed with a gun or knife. Blunt force trauma accounted for 7% of homicides, the vast majority of which would have also involved the use of an object that would likely meet the definition of "dangerous weapon." For the remaining 2% of homicides, 1% was committed by strangulation and 1% by other means not specified. Thus the RCC's definition would make between 91 and 98 percent of all homicides in the District an "aggravated murder." The RCC's goal of creating proportionality between offenses would be defeated if every homicide could be charged as aggravated murder.

Rather than having an offense of aggravated murder, PDS suggests that the RCC retain first degree and second degree murder as in the current Code. PDS questions the need for having any aggravating circumstances to add to the maximum punishment for murder. Both first and second degree murder will already carry high statutory maximum prison sentences, leaving room for judges to exercise their discretion to sentence defendants to greater sentences based on the

[1] Available at: https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202016_lowres.pdf

particular circumstances of the case or the unique vulnerability of the decedent. Statutes allowing for even greater sentences for murder in particular instances are thus not necessary.

However, in so far as the CRCC believes it needs to include in the RCC certain aggravating circumstances, such as for instance, the killing of a child or of a police officer, PDS suggests that the RCC include a separate enhancement or aggravator provision. While other parts of the RCC incorporate traditional enhancements or aggravators within different offense grades, PDS recommends the RCC treat murder differently. A separate statute for aggravating factors would also provide clarity because as currently drafted many of the aggravating factors listed in RCC § 22A-1101 cannot be logically applied in the sections where they have been assigned. For instance, it is first degree murder when a person acting with "extreme recklessness"[2] causes the death of another[3] after substantial planning.[4] A separate enhancement section would resolve the factual impossibilities included in this drafting.

2. Reconsideration of Aggravators

As drafted, the RCC provides an aggravating factor to homicide where the decedent is a minor, an adult age 65 or older, a vulnerable adult, a law enforcement officer, a public safety employee, a participant in a citizen patrol, a transportation worker, a District employee or official, or a family member of a District official or employee. While some of these aggravators are long-standing or included in the Code as stand-alone offenses, for instance the murder of a police officer in the course of his or her duties[5], the RCC proposes to add the murder of District employees and their family members to the list of possible aggravators. This addition is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list. For example, a dispute at the Fort Totten Waste Transfer Station that leads to the death of a District employee is not categorically more dangerous to the community than an employee's death at a similar privately-run facility. PDS recommends removing District employees and their family members from this list of possible aggravators. If there is a particular vulnerability that makes the murder of a District employee more dangerous or blameworthy, judges will have sufficient discretion to sentence defendants to the statutory maximum in such instances. Since the statutory maxima will necessarily be high for murder offenses, it will allow for judicial differentiation in sentencing in instances where the defendant's culpability is heightened because of the decedent's status.

[2] "Extreme recklessness" is shorthand for "recklessly, under circumstances manifesting extreme indifference to human life," the mens rea for second degree murder at RCC § 22A-1101(c).

[3] RCC §§ 22A-1101(b)(2), (c).

[4] RCC § 22A-1101(b)(2)(E).

[5] D.C. Code § 22-2106, murder of law enforcement officer.

The RCC also provides aggravators when the defendant mutilated or desecrated the decedent's body or when the defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death. This type of evidence typically would not be relevant to the question of whether the defendant committed the charged offense and therefore would often be inadmissible in a criminal trial.[6] However, as the RCC is currently drafted, evidence of these aggravating circumstances would have to be presented to a jury and would be presented at the same time as all the other evidence in the case. In cases where the defense asserts that another individual committed the crime or that the defendant was misidentified, the evidence of torture or desecration of the decedent's body would be highly inflammatory and would not add anything to the jury's consideration of the key questions in the case.[7] For this reason, PDS recommends that if the RCC keeps these provisions as aggravators, the RCC should also include a requirement that this evidence can only be introduced and proved at a separate hearing in front of a jury following an initial guilty verdict.

PDS also questions the need for a separate aggravator for homicides perpetuated because the decedent was a witness in a criminal proceeding or had provided assistance to law enforcement. This aggravating circumstance would also be charged as the separate substantive offense of obstruction of justice.[8] Creating an aggravating circumstance that will be amply covered by a separate offense contravenes the CCRC's goal of streamlining offenses and eliminating unnecessary overlap.

3. Elevation of Mens Rea in First Degree Murder

PDS recommends that the RCC use the mens rea of purposely in first degree murder. RCC § 22A-1101(b), first degree murder, currently requires a mens rea of knowingly rather than purposely. While the definitions of knowingly and purposely are closely related, purposely is a

[6] Only relevant evidence is admissible in a criminal trial. For evidence to be relevant, it must be "related logically to the fact that it is offered to prove, ... the fact sought to be established by the evidence must be material ... and the evidence must be adequately probative of the fact it tends to establish." *Jones v. United States*, 739 A.2d 348, 350 (D.C.1999) (internal citations omitted). The trial judge has the discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" within this context means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Mercer v. United States*, 724 A.2d 1176, 1184 (D.C. 1999).

[7] *See Chatmon v. United States*, 801 A.2d 92, 101 (D.C. 2002) (noting that the prosecutor's repeated reference to a photo of the decedent in a pool of blood while asking jurors to come to a decision that they could live with was improper and calculated to enflame the passions of the jury without adding to the proof in the case).

[8] D.C. Official Code § 22-722, obstruction of justice.

higher mental state and requires a "conscious desire" to bring about a particular result.[9] The RCC should use the highest mental state to describe the most serious and severely punished crimes in the Code. The RCC requires purposely as the mental state for aggravated assault (RCC § 22A-1202), child abuse (RCC § 22A-1501), first degree abuse of a vulnerable adult (RCC § 22A-1503), and unlawful obstruction of a bridge to the Commonwealth of Virginia (RCC § 22A-2605). The RCC should not use a lower mens rea for first degree murder.

4. Retention of the Element of Premeditation and Deliberation in First Degree Murder

PDS recommends that first degree murder in the RCC have as an element that the person acted with premeditation and deliberation as is currently required by the Code for first degree murder. RCC § 22A-101(b) removes this element from first degree murder. While the CCRC notes in the commentary that the DCCA has interpreted this element as requiring little more than turning a thought over before reaching the decision to kill,[10] in practice, this element is critical to separating impulsive murders from those committed with some degree of forethought. The distinction has been important for the United States Attorney's Office in making decisions about charging a homicide as first degree or second degree murder. The element of premeditation and deliberation has appropriately limited the cases that the United States Attorney's Office brings as first degree murder to those where there is the additional culpability of some form of deliberation. Rash homicides that take place over the course of several angry seconds or that stem from immediate action after or during a dispute may meet the technical definition of deliberation, but are not charged this way. The additional reflection is a meaningful way of differentiating between the offenses of first degree and second degree murder and should not be lightly set aside by the CCRC.

5. Drafting Recommendation for First Degree Murder

RCC § 22A-1101 Murder.

(b) *First Degree Murder.* A person commits the offense of first degree murder when that person:

(1) ~~Knowingly~~ Purposely causes the death of another person; ~~or~~
(2) with premeditation and deliberation;~~ or~~
~~(2) Commits second degree murder and either:~~
~~(A) The death is caused with recklessness as to whether the decedent is a protected person;~~
~~(B) The death is caused with the purpose of harming the complainant because of the complainant's status as a:~~
~~(i) Law enforcement officer;~~

[9] RCC § 22A-206(a), purpose defined.

[10] Report #19, pages 25-26.

~~(ii) Public safety employee;~~
~~(iii) Participant in a citizen patrol;~~
~~(iv) District official or employee; or~~
~~(v) Family member of a District official or employee;~~
~~(C) The defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;~~
~~(D) The defendant mutilated or desecrated the decedent's body;~~
~~(E) The defendant committed the murder after substantial planning;~~
~~(F) The defendant committed the murder for hire;~~
~~(G) The defendant committed the murder because the victim was or had been a witness in any criminal investigation or judicial proceeding, or because the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;~~
~~(H) The defendant committed the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; or~~
~~(I) In fact, the death is caused by means of a dangerous weapon.~~

6. Drafting Recommendation for Second Degree Murder

PDS recommends changes to RCC § 22A-1101(c), second degree murder, to accommodate the changes made to first degree murder and the retention of premeditation and deliberation in first degree murder. PDS recommends adding to the definition of second degree murder, murders that are committed knowingly, but without premeditation and deliberation. Many of the District's homicides that are committed with firearms would constitute knowingly causing the death of another. In such instances, where there is not premeditation and deliberation, that individual's mental state much more closely aligns with knowing that death is certain than with being reckless that death may result. Where the conduct is knowing, but without premeditation and deliberation, the offense definition and the instructions that a jury receives should more closely fit the conduct. It would be a fiction to call that mental state in all instances merely one of recklessness. The option of knowingly committing the homicide should exist within second degree murder.

PDS therefore recommends the following language:

(c) *Second Degree Murder*. A person commits the offense of second degree murder when that person:

(1) Knowingly causes the death of another person; or

(2) Recklessly, under circumstances manifesting extreme indifference to human life, causes the death of another person; or

(3) Negligently causes the death of another person, other than an accomplice, in the course of and in furtherance of committing, or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual

abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnapping, or kidnapping]; provided that the person or an accomplice committed the lethal act; and

7. Availability of Mitigation Defense

PDS recommends rewriting part of the mitigation defense to recognize that the defendant may act with belief that deadly force was necessary to prevent someone other than the decedent from unlawfully causing death or serious bodily injury. For example, the defendant may have believed (unreasonably) that X was about to kill or seriously injure him; when reaching for a gun, the defendant is jostled so he fatally shoots Y rather than X. Just as a person would still be liable if he with premeditation and deliberation aimed to shoot X but due to poor aim or a defective firearm fatally shot Y instead, a person should still be able to avail himself of the mitigation defense if he causes the death of someone other than the person he believes is threatening death or seriously bodily injury. Further, the change PDS proposes would bring this part of the mitigation defense, at RCC § 22A-1101(f)(1)(B), in line with another, at RCC § 22A-1101(f)(1)(A). As explained in Report # 19, the "'extreme emotional disturbance' [that is mitigating pursuant to § 22A-1191(f)(1)(A)] need not have been caused wholly or in part by the decedent in order to be adequate."[11]

PDS proposes rewriting §22A-1101(f) as follows:

(f) *Defenses.*
(1) *Mitigation Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the presence of mitigating circumstances is a defense to prosecution under this section. Mitigating circumstances means:
(A) Acting under the influence of an extreme emotional disturbance for which there is a reasonable cause as determined from the viewpoint of a reasonable person in the defendant's situation under the circumstances as the defendant believed them to be;
(B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent ~~the decedent~~ another person from unlawfully causing death or serious bodily injury; ….

8. Burden of Proof for Mitigation Defense

RCC § 22A-1101(f)(2) frames mitigating circumstances in first and second degree murder as an element or multiple elements that must be disproved by the government if "evidence of mitigation is present at trial." PDS recommends that RCC §22A-1101(f)(2,) burden of proof for

[11] Report #19, page 18.

mitigation defense, mirror DCCA case law on the amount of evidence that must be presented to trigger the government's obligation to disprove the existence of any mitigating circumstances. Under current law, a defendant is entitled to a jury instruction such as mitigation for first degree and second degree murder or self defense if "the instruction is supported by any evidence, however weak."[12]

PDS recommends redrafting RCC § 22A-1101(f)(2) as follows:

> *Burden of Proof for Mitigation Defense*.
>
> If <u>some</u> evidence of mitigation<u>, however weak,</u> is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt.

9. <u>Manslaughter</u>

For clarity and consistency, PDS recommends that the RCC eliminate the offense of aggravated manslaughter, RCC § 22A-1102(a) and group status based aggravators where the decedent is, for instance a law enforcement officer or public safety employee, in a separate aggravator statute.

PDS believes that manslaughter should remain a lesser included offense of first and second degree murder and therefore would request a specific statutory provision that makes manslaughter a lesser included offense of murder even if the elements of the revised offenses do not align under the *Blockburger* test.[13]

[12] *Murphy-Bey v. United States*, 982 A.2d 682, 690 (D.C. 2009); *see also Henry v. United States*, 94 A.3d 752, 757 (D.C. 2014) (internal citations omitted) "Generally, when a defendant requests an instruction on a theory of the case that negates his guilt of the crime charged, and that instruction is supported by any evidence, however weak, an instruction stating the substance of the defendant's theory must be given."

[13] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: The Public Defender Service for the District of Columbia

Date: May 11, 2018

Re: Comments on First Draft of Report No. 20, Abuse & Neglect of Children, Elderly, and Vulnerable Adults

The Public Defender Service makes the following comments RCC Section 1501, Child Abuse.

1. Age Difference between the Child and the Adult

RCC § 22A-1501(a)-(c), first through third degree child abuse, prohibits abusive acts committed against children by parents, guardians, individuals acting in a parental role and by anyone, regardless of any parental role, who is more than two years older than the child. Under this definition, an 18 year old who fights with a 15 year old may be found guilty of child abuse. This would be the case although the 15 and 18 year old go to school together, take the same classes and play sports together. In this context, 15 and 18 year olds are very much peers, and physical conflicts between them should not be given the label of child abuse. The label does not make sense given the close age of the individuals involved and the comparable vulnerability of the 15 year old. A 15 year old is often as large and as strong as an 18 year old. A 15 year old often has a substantial degree of independence and the ability to seek help from members of his neighborhood or school community. A conviction for child abuse comes with significantly more stigma and probable collateral consequences than a conviction for assault. This is the case in part because the offense of child abuse connotes predatory and violent conduct towards young children who are incapable of defending themselves against adults. When the actors are 15 and 18 and the age difference is a little more than two years, the label of child abuse should not apply. PDS proposes the age difference be four years as it is with child sexual abuse at D.C. Code §§ 22-3008, 22-3009.

PDS therefore suggests the following modification to RCC§ 1501(a)-(c):

(2) In fact:

(A) that person is an adult at least ~~two~~ four years older than the child; or

(B) that person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

2. Criminalizing the Use of Physical Force that Overpowers a Child

RCC §22A-1501(c), third degree child abuse, criminalizes any use of physical force that overpowers a child. Young children who are so much smaller than adults are easy to overpower with physical force without causing any physical or emotional harm. For instance, a child who is pushing in line, or cutting in line, could be carried to the back of a line by an adult with no relationship to the child. Physically removing a 10 year old to the back of a line in a way that does not cause any injury to the child should not be criminalized as child abuse. That contact may be a fourth or fifth degree assault pursuant to RCC § 22A-1202(e) and (f) and should be charged as such. Charging it as assault will adequately address the conduct without exaggerating the harm to the child by labeling the offense as child abuse.

PDS therefore recommends that the RCC amend third degree child abuse as follows:

(c) *Third Degree Child Abuse.* A person commits the offense of third degree child abuse when that person:

(1)

(A) In fact, commits harassment per § 22A-XXXX, menacing per § 22A-1203, threats per § 22A-1204, restraint per § 22A-XXXX, or first degree offensive physical contact per § 22A-1205(a) against another person, with recklessness that the other person is a child; or

(B) Recklessly causes bodily injury to~~, or uses physical force that overpowers,~~ a child; and

(2) In fact:

(A) That person is an adult at least ~~two~~ four years older than the child; or

(B) That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

3. Burden of Proof for Parental Discipline Defense

PDS also recommends a change in the RCC's language for the trigger for the reasonable parental discipline defense. RCC § 22A-1501(f)(2) provides that "if evidence is present at trial of the defendant's purpose of exercising reasonable parental discipline, the government must prove the

absence of such circumstances beyond a reasonable doubt."[1] The question of whether any exercise of parental discipline is reasonable is uniquely within the province of the jury. It is a fact-based inquiry that, according to the District of Columbia Jury Instructions, involves consideration of the child's age, health, mental and emotional development, alleged misconduct on this and other occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other evidence deemed relevant.[2] Any judicial finding on whether the issue of reasonable parental discipline has been raised should focus on whether there has been any evidence, however weak, that the defendant's purpose was parental discipline, not on the reasonableness of that discipline. Therefore PDS recommends removing "reasonable" from the burden of proof language.

In addition, for consistency with requests in other provisions, PDS suggests the following language:

> (f)(2) Burden of Proof for Parental Discipline Defense. If <u>some</u> evidence, <u>however weak</u>, is present at trial of the defendant's purpose of exercising ~~reasonable~~ parental discipline, the government must prove the absence of such circumstances beyond a reasonable doubt

4. <u>Merger Provision</u>

In order to limit offense overlap and duplication, PDS recommends that the RCC include a specific merger provision to allow for the merger of offenses prohibiting the abuse and neglect of vulnerable persons and assault offenses.

[1] Emphasis added.

[2] Criminal Jury Instructions for the District of Columbia, No. 4.100 (5th ed., rev.2017).

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins
Date:	July 13, 2018
Re:	Comments on First Draft of Report No. 21, Recommendations for Kidnapping and Related Offenses

In general, the Public Defender Service for the District of Columbia supports the Criminal Code Reform Commission's approach to reforming the District's kidnapping statute, D.C. Code § 22-2001, by narrowing the offense of "kidnapping" and creating the offense of "criminal restraint." PDS makes the following specific comments.

1. PDS proposes rewriting Criminal Restraint, RCC §22A-1404, to address a number of issues related to how the offense treats families and guardians.

    A. Criminal restraint needs to be rewritten to clarify that (a)(2)(A), (B), and (C) are for conduct involving adult complainants and (a)(2)(D) is the only alternative available for charging criminal restraint of a person who is a child under the age of 16. This approach is supported by the commentary, which notes that the current kidnapping statute fails to specify and the DCCA has failed to determine "whether a person can commit kidnapping by taking a child with the child's consent, but without the consent of a parent or legal guardian." The commentary goes on to explain, "[h]owever, the RCC criminal restraint statute specifies that a person may commit criminal restraint by interfering with the freedom of movement of a person under the age of 16, if a parent, legal guardian, or person who has assumed the obligations of a parent has not freely consented to the interference, *regardless of whether the person under 16 has provided consent*."[1] If the consent of the person under 16 can be disregarded, then it should be clear that a person cannot be charged with criminal restraint pursuant to (a)(2)(A), (B), or (C), all of which base liability on whether the defendant had the consent of the person with whose freedom s/he interfered.

[1] Report # 21, page 35 (emphasis added).

B. PDS agrees with the Commission's decision to "set the age of consent for interference with freedom of movement at 16 years."[2] However, the Commission failed to account for the fact that persons under age 18 are still "children," both under current D.C. law, see e.g., D.C. Code § 16-2301(3), and as proposed for the RCC, see §22A-1001(23). And children must follow the instructions of their parent(s) or they may be found to be a "child in need of supervision." D.C. Code § 16-2301(8) defines a "child in need of supervision" as a child who "is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable."[3] Thus, a 16-year-old cannot decide to live someplace other than where his parent says he must live. A parent who tells her 17-year-old, "Stay in your room or you'll be sorry," should not be committing a criminal offense, even if the words are considered a threat to cause bodily injury (assuming the "threat" is to exercise reasonable parental discipline). PDS proposes that the 16 and 17 year olds be able to give or withhold consent regarding their freedom of movement with respect to persons who are not their parent or guardian; however, if a parent or guardian substantially interferes with the freedom of movement of a 16 or 17-year-old, then the conduct should not be criminal restraint.[4]

C. PDS strongly objects to the elimination of the "parent to a minor exception" to Kidnapping in D.C. Code §22-2001.[5] Understood in the context of the breadth of the kidnapping statute, excepting the conduct of parents to minors is sound policy that recognizes that minors must obey their parents' lawful commands, perhaps particularly with respect to their freedom of movement. "We're going on a trip and you're coming with us." "Go to your room." Do not leave this house." "You're living with your grandmother for the summer." RCC § 22A-1404, as drafted in Report # 21, fails to recognize this relationship. It criminalizes the conduct of parents but provides a defense. PDS proposes that for Criminal Restraint the conduct of parents, with respect to their children under age 18, be excepted from criminal liability as under the current statute.

D. PDS agrees with the Commission's recognition that persons age 18 or older may have legal guardians with the legal authority to dictate the freedom of movement of their wards.[6] However, the Commission fails to define "legal guardian" or recognize the variety of "guardianships," and grants too much authority to "legal guardians" and not enough authority to wards.

[2] Report # 21, page 35.

[3] D.C. Code § 16-2301(8)(A)(iii).

[4] The conduct of the parent or guardian could still be criminal under the child abuse and neglect statutes.

[5] "Whoever shall be guilty of …kidnapping… any individual by any means whatsoever, and holding or detaining…such individual … *except, in the case of a minor, by a parent thereof*, shall, upon conviction thereof, be punished by imprisonment…" D.C. Code § 22-2001 (emphasis added).

[6] See RCC §22A-1404(a)(2)(D) ("When that person is a child under the age of 16 *or a person assigned a legal guardian*…") (emphasis added).

District law allows for the appointment of a "guardian" to an "incapacitated individual" pursuant to Chapter 20 of Title 21 of the D.C. Code. An "incapacitated individual" is "an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator."[7] An adult might also be only "an incapacitated individual for health-care decisions."[8] A "guardian" may be a "temporary guardian," who is appointed for a finite period of time to serve as an "emergency guardian," a "health-care guardian," or a "provisional guardian."[9] A guardian may also be a "general guardian," whose guardianship is neither limited in scope nor in time by the court,[10] or a "limited guardian," whose powers are limited by the court and whose appointment may be for a finite period of time or for an indeterminate period of time.[11] In guardianship proceedings, the court is to "exercise [its] authority …so as to encourage the development of maximum self-reliance and independence of the incapacitated individual."[12] "When the court appoints a guardian, it shall appoint the type of guardianship that is least restrictive to the incapacitated individual in duration and scope…."[13] A general or a limited guardian may "take custody of the person of the ward and establish the ward's place of abode within or without the District, if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward."[14] However, no guardian to an incapacitated individual has the power "to impose unreasonable confinement or involuntary seclusion, including forced separation from other persons…."[15]

PDS proposes that the offense of "criminal restraint" follow the framework of the guardianship laws by maximizing the self-reliance and independence of the person, despite the fact that they have a guardian, and do so by recognizing their ability to consent or to withhold consent to the substantial interference with their movement. On the other hand, guardians who have the legal authority to take physical custody of their ward should not be criminally liable for exercising that authority. Relatedly, a guardian with the authority to take physical custody of a person, meaning they have authority to dictate or restrict their ward's freedom of movement at least to some degree, should have

[7] D.C. Code § 21-2011(11).

[8] D.C. Code § 21-2011(11A).

[9] D.C. Code § 21-2011(8)(A).

[10] D.C. Code § 21-2011(8)(B).

[11] D.C. Code § 21-2011(8)(C).

[12] D.C. Code § 21-2044(a).

[13] Id.

[14] D.C. Code § 21-2047(b)(2).

[15] D.C. Code § 21-2047.01(7).

that authority accorded respect in the criminal code by criminalizing the conduct of a person who substantially interferes with the ward's freedom of movement without the consent of the guardian.

E. PDS proposes that, rather than making it a defense to a prosecution under what is currently RCC §22A-1404(a)(2)(D) that a person is a "relative" of the complainant, "relatives" be excepted from (a)(2)(D). The result is the same, the "relative" will not be convicted. The difference is whether on the way to that inevitable result, the relative can be charged with a crime, have an arrest record, be subject to pretrial detention or restrictions on his or her life, such as requirements to wear a GPS monitor, to submit to drug testing, to observe a curfew or a stay away for person(s) and/or location(s). In addition, because (a)(2)(D) necessarily involves a person under the age of 16, the conduct which constitutes that offense is always aggravated if the relative is more than 2 years older than the child. Since the aggravated form of the offense can almost always be charged, the burdens and risks of arrest – a worse charge on the arrest record, a greater likelihood of pretrial detention - correspondingly increase. The more fair and merciful approach would be to except the conduct rather than make it a defense.

In light of the above objections and proposals, PDS proposes rewriting the offense definition for criminal restraint as follows:

(a) *Offense Definition*. A person commits the offense of criminal restraint when that person:
  (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  (2) In one of the following ways;
    (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (B) When that person is 16 or 17 years of age and the defendant is not the parent, legal guardian, or person who has assumed the obligations of a parent to that person:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately

would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or

(C) When that person is a child under the age of 16 and the defendant is not a relative or legal guardian of the child, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or

(D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian.

2. PDS proposes that criminal restraint have a "Good Samaritan" defense for instances when a person substantially interferes with another's freedom of movement because the person has a reasonable belief that such interference is necessary to prevent imminent bodily harm to the other person. For example, a stranger seeing a young child wandering alone might, even knowing he does not have the consent of the child's parent, detain the child while he calls the police for help. Or an adult child of an elderly parent with dementia or Alzheimer's but who is not the "guardian" of their parent might, despite the protestations of the parent, bolt the doors of their shared home to prevent the parent from wandering off in the night and getting lost or wandering into traffic. PDS proposes the following language –

(d) *Defenses*. (1) It is a defense to prosecution under this section that the defendant acted based on a reasonable belief that such action was necessary to protect the complainant from imminent physical harm.

(2) Burden of proof – If evidence, however weak, is present at trial of the defendant's purpose to protect the complainant from imminent physical harm, the government must prove the absence of such circumstances beyond a reasonable doubt.

3. PDS proposes rewriting Kidnapping, RCC §22A-1402, to change how parents and guardians are treated under the offense. As it did for criminal restraint, PDS proposes that guardians of adult wards be treated separately and have their consent tied to the guardian's authority to take physical custody of their ward. PDS also proposes separate sections for persons who are 18 years of age or older, persons who are 16 or 17 years of age, and persons who are children under the age of 16. Although both persons who are 18 years of age or older and 16 and 17 year old are of the age of consent, PDS proposes treating them separately in order to accommodate guardians. Persons who are 18 years of age may or may not have guardians who have the legal authority to take physical custody of them, and that possibility matters for whether the consent of the adult (ward) or the guardian controls. In contrast, 16 and 17 year olds, always have guardians with the legal authority to take them in physical custody; they are generally called "parents." However, PDS supports the decision to make 16 the "age of consent" for freedom of movement. Unlike with criminal restraint, where PDS proposed excepting parents and, in some instances relatives, from criminal liability, PDS recognizes that the "with intent" element in kidnapping sufficiently narrows the criminal conduct. With one exception, PDS does not disagree that a parent,

guardian, or other relative, may not hold their minor child for ransom or reward, use their minor child as a shield of hostage, to facilitate the commission of any felony, etc. However, a parent, guardian, or person who has assumed the obligations of a parent must be free (not criminally liable) to substantially interfere with the freedom of movement with their minor child (under age 18) with the intent to inflict bodily injury when that infliction is in the exercise of parental discipline.

Specifically, PDS recommends that the offense definition of Kidnapping be written as follows:

(a) *Offense Definition*. A person commits the offense of kidnapping when that person:
  (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  (2) In one of the following ways;
    (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (B) When that person is 16 or 17 years of age:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (C) When that person is a child under the age of 16, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or
    (D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian; and
  (3) With intent to:
    (A) Hold the complainant for ransom or reward;
    (B) Use the complainant as a shield or hostage;
    (C) Facilitate the commission of any felony or flight thereafter;
    (D) Inflict bodily injury upon the complainant, <u>except in the exercise of parental discipline by a parent, legal guardian, or person who</u>

has assumed the obligations of a parent against a complainant under the age of 18;

(E) ~~or to commit~~ Commit a sexual offense as defined in RCC XX-XXXX against the complainant;

(F) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;

(G) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or

(H) Hold the person in a condition of involuntary servitude.

PDS also recommends adding the term "parental discipline" to subsection (c), Definitions, and defining it by reference to the "parental discipline defense" for child abuse at RCC §22A-1501(f).

4. PDS recommends adding a Good Samaritan defense to Kidnapping, using the same language as proposed for Criminal Restraint.

5. PDS objects to aggravating kidnapping or criminal restraint based on the aggravator "with the purpose of harming the complainant because of the complainant's status."[16] Conduct against a law enforcement officer, public safety employee, citizen patrol member, or District official or employee is aggravated pursuant to subsection (a)(2)(A), when that person is a "protected person." The additional aggravator at subsection (a)(2)(B) is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list.

[16] Subsection (a)(2)(B) of both aggravated kidnapping and aggravated criminal restraint.

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	July 13, 2018
Re:	Comments on First Draft of Report 22, Accomplice Liability and Related Provisions

The Public Defender Service for the District of Columbia makes the following comments on Report #22, Accomplice Liability and Related Provisions.

1. RCC § 22A-210 provides that a person is an accomplice in the commission of an offense by another when that person is "acting with the culpability required by that offense." Report #22 at footnote 5, states that any broader aspect of culpability, such as "proof of premeditation, deliberation, or the absence of mitigating circumstances" is encompassed within culpability when required by the specific offense.

   PDS wholeheartedly agrees with footnote 5 and believes it is consistent with and required by *Wilson-Bey v. United States*.[1] PDS is concerned, however, that this view of what culpability encompasses will not be applied if it remains only in a footnote to the commentary. RCC § 22A-201(d), Culpability Requirement Defined states that "culpability requirement" includes each of the following: "(1) The voluntariness requirement, as provided in § 22A-203; (2) The causation requirement, as provided in § 22A-204; and (3) The culpable mental state requirement, as provided in § 22A-205." It is unclear whether "premeditation, deliberation, or the absence of mitigating circumstances" are "culpability requirements" for principle liability given this definition and also unclear whether, from this definition, premeditation and deliberation and any lack of mitigating circumstances would be necessary for accomplice liability. Without a statutory definition broad enough to encompass premeditation, deliberation, and absence of mitigating circumstances, there is a substantial risk that culpability for accomplice liability would be

[1] *Wilson-Bey v. United States*, 903 A.2d 818, 822 (2006) (holding that in any prosecution for premeditated murder, whether the defendant is charged as a principal or as an aider or abettor, the government must prove all of the elements of the offense, including premeditation, deliberation, and intent to kill).

watered down. Even if practitioners and judges found footnote 5 to argue from, the narrow culpability requirement definition could be read to supersede a footnote from the commentary. PDS proposes amending the definition of "culpability requirement" to include premeditation and deliberation and any lack of mitigation.

2. RCC § 22A-210(a)(2) allows for accomplices to be held liable when, with the requisite culpability required for the offense, the defendant "purposely encourages another person to engage in specific conduct constituting that offense." The act of encouraging a criminal offense, even with the intent required for the commission of the offense, extends criminal liability to those who merely utter words in support of an offense but who have no meaningful impact on whether the offense is carried out.

   For example, two friends may be walking together after leaving a bar when one friend sees her ex-husband's car. The ex-wife hates her ex-husband and her friend knows all the reasons behind the hatred. The ex-wife sees a piece of metal on the ground and raises it to smash the windshield of her ex-husband's car. As she raises the piece of metal, she says to her friend, "I'm going to smash his windshield." The friend replies "go for it." Under RCC §22A-2503, criminal damage to property, the friend who said "go for it" would only need to possess a mental state of recklessness to be held liable as an accomplice for criminal damage to property. RCC § 22A-206 states that a person acts with recklessness with respect to a result when "(A) that person is aware of a substantial risk that conduct will cause the result; and (B) the person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation." It is PDS's understanding from the commentary to Report #22 and from the position of the CRCC that any causation requirement from RCC 22A § 201(d) would not apply to the substantive offense of criminal damage to property. Thus, the friend's encouraging words, "go for it" do not have to be a but for cause for the criminal damage to property.

   It unfair to hold people criminally liable for mere words, even if they are specific, when those words have no meaningful impact on the commission of an offense. The ex-wife was going to smash the window even in the absence of the encouraging words of "go for it." In such circumstances only one individual should be criminally liable for the conduct. Therefore, for the encouragement prong of RCC 22A-210, PDS recommends that the CRCC insert causation language to prevent punishment for de minimus conduct.

PDS suggests the following revision:

(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

> (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or

(2) Purposely encourages another person to engage in specific conduct constituting that offense and the encouragement is a substantial factor in the commission of the offense.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 13, 2018

SUBJECT: First Draft of Report #21. Recommendations for Kidnapping and Related Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #21 - Recommendations for Kidnapping and Related Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1401. Aggravated Kidnapping

The offense definition of aggravated kidnapping includes when a person commits kidnapping with the purpose of harming the complainant because of the complainant's role in public safety or their status as a District official or employee, or a family member of a District official or employee.[2] The word "harm", however, is not defined. Merriam-Webster defines harm as

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

[2] RCC § 22A-1401 (a)(2)(B) establishes that one of the ways that a person commits aggravated kidnapping is when they commit kidnapping as defined in RCC § 22A-1402 and who does this "With the purpose of harming the complainant because of the complainant's status as a [:] Law enforcement officer; Public safety employee; Participant in a citizen patrol; District official or employee; or Family member of a District official or employee…"

"physical or mental damage."[3] Therefore, one would assume that this word has a broader meaning then the phrase "bodily injury" which is contained in the definition of the underlining offense of kidnapping or that term would have been used in the aggravated assault provision. See RCC § 22A-1402(a)(3)(D). To avoid needless litigation, the Commission should either define the word "harm" or explain in the Commentary the difference between the definitions of "harm" and "bodily injury."

RCC § 22A-1401(d) states, "Multiple Convictions for Related Offenses. A person may not be sentenced for aggravated kidnapping if the interference with another person's freedom of movement was incidental to commission of any other offense."[4] This limitation appears to be included to address the situation where the victim was moved or detained for a brief distance or a brief period of time so that another crime can be committed. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can immediately be robbed). What is left unanswered, however, is the boundaries of this exception. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can be robbed but because a movie lets out the victim is kept in the alley for 20 minutes until everyone walks by.) The Commentary should give examples of what is clearly incidental to the commission of another crime and what is not.[5]

RCC § 22A-1402. Kidnapping

The offense of kidnapping requires that the person interferes with the victim's freedom of movement in specified ways. Paragraph (a)(2) lists those ways.[6] One of the ways is "With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury…" See RCC § 22A-1402 (a)(2)(C). It is not apparent from the text or the Commentary how the government could prove this counterfactual. The

[3] See https://www.merriam-webster.com/dictionary/harm

[4] The same limitation on sentencing is contained in the kidnapping, aggravated criminal restraint, and criminal restraint provisions. See RCC § 22A-1402 (e), RCC § 22A-1403 (d), and RCC § 22A-1404 (e).

[5] The same issue arises in the context of RCC § 1403, Aggravated Criminal Restraint, and RCC § 1404, Criminal Restraint. See RCC § 1403(a)(2)(B) and RCC § 1404(a)(2)(C).

6 RCC § 22A-1402 (a)(2) establishes the ways that a person's freedom of movement should not be substantially interfered with. They are:

(A) Without that person's consent;
(B) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury;
(C) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
(D) When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person who has assumed the obligations of a parent, or legal guardian;

victim in this situation has been deceived. He or she would have no way of knowing what the person would have done had the deception failed and, so, the government would not have evidence that enables it to meet this offense prong. The Commentary does not shed any light either on how this element would be proved or whether any other Model Penal Code jurisdiction has adopted an element that requires the government to prove what would have happened, but did not.

Additionally, to be convicted of kidnapping the deceived victim, the government must prove the first element of the offense, that is that the person "knowingly interferes to a substantial degree with another person's freedom of movement." See RCC § 1402(a)(1). But so long as the deception lasts, it cannot be said that the victim's freedom of movement was curtailed because the victim chose to be in the location where he or she was.

The same issue arises when the victim is under the age of 16. Paragraph (a)(2) states that a person can commit the offense of kidnapping, "When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person who has assumed the obligations of a parent, or legal guardian." See RCC § 22A-1402 (a)(2)(D). On page 12 of the Commentary it states, "enticing a child to get into a car and remain in the car as it drives away with the truthful promise of candy at the final destination may constitute kidnapping assuming the defendant also satisfied the intent requirement under subsection (a)(3)."[7] However, to be convicted of kidnapping a child the government must also prove the first element of the offense, that is that the person "Knowingly interferes to a substantial degree with another person's freedom of movement." See RCC § 1402(a)(1). But if the child willingly goes into the car and happily stays there then it cannot be shown that the child's freedom of movement has been interfered with. The child has merely been persuaded to stay in the car.[8]

The offense of kidnapping requires that the person restrains the victim's movement with a specified intent. Subsection RCC 22A-1402 § (a)(3)(A) specifies that kidnapping includes acting with intent to hold the complainant for ransom or reward. However, the Commentary, on page 11 states, "Holding a person for ransom or reward requires demanding anything of pecuniary

[7] RCC § 22A-1402 (a)(3) establishes the intent element for kidnapping. They are to:

(A) Hold the complainant for ransom or reward;
(B) Use the complainant as a shield or hostage;
(C) Facilitate the commission of any felony or flight thereafter;
(D) Inflict bodily injury upon the complainant, or to commit a sexual offense as defined in RCC XX-XXXX against the complainant;
(E) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;
(F) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or
(G) Hold the person in a condition of involuntary servitude.

[8] The same issues outlined in this section apply to the Criminal Restraint provision found in RCC § 22A-1404, Criminal Restraint.

value in exchange for release of the complainant." The problem is that the word "pecuniary" in the Commentary is too limited. Merriam-Webster defines "pecuniary" as either "consisting of or measured in money" or "of or relating to money."[9] Therefore, following the explanation in the Commentary, a person who was held until the perpetrators received specified jewelry of sentimental value or other property would not be guilty of kidnapping. The Commentary should be modified to read, "Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant."

[9] See https://www.merriam-webster.com/dictionary/pecuniary.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 13, 2018

SUBJECT: First Draft of Report # First Draft of Report No. 22. Accomplice Liability and Related Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #22 - Accomplice Liability and Related Provisions. [1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-210. ACCOMPLICE LIABILITY

The text of RCC § 22A-210 should make it clear that an accomplice can be convicted for assisting or encouraging a person to commit an offense even if the principal does not complete all of the elements of the offense and would only be guilty of attempt. RCC § 22A-210(b), (c), and (d) all speak in terms the "commission of an offense."[2] While the phrase "commission of an

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

[2] RCC § 22A-210 states:
(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

offense" in some sources is defined to include an attempt, in other sources it appears to require a completed offense.[3] Similarly, RCC § 22A-210(d) speaks in terms of establishing that an accomplice may be convicted of an offense even if the person claimed to have "committed the offense" has not been prosecuted or convicted, convicted of a different offense or degree of an offense, or has been acquitted. Subparagraph (d) does not specifically include attempts. A modification of the illustration on page 56 demonstrates the need for clarifying this issue. The illustration and explanation contained in the Report is modified as follows:

> a drug dealer asks his sister—who is unaware of her brother's means of employment—to deliver a package for him to a restaurant and to collect money for the package from the cashier. He credibly tells his sister that the package is filled with cooking spices; however, it is actually filled with heroin. If the sister is subsequently arrested by the police as she is about to deliver the package in transit to the restaurant, the drug dealer cannot be deemed an accomplice to the attempted distribution of narcotics by the sister since the sister cannot herself be convicted of that offense. Although she has engaged in conduct that satisfies the *objective elements* of the attempted offense, the sister nevertheless does not act with the

> (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
> (2) Purposely encourages another person to engage in specific conduct constituting that offense.

(b) PRINCIPLE OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist.

(c) PRINCIPLE OF CULPABLE MENTAL STATE EQUIVALENCY APPLICABLE TO RESULTS WHEN DETERMINING DEGREE OF LIABILITY. An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.

(d) RELATIONSHIP BETWEEN ACCOMPLICE AND PRINCIPAL. An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein, although the other person claimed to have committed the offense:

> (1) Has not been prosecuted or convicted; or
> (2) Has been convicted of a different offense or degree of an offense; or
> (3) Has been acquitted.

[3] The phrase "commission of an offense" is defined in one source as "The attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense in some dictionaries, see https://www.lectlaw.com/def/c065.htm. However, another source explains, the phrase "commission of an offense" is "The act of doing or perpetrating an offense or immediate flight after doing an offense is called commission of an offense", see https://definitions.uslegal.com/c/commission-of-an-offense/.

> required *culpable mental state*, i.e., knowledge (or even negligence) as to the nature of the substance she attempted to deliver and receive cash for. Under these circumstances, the drug dealer can, however, be held criminally responsible for attempted distribution as a principal under a different theory of liability: the "innocent instrumentality rule."

As demonstrated above, there is no reason why the brother should not be guilty of attempted distribution of the narcotics. The language in RCC § 22A-210 should be modified to clarify accomplice liability for attempts.

The Commentary to RCC § 22A-210(c) makes clear that a person can have accomplice liability through omission.[4] The Commentary states, "Typically, the assistance prong will be satisfied by conduct of an affirmative nature; however, an omission to act may also provide a viable basis for accomplice liability, provided that the defendant is under a legal duty to act (and the other requirements of liability are met)." Footnote 7, on the same page, states "… For example, if A, a corrupt police officer, intentionally fails to stop a bank robbery committed by P, based upon P's promise to provide A with a portion of the proceeds, A may be deemed an accomplice to the robbery…" The Commentary should distinguish this form of liability from the related, but distinct accomplice liability of a person encouraging another person to commit an offense by omission. For example, if AA, a corrupt police officer, talks his partner A, another corrupt police officer, to intentionally fail to stop a bank robbery committed by P, based upon P's promise to provide AA with a portion of the proceeds, AA may be deemed an accomplice to the robbery. In this example, AA purposely encouraged A to engage in specific conduct constituting an offense of omission.

RCC § 22A-210(c) states that "[a]n accomplice in the commission of an offense that is divided into degrees based on distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability." As the Report notes,[5] this means an accomplice can be convicted of a grade of an offense that is either higher or lower than that committed by the principal actor where the variance is due to distinctions between the two (or more) actors' state of mind. However, the example in the Commentary, does not demonstrate this principle.[6] The example demonstrates that an accomplice could be convicted of manslaughter when the principal is convicted of murder. However, manslaughter is not a "degree" of murder, nor is murder described as "aggravated" manslaughter. The question raised by the example, is not merely whether the Commentary should have used as an example an offense that was divided into degrees, but does the principle of culpable mental state equivalences applicable to results also apply between greater and lesser included offenses that are contained in different code provisions? If it does, as the example would suggest, RCC § 22A-210(c) should be split into two subparagraphs: one where the accomplice and principal commit an offense that is divided into

[4] See page 4.
[5] See page 6.
[6] See footnote 15 on page 6.

degrees based upon distinctions in culpability and another where distinctions in culpability is but one distinction between greater and lesser included offenses.

RCC § 22A-211 LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON

RCC § 22A-211 (a) states that "A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense."[7] In the last sentence of the first paragraph of the Commentary it states, "Collectively, these provisions provide a comprehensive statement of the conduct requirement and culpable mental state requirement necessary to support criminal liability for causing another person to commit a crime." The problem is that the text of RCC § 22A-211 does not define the term "legally accountable," nor does it explicitly state that a person who is legally accountable for the actions of another is guilty of the offense.

RCC § 22A-211 (a) is titled, "USING ANOTHER PERSON TO COMMIT AN OFFENSE." [emphasis in original] The title is misleading. As drafted, it implies that the person acted with some intentionality in causing another person to act. As the Commentary makes clear, however, a person is legally accountable for the conduct of another – and thus guilty of an offense - even when the person does not intentionally use an innocent or irresponsible person to commit a crime. On page 61 of the Commentary it states:

> This general principle of culpable mental state equivalency has three main implications. First, the innocent instrumentality rule does not require proof of intent; rather, "a defendant may be held liable for causing the acts of an innocent agent even if he does so recklessly or negligently, so long as no greater *mens rea* is required for the underlying offense." For example, P may be held liable for reckless manslaughter if he *recklessly* leaves his car keys with X, an irresponsible agent known to have a penchant for mad driving, if X subsequently kills V on the road, provided that P *consciously disregarded a substantial risk* that such a fatal outcome could transpire, and such disregard was a gross deviation from a reasonable standard of care. [internal footnotes omitted]

In the example given in the Commentary, the person who is liable for reckless manslaughter cannot be said to having "used" the other person to commit a crime.

[7] See page 52.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins
Date:	September 11, 2018
Re:	Comments on First Draft of Report No. 23, Disorderly Conduct and Public Nuisance

PDS has the following comments about the RCC disorderly conduct and public nuisance offenses.

1. PDS recommends that both disorderly conduct[1] and public nuisance[2] have a third element: "[and] the person knowingly fails to obey a law enforcement officer's order that the person cease engaging in the conduct."

   The public order and safety benefit of a crime such as disorderly conduct is that it can allow for law enforcement intervention at a low level of harm (or disorder), before the conduct has a chance to escalate into more serious criminal conduct or provoke a criminal response by a third party. The challenge of criminalizing low-level conduct is that it increases the opportunities for negative contacts with law enforcement particularly in communities that many view as over-policed.[3] PDS agrees with the general approach the Commission takes with respect to disorderly conduct and public nuisance but thinks ultimately the Commission's proposal still allows too much room for over-policing and over-criminalizing the lives of marginalized persons. For example, RCC § 22A-4001 requires that the "apparent danger of bodily injury … must be unlawful, such as assaultive conduct."[4] "Horseplay" and other legal group activities would not, according to the Commentary, be disorderly conduct unless the conduct created a likelihood of

[1] RCC § 22A-4001.

[2] RCC § 22A-4002.

[3] As the D.C. Council Committee on Public Safety and the Judiciary explained "[t]he disorderly conduct [offense] is clearly important to quality of life as well as the public peace" while also noting that the D.C. Office of Police Complaints' detailed 2003 report on arrests for disorderly conduct "not surprisingly" included a finding that the disorderly conduct statutes were subject to abuse by arresting officers. See Council of the District of Columbia Committee on Public Safety and the Judiciary Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010, at pages 2-3.

[4] Report #23, page 4.

immediate bodily injury to someone not participating in the legal group activity.[5] However, the offense does not actually require that the conduct be unlawful. The crime is recklessly causing another to *reasonably believe* that the conduct is unlawful. While horseplay might be lawful, if the "horseplayers" are aware of a substantial risk that someone observing them will "reasonably believe" that their (lawful) conduct is in fact unlawful, then the "horseplayers" would be guilty of committing "disorderly conduct." Layer into this the widely accepted notion that certain behavior is often viewed as being "violent" when committed by African-Americans and recognizing that African-Americans are well aware that their innocent conduct creates a "substantial risk" that it will be viewed "reasonably" (as in, a belief commonly held by a majority of persons) as unlawful and potentially injurious to others or their property[6] and it is clear that, despite its best efforts to construct clear and narrow boundaries around this offense, the Commission left the back door unlocked, if not open.

That said, PDS also strongly supports intervention and defusing of situations while they are at a low-level rather than waiting until more serious offenses are committed. Adding an element that the person must fail to obey a law enforcement order that she cease engaging in the conduct creates a better balance between the desirable goals of a disorderly conduct statute to keep the peace and the risks of police abuse and over-criminalization. It allows, actually requires, law enforcement interaction – the order to cease – which will usually be sufficient to defuse a potentially unlawful situation or to establish that the conduct is lawful.[7] Plus, it provides an additional safeguard for the individual before she is subject to arrest and prosecution.

2. PDS recommends eliminating "taking of property" as a means of committing disorderly conduct." The basic offenses of assault (unlawful bodily injury to another person) and "[criminal] damage to property" only require "recklessly" as a mental state.[8] Theft, however, requires *knowingly* taking the property of another.[9] *Recklessly* engaging in behavior that causes another to reasonably believe there is likely to be an immediate [*reckless*] bodily injury to another or that there is likely to be immediate [*reckless*] damage to property makes sense and is plausible. In contrast, disorderly conduct (taking property) would require that a person

[5] Id.

[6] See e.g., driving while Black, walking while Black, swimming while Black, selling water while Black, sleeping while Black, barbecuing while Black, waiting for the subway while Black, playing with a toy in a public park while Black, being in one's own backyard while Black, being in one's own apartment located above a police officer's apartment while Black, etc., etc., etc.

[7] If the law enforcement interaction establishes that the conduct is lawful – e.g., the people involved explain they are actually playing rugby – then the law enforcement official will have no basis on which to order the conduct to cease. The officer's interaction will have established that it would be *unreasonable* to believe there is likely to be immediate and unlawful bodily injury to another person except, exactly at the Commentary explains, in situations where the conduct creates a likelihood of immediate bodily injury to a third party, a person not engaged consensually in the lawful group activity.

[8] See RCC § 22A-1202(f); §22A-2503(a).

[9] See RCC § 22A-2101(a).

recklessly engage in conduct that causes another to *reasonably* believe there is likely to be the immediate *knowing* taking of property. Conduct that is "dangerously close" to taking property should be prosecuted as attempt theft. As currently drafted, disorderly conduct (taking of property) either overlaps with attempt theft or criminalizes conduct that is *less than* "dangerously close" to theft. Including "taking of property" as a means to commit disorderly conduct weakens the offenses of theft and attempt theft; there is no point in requiring the knowing taking of property if one can be prosecuted for recklessly making someone believe property will be (knowingly) taken. PDS is concerned, assuming there even is reckless conduct that could create a reasonable belief about a knowing result, that the conduct would necessarily be very minor and ambiguous; so minor and ambiguous that to arrest and prosecute someone for it would be arbitrary and unjust.

3. PDS recommends that both disorderly conduct and public nuisance be jury demandable, regardless of the penalty attached. Because of the First Amendment implications of both offenses as well as the tension they create between preserving public order and over-policing/police abuse, the accountability that a jury provides is critical.

4. PDS recommends rewriting the definition of "lawful public gathering" in the public nuisance offense to narrow its reach.[10] The definition does not require that the gathering itself be public, so it would seem to be unlawful to intentionally interrupt a private gathering. The breadth and vagueness of the catch-all language, "similar organized proceeding," only reinforces the sweep of this provision. Are weddings "lawful public gatherings"? Is a high school graduation ceremony a "lawful public gathering?" PDS finds this means of committing the public nuisance offense troubling but would consent to a definition that is narrow and specific to funerals, that uses the word "means" instead of "includes," and that does not include any catch-all language.

5. PDS objects to the definition of "public building" in the public nuisance offense.[11] Although according to the Commentary, subsection (c)(4) is to "clarif[y] that a public building is a building that is occupied by the District of Columbia or federal government" and therefore is not meant to "apply to efforts to dissuade customers from patronizing a privately-owned business,"[12] the definition, by focusing on the physical building and by using the very general term "government", does not address situations where privately-owned business are co-located in buildings with any D.C. or federal government agency. The Commission clarified at its August 1 public meeting that subsection (c)(4) is "intended to prohibit purposeful (and not incidental) interruptions of [D.C.] Council hearings and similar proceedings, whether they occur at [the Wilson Building] or at an offsite location." [13] PDS recommends rewriting the definition of "public building" to more clearly convey that narrower intent.

[10] See RCC § 22A-4002(c)(4).

[11] See RCC § 22A-4002(c)(5).

[12] Report # 23, page 13.

[13] Minutes of Public Meeting, D.C. Criminal Code Reform Commission, August 1, 2018, page 4.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	September 11, 2018
Re:	Comments on First Draft of Report No. 24, Failure to Disperse and Rioting

PDS has the following comments about the RCC offenses of failure to disburse and rioting.

1. As reflected in the minutes of the CCRC meeting of August 1, 2018, PDS raised a concern about liability for failure to disperse where the individual does not know that a law enforcement officer has determined that her presence is substantially impairing the law enforcement officer's ability to stop a course of disorderly conduct. At the August 1, 2018 meeting staff clarified that a person must know that she is being ordered to disperse. Staff further noted that the person must be in the immediate vicinity of the course of disorderly conduct and that the officer's assessment about the need for the order to disburse must be objectively accurate. PDS requests that this clarification by staff be included in the commentary of RCC § 22A-4102.

2. RCC § 22A-4101 defines rioting, in part, as the commission of disorderly conduct when the defendant is "reckless" as to the fact that four or more people in the immediate vicinity are simultaneously engaging in disorderly conduct. PDS recommends that the CCRC substitute the mental state of recklessness with knowledge. Requiring that the defendant know that individuals in his immediate vicinity are engaging in disorderly conduct is appropriate given First Amendment concerns about rioting statutes. In the District, it is not uncommon for protests to involve thousands of people or even tens of thousands of people. Under these circumstances, during a mass protest, it may always be the case that a protester is aware of a substantial risk that others are engaging in disorderly conduct and that the standard of care that a reasonable person would observe is to remove himself from the protest.[1] Using a standard of recklessness would over-criminalize potentially constitutionally protected conduct. Just as the CCRC requires knowledge that a participant in the disorderly conduct is using or plans to use a weapon, the CCRC should require actual knowledge that others in the immediate vicinity are engaged in disorderly conduct.

[1] RCC § 22A-205.

3. PDS recommends eliminating "taking of property" as a means of committing rioting. Under the current RCC definition, an individual commits the offense of rioting when he commits disorderly conduct, reckless as to the participation of four or more people and when the conduct is committed with the intent to facilitate the commission of a crime involving bodily injury to another, damage to property of another, or the taking of property of another. Including taking of property within rioting has the potential of creating unnecessary overlap with the offenses of robbery and theft committed by codefendants. For example, under the current RCC definition of rioting, almost any robbery committed by four or more juveniles could also be charged as rioting. If the CCRC's inclusion of conduct "involving the taking of property of another" is intended to address crimes such as looting by multiple individuals, that conduct would already be covered by the inclusion of conduct "involving damage to the property of another." There are few instances when a group of four or more people could commit disorderly conduct and take property of another without also causing damage to property. Removing "the taking of property of another" from the definition would not cause any gaps in liability and would prevent overlap with property crimes committed by codefendants.

4. RCC § 22A-4101(3)(B) defines rioting as criminal conduct committed while "knowingly possessing a dangerous weapon." PDS recommends that this language be amended to "knowingly using or displaying a dangerous weapon." This amendment would mirror section (C) of rioting which establishes liability when the defendant "know[s] any participant in the disorderly conduct is using or plans to use a dangerous weapon."

   The possession of a dangerous weapon[2], such as false knuckles[3] or a knife with a blade over three inches in length, in a pocket, purse, or backpack while committing the offense of disorderly conduct does not increase danger to the community or elevate the fear experienced by bystanders. The possession of a dangerous weapon in a backpack would not be apparent to community members until the weapon is later recovered during a search incident to arrest. In such instances, where the weapon is not used or displayed, the possession of a weapon would be entirely ancillary to the offense of rioting.

   The possession of a dangerous weapon in a backpack, purse, or pocket would also be separately punishable as a stand-alone count of weapon possession. To decrease unnecessary overlap, the RCC should limit liability in rioting to occasions when the defendant knowing uses or displays a dangerous weapon.

[2] RCC § 22A-1001 (dangerous weapon defined).

[3] § 22A-1001(14) (prohibited weapon defined).

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	September 11, 2018
Re:	Comments on First Draft of Report No. 25, Merger

PDS has the following comments about the RCC principle of merger.

1. PDS recommends that merger, RCC § 22A-212 be restructured as a rule instead of a presumption. Presumptions are often difficult to apply and require either additional drafting language or appellate interpretation.[1] As currently framed, RCC § 22A-212, establishes rules for merger and an exception when the legislature clearly manifests the intent to allow multiple convictions. However, the use of a presumption for those rules makes them much more difficult to apply. In order to provide clarity for defendants, practitioners, and judges, and to avoid the need for appellate litigation of basic principles, the RCC should reframe the merger provision as a rule.

2. RCC § 22A-212(d)(1) establishes a rule of priority that when two offenses merge, the offense that remains shall be "the most serious offense among the offenses in question." Although footnote 27 to the Commentary explains what the most serious offense "will typically be," the phrase is still open to interpretation and argument by the parties in individual cases. Rather than leaving the matter of which offense is most serious to the parties to dispute, PDS recommends that for the purposes of clarity and certainty, the RCC define "most serious offense" as the offense with the highest statutory maximum. Further, the definition should be included in the statute, not relegated to the Commentary.

[1] *See, e.g.*, D.C. Code § 23-1322 (detention prior to trial); *Blackson v. United States*, 897 A.2d 187, 196 (D.C. 2006); *Pope v. United States*, 739 A.2d 819, 826 (D.C. 1999).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 14, 2018

SUBJECT: First Draft of Report #23, Disorderly Conduct and Public Nuisance

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #23 - Disorderly Conduct and Public Nuisance.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-4001. Disorderly Conduct.

The proposed disorderly conduct statute varies from the current law in many ways. It appears to legalize a certain type of dangerous behavior. As the Comment section notes on page 4, to be disorderly conduct under the proposal, "The apparent danger of bodily injury must be to another person; a person cannot commit disorderly conduct where she poses a risk of harm to only herself." While we do not disagree with footnote 6 that "a person who is performing a dangerous skateboarding stunt, high wire act, or magic trick in a public square" should not be guilty of this offense, we disagree that "She has not committed disorderly conduct unless it appears likely that her conduct will cause bodily injury to someone other than herself or damage to property." D.C. Code § 22-1321(a)(3) currently makes it unlawful for a person to "Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

by that person or another person." So, under current law, a person can commit disorderly conduct where she poses a risk of harm only to herself.

RCC § 22A-4001[2] would exempt police from being the target of all disorderly conduct offenses. Current law only exempts them from being the target of "Direct abusive or offensive language or gestures at another person … in a manner likely to provoke immediate physical retaliation or violence by that person or another person." This was because the Council acknowledged the special training that police should have. It does not exempt them from being the victim of **"**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" or "Incite or provoke violence where there is a likelihood that such violence will ensue" e.g. It would be disorderly conduct for a person to incite a mob to hurt a police officer by chanting, "stone the cop, kill the cop" when there were rocks nearby.

As to the current state of the law concerning the exemption of police from being the target for disorderly conduct offenses, OAG disagrees with the conclusion in the Relation to Current District Law portion of the Commentary that the proposal would merely clarify existing law. On page 7 the report says D.C. Code § 22-1321 (a)(1) and (a)(2) are "silent as to whether they cover conduct directed at law enforcement officers and no District case law addresses this issue." True, (a)(1) and (a)(2) do not specifically reference law enforcement officers, but their plain terms unequivocally cover them, just as they unequivocally reach other groups that aren't specifically mentioned (*e.g.*, tourists). Paragraph (a)(1) is satisfied by reasonable fear to "another person," which logically includes law enforcement officers. And (a)(2) refers to incitement of provocation of violence, without regard to the identity of the potential victim. It is only (a)(3), dealing with abusive or offensive language or gestures, that carves out police officers – which is no more than what the legislative history the report cites says. On page 8 of the Committee Report it states, in relevant part, the following:

> Subsection (a) proscribes breach of the peace; it prohibits conduct and language (e.g., fighting words) that is likely to provoke an outbreak of violence (e.g., a

[2] The offense portion of RCC § 22A-4001 is as follows:

(a) A person commits disorderly conduct when that person:
  (1) Recklessly engages in conduct that:
    (A) Causes another person to reasonably believe that there is likely to be immediate and unlawful:
      (i) Bodily injury to another person;
      (ii) Damage to property; or
      (iii) Taking of property; and
    (B) Is not directed at a law enforcement officer in the course of his or her official duties;
  (2) While that person is in a location that, in fact, is:
    (A) Open to the general public; or
    (B) A communal area of multi-unit housing.

> fight) … The Committee Print rejects language proposed by OAG/MPD/USAO for paragraph (3) of this subsection because it would undercut an important purpose of the language: that the 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. (See *Shepherd v. District of Columbia,* 929 A.2d 417,419 (D.C. 2007)). The law should have a bright line: that offensive language directed at police officers is not disorderly conduct. Further, 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 (see *Comments of the OAG, MPD, and USAO* attached to this report). [emphasis added][3]

When the Council enacted the legislation it created that bright line in the part of the disorderly conduct statute that relates to "Direct abusive or offensive language or gestures at another person" and included the limitation on police officers only in that offense. RCC § 22A-4001 does not clarify the limitation concerning police officers. It expands it.[4]

RCC § 22A-4002. Public Nuisance.

RCC § 22A-4002 provides that:

(a) *Offense.* A person commits public nuisance when that person:
  (1) Purposely engages in conduct that causes an unreasonable interruption of:
    (A) a lawful public gathering;
    (B) he orderly conduct of business in a public building;
    (C) any person's lawful use of a public conveyance; or

[3] The proposal by "OAG/MPD/USAO" appeared in an attachment to a letter written to Mr. Silbert of the Council for Court Excellence. The topic heading of that section was "Abusive or offensive words – Proposed D.C. Official Code § 22-1321(a)(3)" and the recommended change only applied to that provision (which was the only provision that had a law enforcement carve out). See page 89 of the legislative history for the Disorderly Conduct Amendment Act of 2010. So, when the Council rejected our proposal, they were necessarily only talking about the proposed rewording of (a)(3) concerning law enforcement officers in the context of abusive or offensive words.

[4] Given that the Council enacted D.C. Code § 22-1321 (a)(1), (2), and (3) at the same time and the Council only exempted law enforcement officers from (a)(3), it is unclear why the Commission is even delving into the legislative history to try and glean the Council's intent. Even the Court of Appeals does not look to legislative history when the plain terms of the statute does not produce a result that is "demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571(1982). "[I]n absence of persuasive evidence to the contrary, [this Court is] not empowered to look beyond the plain meaning of a statute's language in construing legislative intent." *United States v. Stokes*, 365 A.2d 615, 618 (D.C. 1976). The current disorderly conduct statute is not ambiguous on this point.

(D) any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am;

(2) While that person is in a location that, in fact, is:

(A) Open to the general public; or

(B) A communal area of multi-unit housing.[5]

One of the ways to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of business in a public building. See paragraph (a)(1)(B). The term "public building" is defined as "a building that is occupied by the District of Columbia or federal government." See paragraph (c)(5). However, the term "occupied" is not defined. While it is clear that this offense applies to a person who disrupts the orderly conduct of public business, it is unclear which of the following locations are considered occupied by the government: a building that is owned by the public, where government offices are located, to any location where the public is invited and government business is held, or all of these locations. The focus of the prohibition, however, is in ensuring that public business can take place without undue interruption. It should not matter, therefore, where the location of the public business is held. In order to clarify and simplify this offense, we suggest that paragraph (B) be rewritten to say, "the orderly conduct of public business." The offense would then be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of public business." The term "public business" could then be defined as "business conducted by the District of Columbia or federal government."

RCC § 22A-4002 (a)(1)(c) states that a person commits this offense when the person purposely engages in conduct that causes an unreasonable interruption of any person's lawful use of a public conveyance. It is unclear if this formulation is more narrow than current law. D.C. Code § 22-1321 (c) states, "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." [emphasis added] So, under current law a person may be guilty of this offense if they stand in front of the bus and refuse to let the

[5] Paragraph (c) lists the definitions for words and terms used in this offense. It states:

(1) The term "purposely," has the meaning specified in § 22A-206;
(2) The term "bodily injury" has the meaning specified in § 22A-1001;
(3) The term "property" has the meaning specified in § 22A-2001;
(4) The term "lawful public gathering" includes any religious service, funeral, or similar organized proceeding;
(5) The term "public building" means a building that is occupied by the District of Columbia or federal government;
(6) The term "public conveyance" means 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; and
(7) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave at the time of the offense.

bus continue on its route. The person is clearly "disrupting the lawful use of a public conveyance." But is that person "caus[ing] an unreasonable interruption of any person's lawful use of a public conveyance"? While the bus may be stopped, is a person's use of the conveyance interrupted? The Comment does not help to explain the drafter's intent. In fact, it appears to limit the scope even further. That comment states "The accused must have the intent and effect of diverting a reasonable passenger's pathway."[6] Nowhere in the current law or in the actual language of RCC § 22A-4002 (a)(1)(C) is this offense limited to pathways.

Another way to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am. As the Comments note, this provision replaces D.C. Code § 22-1321(d). However, that provision is limited by paragraph (a) (2) which requires that the person be in a location that is, in fact, open to the general public or is a communal area of multi-unit housing when they engage in their conduct. See paragraph (a)(1)(D).[7] There is no reason for this limitation. In D.C. Code § 22-1321, the requirement that the disorderly conduct occur in a place that is open to the general public or in the communal areas of multi-unit housing only applies to the offenses that are covered by the disorderly conduct provision in RCC § 22A-4001.[8] There is no reason to extend this limitation to the parts of the disorderly conduct offense that is covered by the public nuisance provision of RCC § 22A-4001.[9]

[6] See the last sentence on page 13 of the Report.

[7] Paragraph (a)(1)(D) states, "While <u>that person</u> is in a location that, in fact is … Open to the general public… or … a communal area of multi-unit housing," [emphasis added]. For purposes of this analysis, we assume that the "that person" refers to the person who commits the public nuisance and not the person referred to in the immediately preceding paragraphs (i.e. "(C) any person's lawful use of a public conveyance; or (D) any person's quiet enjoyment of his or her residence…").

[8] D.C. Code § 22-1321 (a) provides that:

> In any place <u>open to the general public</u>, and <u>in the communal areas of multi-unit housing</u>, it is unlawful for a person to:
>
> **(1)** 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;
>
> **(2)** Incite or provoke violence where there is a likelihood that such violence will ensue; or
>
> **(3)** Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence by that person or another person. [emphasis added]

[9] As noted in the text, both the disorderly conduct and the public nuisance provisions contain the requirement the person be in a location that is open to the general public. However, the definitions of what "open to the general public" is different in these two offenses. Subparagraph (c)(4) of the disorderly conduct provision states "The phrase 'open to the general public' excludes locations that require payment or permission to enter or leave." Subparagraph (c)(7) of

The possibility of arrest and prosecution under D.C. Code § 22-1321(d) has been an effective tool in quieting people who in their own house or apartment listen to their stereos, play musical instruments, or host parties that unreasonably annoy or disturb one or more other persons in their residences. In fact, D.C. Code § 22-1321(d) has been touted as the only effective tool used to combat noise that disrupts people's ability to enjoy their homes at night.[10]

There are other instances where the limitation of the location of the person who is engaging in the conduct that causes unreasonable interruptions, under (a)(2), is irrelevant. For example, "A person commits a public nuisance when that person [p]urposely engages in conduct that causes an unreasonable interruption of … a lawful public gathering…" See (a)(1)(A). Paragraph (c) (4) defines a "lawful public gathering as "any religious service, funeral or similar organized proceeding." It does not matter whether a person who wants to disrupt a funeral service is standing on a corner that is open to the public or is standing on the roof of a private building across the street when they use a megaphone to unreasonable interrupt the public gathering.

The revised public nuisance statute also eliminates urinating and defecating in a public place as a disturbance of the public peace offense. D.C. Code § 22-1321(e). OAG supports decriminalization. However, while public urination and defecation would be better handled as a civil infraction punishable by a civil summons and a fine, the District should seek to develop a robust civil infraction enforcement system.

the public nuisance provision, on the other hand, states, "the phrase 'open to the general public' excludes locations that require payment or permission to enter or leave at the time of the offense." [emphasis added] It is unclear whether the difference was intentional and if it was why these two related offenses would vary on a basic element.

A separate issue with the definitions of "open to the general public" cited above, is that the phrase only gives a slice of a definition, by identifying a specific thing that's excluded from the definition ("excludes locations that require payment…"). Ordinarily, a definition should be exhaustive, covering the realm of what the term includes as well as excludes.

[10] The Criminal Code Reform Commission may want to listen to the hearing on Bill 22-839, the "Amplified Noise Amendment Act of 2018" which was held on July 2, 2018. Although the hearing was focused on why the noise regulations contained in the DCMR are inadequate to address various noise problems, Councilmembers and witnesses where in near agreement that D.C. Code § 22-1321 (d), as written, was the only effective tool in addressing noise issues.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 14, 2018

SUBJECT: First Draft of Report #24, Failure to Disperse and Rioting

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #24 - Failure to Disperse and Rioting.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-4102. Failure to Disperse.

The elements portion of the failure to disperse provision is as follows:

(a) *Offense.* A person commits failure to disperse when that person:
  (1) In fact:
    (A) Is in the immediate vicinity a course of disorderly conduct, as defined in § 22A-4001, being committed by five or more persons;
    (B) The course of disorderly conduct is likely to cause substantial harm to persons or property; and
    (C) The person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct; and
  (2) The person knowingly fails to obey a law enforcement officer's dispersal order;

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(3) When the person could safely have done so.

One way that this offense can be committed is when a person "[is] in the immediate vicinity [of][2] a course of disorderly conduct…being committed by five or more persons…" See (a)(1)(A) above. On page 4, footnote 3, it states that the phrase "immediate vicinity," "as in the disorderly conduct statute, . . . refers to the area near enough for the accused to see or hear others' activities."[3] If this footnote is meant to articulate a specific definition for "immediate vicinity," that definition should be in the text (as it should be in the rioting statute).[4]

As noted above, one element of this offense may be "[t]he person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct…" [emphasis added] The Commentary notes, on page 4, that "Substantial impairment is more than trivial difficulty." There is a footnote to that statement that reads, "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." The problem is that the word "substantial" is not defined in the proposal. It is a long way from "more than trivial difficulty" to "substantial." If the Commentary correctly captures the level of police impairment, then either the word "substantial" should be defined as "nontrivial" or the phrase in the Commentary should be substituted in the text of the offense.

Pursuant to paragraph (d), the "Attorney General for the District of Columbia shall prosecute violations of this section." We agree with this designation but would like to avoid needless litigation concerning the Council's authority to give prosecutorial authority to OAG. The penalty provision for the failure to disperse offense states, "Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both." To avoid needless litigation over the history of this provision, whether it is a police regulation or a penal statute in the nature of police or municipal regulations, and its interplay with D.C. Code § 23-101, OAG recommends that the penalty provision be redrafted to state, "Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X] or a maximum fine of [X]."

In the Explanatory Note, and elsewhere in the Commentary it states, "The offense codifies in the D.C. Code longstanding authority exercised under DCMR 18-2000.2 (Failure to obey a lawful

[2] The text of paragraph (a)(1)(A) states, "Is in the immediate vicinity a course of disorderly conduct …" This may be a typo. We assume that it was supposed to read, "Is in the immediate vicinity of a course of disorderly conduct …"

[3] The footnote should reference the rioting statute (RCC § 22A-4102(a)(2)), not the disorderly conduct statute (which doesn't use the phrase).

[4] The term "immediate vicinity", as noted in the text, is used in, but not defined in the redrafted rioting offense. Footnote 26 in the Commentary does state, "The term "immediate vicinity" in the revised rioting statute refers to the area near enough for the accused to see or hear others' activities" and then says, ". See *United States v. Matthews,* 419 F.2d 1177, 1185 (1969)." The Commission should include a definition in both the failure to disperse and rioting offenses based upon this footnote.

police order) in the context of group disorderly conduct."[5] It must be noted, that the regulation that this offence is codifying only relates to vehicular or pedestrian traffic. As the elements of the offense does not include reference to vehicular or pedestrian traffic, it appears to be broader in scope then the provision that it purports to be replacing. To the extent that it does not subsume the existing regulation, the explanation should be expanded and affirmatively state that the enactment of this provision is not intended to repeal that regulation. Examples of offenses covered by the existing regulation include when officers tells a woman who is double parked to move her vehicle and she does not, asks a man to partially roll down his window so that the officer can test for a tint infraction and he does not, or when an officer sees a woman lift the security tape labeled "POLICE LINE DO NOT CROSS" and she refuses to leave the area when told to do so by a police officer.

In the explanation of subsection (a)(1)(C) in the Commentary, it states, "The actor's engagement in conduct that is protected by the First Amendment, Fourth Amendment, or District law is not a defense to failure to disperse because such rights are outweighed by the need for law enforcement to effectively address group disorderly conduct."[6] While OAG agrees with this statement, at least as far as it speaks of the First Amendment and District law, the Fourth Amendment protects against unreasonable searches and seizures, as such, it is not apparent why it is referenced here.

RCC § 22A-4101. Rioting.[7]

[5] The regulation states, "No person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians and to the operators of vehicles."

[6] The Fourth Amendment to the U.S. Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[7] The offense portion of RCC § 22A-4101, rioting, is as follows:

(a) A person commits rioting when that person:
  (1) Commits disorderly conduct as defined in § 22A-4001;
  (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct;
  (3) And the conduct is committed:
    (A) With intent to commit or facilitate the commission of a crime involving:
      (i) Bodily injury to another person;
      (ii) Damage to property of another; or
      (iii) The taking of property of another;
    (B) While knowingly possessing a dangerous weapon; or

Paragraph (a) states that a person commits rioting when a person "(1) Commits disorderly conduct … (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct … (3) And the conduct is committed . . ." [emphasis added] We read this sentence to mean that "the conduct" in subparagraph (a)(3) refers to the person's conduct in (a)(1) and not the group conduct in (a)(2) notwithstanding that the reference to "group conduct" appears between these two iterations. To clarify this point we recommend that subparagraph (3) be redrafted to read "And the person's conduct is committed…"

One way that this offense can be committed is when a person commits disorderly conduct, reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct and the conduct is committed with intent to commit or facilitate the commission of a crime involving bodily injury to another person. [emphasis added] See (a)(3)(A)(i). As to the offense "involving bodily injury to another person", the question arises whether this other person must be someone other than the person who is committing the disorderly conduct, the four or more other persons who are also committing disorderly conduct, or both. We agree that the offense of rioting should not include situations where the person who is committing disorderly conduct, with others, hurts himself. We want to be clear, in addition, that the text was not meant to exclude situations where a person intends to commit a crime involving bodily injury to someone else who is also being disorderly. We note that the Comment would not require such a reading.[8] Take for example the situation where there is meeting of international finance ministers in the District and protests and counter-protests occur. These protestors represent different and contradictory perspectives on the direction of world finance, just as the counter-protestors do. A subset of the protestors, say anarchists become disorderly, a different subset, say a group supporting funding a repressive country's regime, also becomes disorderly, and a group of the anarchists decide to injure a few of the regime protestors. There is no reason why the offense of rioting should not apply to these anarchists.

(C) While knowing any participant in the disorderly conduct is using or plans to use a dangerous weapon.

[8] See Comment on page 10 that "'Another person' means any person who is not a participant in the rioting." So, another person may include a person who is disorderly, but not rioting.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 14, 2018

SUBJECT: First Draft of Report #25, Merger

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #25 - Merger.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-212. Merger of Related Offenses.

Section 22A-212 makes changes to District merger law as it has evolved under case law. On page 10 of the Commentary it states, "Subsections (a)-(d) of RCC § 212 replace this judicially developed approach with a comprehensive set of substantive merger policies. Many of these policies are based on current District law, and, therefore, are primarily intended to clarify the mechanics of merger analysis for the purpose of enhancing the consistency and efficiency of District law. However, a few of these policies broaden the District's current approach to merger for purposes of enhancing the proportionality of the D.C. Code."

Acknowledging that the current scope of the RCC does not include a redrafting of every District Code offence, the question not specifically addressed by the merger provision or its Commentary

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

is how this provision should be applied to merger questions where a defendant has been found guilty of both an RCC offense and another criminal offense that has not yet been redrafted.

While it is clear that RCC § 22A-103's provision that "Unless otherwise provided by law, a provision in this title applies to this title alone." would clearly mean that the RCC's merger provision would not apply in situations where the court is examining whether two non-RCC offenses merge, the text of 22A-103's would also seem to apply to situations where the court is considering whether a mixed RCC and non-RCC offense merge. To avoid litigation on this point, the Commission should clarify its position on this issue in a subsequent Report.

RCC § 22A-212 (a) states that there is a presumption for merger in a number of circumstances. One of these is where "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense…" In the Commentary, on page 6, it states, "This principle applies when the facts required to prove offenses arising from the same course of conduct are "inconsistent with each other as a matter of law."[2] OAG believes that this clarification is too central to the analysis to be left in the Commentary and that it should be moved to the text of the merger provision. It should state, "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law."

Paragraph (d) establishes a rule of priority based upon the relative seriousness of the offenses as to which offense should remain when offenses merge. In the Commentary, on page 9, the Report says, "where, among any group of merging offenses, one offense is more serious than the others, the conviction for that more serious offense is the one that should remain." The term "serious", however, is not defined in the text. Footnote 27 offers something that can be used as definition.[3] We recommend incorporating the language of this footnote into the text of the merger provision.

OAG agrees with intent of paragraph (e), final judgment of liability, that no person should be subject to a conviction until after "[t]he time for appeal has expired; or … [t]he judgment appealed from has been affirmed."[4] [emphasis added] We make one technical suggestion. As the Court of Appeals may affirm, affirm in part, or remand, we suggest that paragraph (e)(2) be amended to say, "The judgment appealed from has been decided."

[2] The Commentary cites to *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States*, 407 F.2d 1199, 1223 (1967) (en banc)) for this proposition.

[3] Footnote 27 states, "The most serious offense will typically be the offense that is subject to the highest offense classification; however, if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense is "most serious" for purposes of subsection (d)."

[4] This provision states:

> FINAL JUDGMENT OF LIABILITY. A person may be found guilty of two or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:
>
> (1) The time for appeal has expired; or
>
> (2) The judgment appealed from has been affirmed.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	December 20, 2018
Re:	Comments on First Draft of Report 26, Sexual Assault and Related Provisions

The Public Defender Service makes the following comments on Report #26, Sexual Assault and Related Provisions.

1. RCC § 22A-1301(9) and (11) define the phrases "person of authority in a secondary school" and "position of trust with or authority over." Rather than creating a limited and precise definition, in these two instances the RCC use the word "includes" to describe the scope of the legal terms. In other instances in this chapter and in other chapters, the RCC uses the word "means" when defining a term or statutory phrase. The use of the word "includes" falls short of Due Process requirements to provide notice of criminal offenses.[1] It also fails to correct existing ambiguity in D.C. Code § 22-3009.03 and 22-3009.04. Precise definitions in these two instances are particularly important because the terms relate to sexual offenses that are criminalized only because of the status of the complainant or the relationship between the complainant and the defendant. In the absence of the prohibited relationship between the defendant and the complainant, these interactions may be consensual and legal.
2. PDS makes several recommendations for the definition of "person of authority in a secondary school" and for other terms in RCC § 22A-1305(a) and (b).

   With respect to RCC § 22A-1301(9), person of authority in a secondary school, PDS recommends the following language.

   (9) "Person of authority in a secondary school" ~~includes~~ means any teacher, counselor, principal, or coach in a secondary school attended by the complainant or where the complainant receives services or attends regular programming.

[1] See, e.g., *McNeely v. United States*, 874 A.2d 371, 379 (D.C. 2005).

In addition to being more precise, the RCC's definition should correspond to the harm it seeks to prevent. The term "person of authority in a secondary school is used in RCC § 22A-1305, Sexual Exploitation of an Adult. RCC § 22A-1305(a)(2)(A) and RCC § 22A-1305(b)(2)(A) prohibit sexual acts or contact where the defendant is a person of authority in a secondary school and the complainant is under age 20 and "is an enrolled student in the same school system." Consent is not a defense to RCC § 22A-1305.

"Same school system" is not defined in RCC § 22A-1305. As such, it appears that it would prohibit otherwise consensual sexual contact between any 19 year old enrolled at a DCPS school and most DCPS employees. It would prohibit a consensual sexual relationship between a 19 year old student at Wilson High School and a 23 year old athletics coach at Brookland Middle School. RCC § 22A-1305 would hold the coach criminally liable, and would likely require ten years of sex offender registration although nothing about the "complainant's" status as a student in the same school system played a role in the consensual relationship. Across the District, DCPS employs more than 7,000 individuals.[2] Prohibiting consensual relationships between adults because of the defendant's status as a DCPS employee goes too far. Under circumstances where the complainant is legally capable of consent, there is no allegation of non-consent, and there is no inherently coercive environment created by the complainant's status as a student at one school and the defendant's status as an employee at another, the RCC should not criminalize the conduct.

The term "same school system" may also be under inclusive. Nearly half of the District's students attend charter schools. Each charter school organization forms its own local education agency. Under this definition a relationship between a coach at one charter school and a student at another unrelated charter school would not fall under RCC § 22A-1305 even if the two charter schools have a close relationship and the student participates in sports at both schools.[3] A definition that requires a closer connection between the student and the school employee would resolve this.

RCC §22A-1305(a) and (b) should criminalize consensual relationships between adults, or teens age 16 and older, only where the circumstances are truly coercive because of the defendant's power within the school. A definition that limits liability to relationships where the student and the defendant are assigned to the same school, not just the same school system, appropriately draws the line at preventing coercion but not being overly broad.

Within the RCC § 22A-1305, the age of consent for sexual conduct with persons of authority in secondary schools should be set at 18 instead of 20, as currently proposed. It makes sense to add protections for youth age 16 and 17 given the potential for coercion in a school setting and the potential for consent derived from the pressures of that setting. However, once a student reaches age 18, he or she should be free to engage in consensual sexual conduct with others, including individuals who may have positions of authority within the school setting. Those relationship may very well violate employee norms and in

[2] https://dcps.dc.gov/page/dcps-organization.

those instances should lead to the serious sanction of job loss, but they should not result in criminal liability. Relationships between students and school personnel can be prosecuted under RCC § 22A-1303(b), second degree sexual assault, when the power differential or other actions taken by the defendant result in the coercion of the student.[4]

3. With respect to RCC § 22A-1301(11), "position of trust with or authority over," PDS recommends the following changes.

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

   (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;
   (B) A legal or de facto guardian or any person, more than 4 years older than the ~~victim~~ complainant, who resides intermittently or permanently in the same dwelling as the complainant;
   (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the act; and
   (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution where the complainant is an active participant or member, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program where the complainant is an active participant or member, ~~including~~ meaning a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff that has regular contact with the complainant in the above settings.

   These recommendations mirror PDS's recommendations for RCC § 22A-1305. The term position of trust or authority is used in the RCC provisions that criminalize sexual abuse of a minor and in sentencing enhancements. A position of trust and authority should be more than a label based on the defendant's employment or status. The definition should capture situations where the defendant's close relationship to the complainant or minor allow for an abuse of trust or additional harm.

4. PDS makes the following recommendations for revisions to the definition of coercion at RCC § 22-1301(3).

   The RCC definition of coercion is employed primarily in second and fourth degree sexual assault, RCC § 22A-1303(b) and (d). As currently drafted the defendant must knowingly cause the complainant to submit to or engage in a sexual act or contact through some coercive conduct as defined in RCC §22-1301(3). While the requirement that the

[4] RCC § 22-22A-1301(3) defines coercion as threatening, among other things, to take or withhold action as an official, or to cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

defendant knowingly caused the sexual act or conduct through coercion provides some strength to the offense definition, the RCC definition of coercion allows seemingly minor conduct to qualify as coercion. This will require jurors to decide the causal question of the connection between the alleged coercion and the sexual act rather than more appropriately limiting the charges that may be brought under a coercion theory.

The current RCC definition includes sexual acts coerced by threats of ridicule. Ridicule should not be included within the specific definition of coercion. Without more, there is insufficient reason to believe that the threat of ridicule would cause a complainant to perform or submit to a sexual act. Where the ridicule is serious or where the defendant knows that the complainant is particularly vulnerable due to his or her background or particular circumstances, the conduct will fall within the catchall provision of coercion, RCC § 22A-1301(3)(G). Similarly, a threat to cause hatred or contempt of a deceased person should be considered coercive only when it meets the standard of RCC § 22A-1301(G) and should not be a standalone provision of coercion. A watered down definition of coercion brings the possibility of arrests and pretrial incarceration for circumstances that are not sufficiently serious to compel the submission of a reasonable person in the same circumstances.

PDS also has concerns about how the RCC addresses coercion in the context of controlled substances and prescription medication.[5] Generally speaking, this sub-definition of "coercion" needs to focus more precisely on what makes the conduct "coercive" or what makes a person feel *compelled* to submit to or engage in a sexual act or sexual contact. The conduct that makes engaging in a sexual act or sexual contact *compulsory* must be as serious as the other conduct proscribed in the definition, such as threatening to commit a criminal offense against the person.[6] According to the commentary, this sub-definition was modeled on the current definition of "coercion" in the human trafficking chapter of the D.C. Code.[7] That definition refers to controlling a person's access to "an addictive or controlled substance."[8] PDS recommends that "coercion" should be about restricting access to an addictive substance (that is also a controlled substance), not merely about restricting access to a controlled substance. What makes restricting access to a substance coercive or compelling conduct is that the substance is one to which the person is addicted. It would not be coercive to restrict a person's access to cocaine *unless the person is addicted to cocaine*. As the Commission notes, limiting a person's access to alcohol, which is an addictive substance, "is not as inherently coercive as limiting a person's access to a controlled substance, as it is relatively easy to obtain alcohol by other means."[9] PDS agrees with the point but posits that the Commission drew the wrong conclusion from it. Restricting access to alcohol is not "inherently" coercive and, unless one is addicted to it, neither is restricting a person's

[5] RCC § 22A-1301(3)(F).

[6] See RCC § 22A-1301(3)(A).

[7] Report #26, page 10.

[8] See D.C. Code § 22-1831(3)(F).

[9] Report #26, page 10, footnote 40.

access to a controlled substance. More to the point, restricting a person's access to alcohol is not coercive at all *precisely because* it is relatively easy for a person to obtain alcohol by other means. A person faced with the demand, "have sex with me or I won't give you this beer," is unlikely to feel compelled to submit to the sexual act, as the person can easily get beer elsewhere. A person faced with the demand, "have sex with me or I won't give you this heroin," is also unlikely to feel compelled to submit to the sexual act if (A) the person is not addicted to heroin and (B) the person can get heroin from another source. Thus, to be "coercive" restricting access should be about restricting access to a controlled substance to which the person is addicted and should be about more than a mere refusal to sell, exchange, or provide. Finally, PDS asserts that the coercive or compelling conduct involving addictive substances and prescription medication is the same. It is not clear what the difference would be between "limiting access to a controlled substance" and "restricting access to prescription medication" and it is certainly not clear that there should be a difference.

The term "limit access" is too broad to truly reach coercive acts. Limit access would seem to include the defendant not sharing his own controlled substances, to which the complainant has no right. It also criminalizes as second and fourth degree sexual abuse commercial sex where the currency is controlled substances. For instance, it should not be second degree sexual abuse if the defendant requires a sexual act as payment for controlled substances. The conduct of limiting access by refusing to sell drugs unless the complainant performs a sexual act should fall squarely within commercial sex and should not be second or fourth degree sexual abuse. With respect to prescription medication, it should be clear that the coercive conduct is limiting a person's access to their own prescribed medicine. A pharmacist refusing to fill a prescription unless a sexual act is performed in exchange is engaging in prostitution, not attempted sexual assault. Because there are other pharmacies, a person who is unwilling to pay that price for his or her prescribed medication, is not being compelled to engage in the sexual act. However, restricting a person's access to their own medicine would in many circumstances be coercive.

PDS recommends the statutory language below.

(3) "Coercion" means threatening that any person will do any one of, or a combination of, the following:
  (A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
  (B) Accuse another person of a criminal offense or failure to comply with an immigration regulation;
  (C) Assert a fact about ~~another person~~ the complainant, ~~including a deceased person~~, that would tend to subject ~~that person~~ the complainant to hatred, or contempt, ~~or ridicule~~, or ~~to~~ would substantially impair that person's credit or business repute;
  (D) Take or withhold action as a~~n~~ public official, or cause a public official to take or withhold action;
  (E) Inflict a wrongful economic injury;

(F) Restrict ~~Limit~~ a person's access to a controlled substance, as defined in D.C. Code 48-901.02, to which the person is addicted and ~~controlled substance~~ or restrict a person's access to that person's prescription medication; or

(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

In addition to the drafting changes above, PDS recommends that the following language be added to the commentary: Restricting a person's access to a substance to which the person is addicted is not the same as refusing to sell or provide an addictive substance or refusing to fill a person's prescription. Nor is restricting a person's access the same as suggesting a sexual act or sexual contact as a thing of value in exchange for a controlled substance to which the person is addicted or for prescription medication. Such suggestion, and such exchange, may constitute prostitution or soliciting prostitution, but it is not, standing alone, coercion for the purposes of second and fourth degree sexual abuse.

5. PDS recommends a minor modification to RCC § 22A-1303. RCC § 22A-1303(a)(C)(i) prohibits administering an intoxicant without the claimant's effective consent "with intent to impair the complainant's ability to express unwillingness." The RCC should explicitly add: "with intent to impair the complainant's ability to express unwillingness to participate in the sexual act." The above recommendation clarifies the phrase "ability to express unwillingness" and ensures that the motive in providing the intoxicant is connected to the sexual assault.

6. RCC § 22A-1303(f) provides for penalty enhancements for sexual offenses based on the characteristics of the complainant and/or the defendant. PDS objects to the use of enhancements generally. Sexual offenses carry lengthy terms of incarceration. The Sentencing Guidelines provide wide ranges of guidelines-compliant sentences for sex offenses. Given the high statutory maxima and the wide ranges available under the Sentencing Guidelines, sentencing enhancements are not necessary to guide judicial discretion. Judges will examine the facts of each case and sentence appropriately. Defendants convicted of sexual crimes against children younger than 12 will typically receive longer sentences without the effect of any enhancement because the facts of the case will warrant a longer sentence. Sentencing enhancements do not serve a meaningful purpose in guiding judicial discretion and if they are assigned a mandatory minimum or a particular offense severity group on the Sentencing Guidelines they may inappropriately cabin judicial discretion to sentence based on the particular facts of the case.

   If the RCC retains sentencing enhancements, PDS recommends re-evaluating the purpose of RCC § 22A-1303(f)(4)(E) which provides for a penalty enhancement where "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, under 65 years old." If the intent is to focus on the unique vulnerabilities of the complainant, the age should be raised to over age 75. If the intent of the RCC is to punish young defendants who may take advantage of an individual who is over age 65, then the enhancement should also provide for an age gap. In that instance, RCC § 22A-1303(f)(4)(E) should read: "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, at least ten years younger than the complainant."

RCC § 22A-1303(C) adds a sentencing enhancement for instances where the "actor recklessly disregarded that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least two years older than the complainant." PDS objects to this sentencing enhancement in particular. It does not address a particular harm and draws lines that may be entirely arbitrary. A sexual assault of a 17 year old by a 19 year old may be no different than a sexual assault of an 18 year old by a 21 year old. The age distinction drawn in the RCC in many instances will have no correlation to the particular harm of this conduct as opposed to other similar conduct. Sexual assault has devastating consequences for all and arbitrarily drawing this additional age-based line does not enhance the proportionality of punishment or meaningfully distinguish between the harms inflicted. As stated above, judges will have sufficient sentencing discretion to appropriately consider the particular harms caused and the circumstances of the defendant.

7. RCC § 22A-1306, sexually suggestive contact with a minor, prohibits instances where "with the intent to cause the sexual arousal or sexual gratification of any person knowingly… (D) [the actor] touches the actor's genitalia or that or a third person in the sight of the complaint." As written the RCC criminalizes a minor's incidental viewing of sexual activity as a result of sharing a room or a home with others. RCC § 22A-1306(a)(2)(D) would criminalize a sibling masturbating or parents engaging in consensual sex in a room shared with a minor. The unintentional result is to criminalize typical conduct that occurs in households without private space for each individual. RCC § 22A-1306(a)(2)(D) should include an intent element that is related to the minor child. PDS proposes: "[the actor] touches the actor's genitalia or that of a third person in the sight of ~~complaint~~ a minor child with the intent to gratify the actor's sexual desire with respect to the minor child or to humiliate or degrade the minor child.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	December 20, 2018
Re:	Comments on First Draft of Report No. 27, Human Trafficking and Related Statutes

PDS has the following comments about RCC human trafficking and related offenses.

1. PDS recommends making the same changes to the definition of "coercion" as the term is used in the human trafficking chapter that PDS proposed for "coercion" for the sexual assault chapter.

2. PDS objects to the term "harbor" where it is used in Trafficking in Labor or Services,[1] Trafficking in Commercial Sex,[2] Sex Trafficking of Minors,[3] and Sex Trafficking Patronage.[4] Although it is used in the current D.C. Code,[5] that use is grammatically incorrect; the Revised Criminal Code should not perpetuate the misuse of the term. A "harbor" is a place of refuge. "To harbor" means to provide shelter or sanctuary. While we may speak of "harboring a fugitive" or "harboring a criminal," that is not an incorrect use of the term. Harboring a fugitive means to provide shelter for a fugitive. From the fugitive's perspective, the shelter is a "place of refuge;" it is simply that society does not want fugitives or criminals to have a place of refuge. In contrast, society likely supports persons and organizations that provide places of refuge to victims of trafficking.[6] PDS recommends replacing "harbor" with the term "house."

[1] RCC § 22A-1605(a)(1).

[2] RCC § 22A-1606(a)(1).

[3] RCC § 22A-1607(a)(1).

[4] RCC § 22A-1610(c)(2).

[5] For example, it is used at D.C. Code § 22-1833, Trafficking in labor or commercial sex acts, and at D.C. Code § 22-2704, Abducting or enticing a child from his or her home for purposes of prostitution, harboring such a child.

[6] See e.g., "Apple wins Stop Slavery Award, touts new initiative to hire human trafficking victims at retail stores," https://appleinsider.com/articles/18/11/14/apple-wins-stop-slavery-award-touts-new-initiative-to-hire-human-trafficking-victims-at-retail-stores.

3. PDS recommends changing the offense titles so the title better conveys the relative seriousness of the conduct. Forced labor or services and forced commercial sex make liable the person or the accomplice who, by means of coercion or debt bondage, causes another to engage in labor or services or in commercial sex. Whether or not the forced labor or services or forced commercial sex is part of a larger criminal enterprise, this conduct is at the core of the offense and is the most serious. The public perception of "trafficking" is that it is particularly serious, a form of modern-day slavery. Labeling the core offense as "forced commercial sex" and the supporting conduct as "trafficking" is precisely backwards. Thus, PDS recommends that "Forced Labor or Services" should be retitled to "Labor or Services Trafficking" and "Forced Commercial Sex" should be retitled to "Commercial Sex Trafficking." Further, "Trafficking in Labor or Services," "Trafficking in Commercial Sex," Sex Trafficking of Minors" should be retitled to "Assisting Labor or Services Trafficking," "Assisting Commercial Sex Trafficking," and "Assisting Sex Trafficking of Minors" respectively.

4. PDS recommends rewriting RCC § 22A-1605, Assisting Labor or Services Trafficking (formerly Trafficking in Labor or Services), and RCC § 22A-1606, Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex). The offenses criminalize conduct performed in aid of forced labor or services or forced commercial sex. As the Advisory Board discussed extensively with the Commission at the December 19, 2018 public meeting, there is a great danger that the offense will be written too broadly and criminalize persons who contribute minimally to the crime and have no vested interest in the success or outcome of the crime. Examples we discussed include the cab driver who drives someone he knows is a "trafficking victim" to the grocery store; the cab driver who one time drives someone she knows is being trafficked to a brothel; a pizza delivery person with a standing order to deliver pizza to a place the person knows houses trafficking victims; a hotel maid who cleans the room knowing it was a place where commercial sex trafficking took place. PDS strongly argues for a narrow offense and has a number of drafting recommendations. First, PDS agrees with the suggestion made during our Advisory Board discussion that the greatest concern is with persons who assist trafficking by housing, hoteling, [7] transporting, recruiting, and enticing. PDS therefore recommends narrowing the offense to criminalize only that conduct. Second, the offenses, including the penalties, and the commentary should make clear the seriousness of the offense and the culpability of the actors relative to each other. As stated above at PDS comment (3), labor or services trafficking or commercial sex trafficking, that is actually causing a person to engage in labor, services, or commercial sex by means of coercion or debt bondage, is the most serious conduct. A person who engages in conduct, such as transporting a person, *with the purpose* of assisting in the commission of the trafficking is liable as an accomplice and may be punished accordingly. Less serious, but still culpable, is an actor who knowingly recruits, entices, houses, hotels, or transports a person *with the intent* that the person be caused to engage in labor, services or commercial sex by means of coercion or debt bondage. "With intent" requires purpose or knowledge so it allows for a conviction based on a lower mental state than accomplice liability would require. But it solves the problem discussed at the December 19, 2018 Advisory Board meeting that the assisting offenses as currently drafted allow for criminal liability for an actor

[7] Though not commonly used as a verb, the Oxford English Dictionary confirms that "hotel" can be a verb.

who transports a person and who is aware of a substantial risk (or even knows) that the person is being trafficked, but the transportation does not aid the commission of the trafficking.

PDS recommends rewriting the offense elements of Assisting Labor Services Trafficking and Assisting Commercial Sex Trafficking as follows:

(1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports~~, provides, obtains, or maintains by any means,~~ another person;

(2) With intent that the person be caused to provide [labor or services][commercial sex];

(3) By means of coercion or debt bondage.

For the same reasons, PDS recommends rewriting the offense elements of RCC § 22A-1607, Assisting Sex Trafficking of Minors, as follows:

(1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports, ~~provides, obtains, or maintains by any means,~~ another person;

(2) With intent that the person be caused to engage in a commercial sex act;

(3) With recklessness as to the complainant being under the age of 18.

5. With respect to the RCC offenses of Commercial Sex Trafficking (formerly Forced Commercial Sex), Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex), and Assisting Sex Trafficking of Minors (formerly Sex Trafficking of Minors), PDS recommends clarifying that the provision or promise of something of value necessary to make the sex act "commercial" must be provided or promised by someone other than the actor who is "forcing" the commercial sex by coercion or debt bondage. This is necessary to distinguish those offenses from sexual assault. To understand how the offenses could currently overlap, imagine the following scenario: Actor restricts complainant's access to complainant's insulin by hiding it. Actor says, "I'll give you your insulin back if you have sex with me." If complainant complies, that would be second degree sexual assault by coercion.[8] PDS is concerned that, as currently drafted, the RCC forced commercial sex statute could be interpreted to also criminalize that conduct because the actor would be causing the complainant, by means of coercion, to engage in a sexual act that was made "commercial" by being in exchange for the insulin, a thing of value. The difference between sexual assault and forced commercial sex is that it is a third person who is giving something of value in exchange for the sexual act or sexual contact and that thing of value is different from that which is being used to coerce the complainant's compliance. PDS recommends rewriting Forced Commercial Sex as follows:

[8] See RCC § 22A-1303(b)(2)(A).

~~A person~~ An actor or business commits the offense of commercial sex trafficking ~~forced commercial sex~~ when that ~~person~~ actor or business:

(1) Knowingly causes a person to engage in a commercial sex act with another person;

(2) By means of coercion or debt bondage.

Assisting Commercial Sex Trafficking and Assisting Sex Trafficking of Minors should be rewritten similarly. For the same reason, Sex Trafficking Patronage should be modified to distinguish it from sexual assault. First Degree Sex Trafficking Patronage should be written as follows:

~~A person~~ An actor commits the offense of first degree sex trafficking patronage when that ~~person~~ actor:

(1) Knowingly engages in a commercial sex act;

(2) When coercion or debt bondage was used by another person or a business to cause the person to submit to or engage in the commercial sex act;

(3) With recklessness that the complainant is under 18 years of age.

Second and third degree sex trafficking patronage should be rewritten similarly.

6. With respect to RCC § 22A-1608, Benefitting from Human Trafficking, the RCC Commentary states that the offense "criminalizes knowingly obtaining any benefit or property by participating, other than through the use of physical force, coercion or deception, in an association of two or more persons…"[9] PDS questions where in the offense elements it is clear that the participation must be "other than through the use of physical force, coercion or deception." PDS recommends rewriting the offense to state more clearly the exclusion of the use of physical force, coercion or deception.

7. PDS recommends rewriting RCC § 22A-1608, Benefitting from Human Trafficking, to allow for greater differentiation between offender culpability. The only distinction between the two degrees of benefitting is whether the group, in which the actor participates, is engaged in forced commercial sex (first degree) or forced labor or services (second degree). Thus, the person who is a "kingpin" in a group and who gains significant benefits from their participation is treated the same as the person whose participation in the group is sufficiently marginal that they are only disregarding a substantial risk that the group participates in the forced commercial sex or labor or services. PDS recommends increasing the mental state for first and second degree to knowing that the group has engaged in conduct constituting forced commercial sex (first degree) or forced

[9] Report #27, page 49. The report also says "Subsection (a)(2) [of RCC § 22A-1608] specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons." *Id*.

labor or services (second degree). PDS further proposes creating a third degree benefitting from human trafficking offense that encompasses both forced commercial sex and forced labor or services and that has the mental state of "recklessness" with respect to the forced conduct in which the group engages.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	December 20, 2018
Re:	Comments on First Draft of Report No. 28, Stalking

PDS has the following comments about the RCC offense of stalking.

1. PDS objects to the negligence mental state in the proposed stalking offense.[1] As currently proposed, a person commits stalking if the person purposely engages in a pattern of conduct directed at an individual and does so either (A) with intent to cause the individual to fear for his or her safety or with intent to cause the individual to suffer significant emotional distress or (B) negligently causing the individual to fear for his or her safety or to suffer significant emotional distress. Particularly because the purpose of the person's conduct (necessary to establish it as a pattern) need not be nefarious – for example, "a person might persistently follow someone with the goal of winning their affection"[2] – a negligence mental state standard is too low. Increasing the mental state to "recklessly," as PDS recommends, makes the second way of committing the offense on par with the first way. That a person's conduct is done with an awareness of a substantial risk that her conduct is causing the individual to fear for his safety is of similar seriousness as a person's conduct being done with the intent to cause such fear (whether or not it actually does). Allowing a conviction based only on proof that the person, who may otherwise have a benign or beneficent purpose, *should have been* aware that her conduct was causing the individual to fear for his safety would allow a conviction based on conduct that is of significantly lower culpability than the intentional conduct, yet the offense does not define them as different degrees.

2. PDS recommends increasing the separate occasions of conduct required to establish a pattern from two to three.[3] As the commentary explains, stalking concerns "longer-term apprehension," in contrast to breach of the peace statutes like disorderly conduct, rioting, and public nuisance

[1] See RCC § 22A-1801(a)(2)(B).

[2] Report #28, page 5, footnote 2.

[3] See RCC §22A-1801(d)(3).

which create "momentary fear of an immediate harm."[4] Requiring three occasions to establish a "pattern of conduct" does more to assure that the harm being punished is "longer-term apprehension" and better distinguishes between conduct that constitutes stalking and conduct that would constitute a breach of the peace.

3. PDS recommends rewriting the definition of "financial injury" to limit "attorney's fees" at sub-subsection (F) to only those attorney's fees "incurred for representation or assistance related to" the other forms of financial injury listed at (A) through (E). This is consistent with the objection and proposal PDS made on the definition of "financial injury" in its November 3, 2017 comments on Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions.

4. PDS appreciates the effort to protect the conduct of attorneys and private investigators acting within the reasonable scope of their official duties from prosecution pursuant to the revised stalking statute.[5] The list of excluded professionals is inadequate, however, to cover investigators employed by the Public Defender Service or by private attorneys appointed to represent indigent defendants pursuant to the Criminal Justice Act. PDS and CJA investigators are not "licensed private investigators." In addition, PDS and law school programs rely on college and law student interns to perform investigative tasks. PDS strongly urges rewriting the excluded professions list as follows: "(A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, person acting as an agent of an attorney, process server, *pro se* litigant, or compliance investigator..."

5. PDS agrees with the explanation of "physically following" that is in the commentary.[6] PDS recommends including the term in the definitions subsection of the statute and using the explanation from the commentary. Specifically, PDS recommends adding to subsection (d) the following: "The term 'physically following' means to maintain close proximity to a person as they move from one location to another."

6. PDS suggests deleting footnote 10.[7] The Do Not Call Registry is not a good example of a government entity that might be the indirect source of notice to the actor to cease communications with the complainant. The Do Not Call Registry is for telemarketing calls only; it does not restrict calls from individuals.[8]

7. PDS recommends that the commentary clarify that the actor must know that the notice to cease communication is from the individual, even if the notice is indirect. The commentary should be clear that if the actor does not know that the person delivering the message to cease communicating with the individual is authorized to deliver such message on the individual's

[4] Report #28, page 10, footnote 40.

[5] See RCC § 22A-1801(e)(3).

[6] Report #28, pages 5-6.

[7] Report #28, page 6.

[8] Incidentally, the Registry does not restrict calls from charities or debt collectors either.

behalf, then the message does not qualify as the "notice" required by the offense. For example, the former paramour receives a message from the new paramour to stop calling and texting the individual will not satisfy the requirement that the actor (former paramour) "knowingly received notice from the individual" unless the actor knows that the new paramour is authorized to deliver the message to cease communications.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 21, 2018

SUBJECT: First Draft of Report #26, Sexual Assault and Related Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #26 - Sexual Assault and Related Provisions.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1301 (2), definition of bodily injury.

RCC § 22A-1301 (2) states that bodily injury "means significant physical pain, illness, or any impairment of physical condition." It is unclear from the text and the Commentary if the word "significant" is meant to modify only physical pain or whether it is meant to modify illness as well. Because of the wording of the definition of "bodily injury" in D.C. Code § 22-3001 (2), OAG assumes that the drafter's meant that bodily injury "means illness, significant physical pain, or any impairment of physical condition." OAG makes this assumption because the phrase "bodily injury", in DC Code § 22-3001(2), is defined as and "… 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." Note that there are no modifiers that apply to the words "disease" or "sickness" in the current law. However, if the drafter's meant the word "significant" to modify both words, then the definition should be

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

rewritten to say that it "means significant physical pain, significant illness, or any impairment of physical condition." The Commentary should then explain why it made that choice.

RCC § 22A-1301 (8), definition of effective consent, and, RCC § 22A-1301 (3), definition of coercion.

As written, an actor who threatens a complainant that they will expose or publicize a fact, whether true or false, that will subject the complainant to embarrassment cannot be charged with a sexual assault if the complainant acquiesces. In order to determine if a person has given "effective consent" in this context, we need to determine if the person was coerced. RCC § 22A-1301 (8) states that effective consent "means consent obtained by means other than physical force, coercion, or deception." RCC § 22A-1301 (3) defines coercion. One way that a person may be coerced is if the actor threatens the complainant that they will "assert a fact about another person, … that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute…"[2] The word "embarrassment" is notably missing from that list. However, the Council, as recently as December 4, 2018 recognized that persons may submit to unwanted sex rather than have something embarrassing made public when it passed the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018. In the legislation, a person commits the offense of blackmail if they threaten to "[e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation… or distribute a photograph, video, or audio recording, whether authentic or inauthentic, tending to subject another person to hatred, contempt, ridicule, embarrassment or other injury to reputation…" [emphasis added][3]

The definition of "coercion" in paragraph (G) includes "Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply." For clarity, this phrase should explicitly

[2] The full definition of coercion is much broader. RCC § 22A-1301 (3) states that coercion "means threatening that any person will do any one of, or a combination of, the following:
(A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
(B) Accuse another person of a criminal offense or failure to comply with an immigration law or regulation;
(C) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute;
(D) Take or withhold action as an official, or cause an official to take or withhold action;
(E) Inflict a wrongful economic injury;
(F) Limit a person's access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person's access to prescription medication; or
(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and the same circumstances to comply."

[3] See lines 24 through 32 of the engrossed original of the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018 and the accompanying committee report. http://lims.dccouncil.us/Legislation/B22-0472?FromSearchResults=true

refer to another person. In other words, the phrase "same background and in the same circumstances" should have an object to which it refers. We suggest that the paragraph be rewritten to say, "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 § 22A-1303, Sexual assault.

RCC § 22A-1303, and many of the other related provisions, ascribes the mental state of "knowingly" to many of the elements of the offense. As noted on page 58 of the Report, a consequence of using this mental state is that there will be a change in District law such that a person would be able to use self-induced intoxication as a defense.[4] While understanding why the Commission chose to use the mental state of knowingly in these offenses, a person should not be able to decide to rape, or otherwise sexually abuse, someone; consume massive amounts of alcohol to get up the nerve to do it; consummate the rape; and then be able to argue, whether true or not, that at the time of the rape he lacked the mental state necessary to be convicted of the offense. If the Commission is going to use this mental state, then the Commission should create an exception that accounts for this situation. This exception would be similar to what the Commission is already proposing in § 22A-208 (c) concerning willful blindness.[5]

[4] The relevant portion of this discussion is found on pages 58 and 59 of the Report. There it states:

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

[5] RCC § 22A-208 (c) states "IMPUTATION OF KNOWLEDGE FOR DELIBERATE IGNORANCE. When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if … The person was reckless as to whether the circumstance existed;

RCC § 22A-1303 (a)(2) makes it a first degree sexual assault when a person causes someone to submit to a sexual act "… (A) By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant." It is unclear whether the drafters meant for the phrase "force that overcomes, restrains, or causes bodily injury to the complainant" to modify "physical force" or also modifies the use of "a weapon." OAG believes that when a person uses a weapon to cause a victim to engage in a sexual act it should be a first degree sexual assault, without having to prove the effect of the use of the weapon on the complainant; it should be assumed. For the sake of clarity, paragraph (A) should be redrafted.[6]

RCC § 22A-1303 (a)(2)(C)(ii) makes it a first degree sexual assault when a person causes someone to submit to a sexual act by drugging the complainant when the substance in fact renders the complainant "…(ii) Substantially incapable, mentally or physically, of appraising the nature of the sexual act; or (iii) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual act." There are two issues with the way that this is phrased. First, it is unclear in subparagraph (ii) what the word "physically" adds. In other words, after a person has been drugged, what is the difference between a person being substantially incapable "mentally" of appraising the nature of the sexual act and a person being substantially incapable "physically" of appraising the nature of the sexual act? The second issue is that these two statements do not reach the situation where a victim is drugged, can still appraise the nature of the sexual act and can communicate that he or she is unwilling to engage in a sexual act, but is physically unable to move anything but their mouth. The provision should clarify that first degree sexual assault covers a person who has sex with a victim after administering a drug that physically incapacitates the victim, though allowing the victim to think and speak.

RCC § 22A-1305, Sexual Exploitation of an Adult.

In paragraph (a)(2)(C) the subparagraph criminalizes sexual acts between a complainant and "member of the clergy" under specified circumstances. The phrase "member of the clergy" is not defined. To improve clarity and avoid needless prosecutions and litigation the Commission should define this term. The Commission could base its definition of "member of the clergy" on the list of clergy that appears in D.C. Code § 22-3020.52. This is the Code provision that requires "any person" to report information concerning child victims of sexual abuse but exempts "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" when those persons are involved in a confession or penitential communication.

and …The person avoided confirming or failed to investigate whether the circumstance existed with the purpose of avoiding criminal liability."

[6] The Commission could redraft subparagraph (A) so that if follows the basic structure of subparagraph (B). It would look as follows:

"(A) By using:

(i) A weapon; or

(ii) Physical force that overcomes, restrains, or causes bodily injury to the complainant…"

RCC § 22A-1307, Enticing a minor.

One way that a person can commit the offense of enticing a minor is to knowingly persuade or entice, or attempt to persuade or entice, "the complainant to go to another location in order to engage in or submit to a sexual act or conduct." RCC § 22A-1307(a)(1)(B). As written, it is unclear if the phrase "in order to" refers to the actor's motivations or is part of what the actor must communicate to the complainant. The Commentary should clarify that "in order" refers to the actor's motivation for the communication to get the complainant to go to another location, not that the actor has to communicate to the complainant that a sexual act or contact is the reason for going to another place.

Pursuant to RCC § 22A-1307 (a)(2) a person can commit this offense when "The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and … (C) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age, and the actor recklessly disregards that complainant purports to be a person under 16 years of age." There is a problem, however, with how this subparagraph is structured. Paragraph (C) is still subject to the overarching lead in language, so this law-enforcement language still doesn't apply unless the actor is 4 years older than the complainant. If the intent is to include any situation where an actor tries to entice a law enforcement officer who purports to be under 16 the provision should be restructured. For example, the Commission could redraft this provision to read:

> (2)(A) The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and:
>
> (1) The actor recklessly disregards that the complainant is under 16 years of age; or
>
> (2) The actor recklessly disregards that the complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant; or
>
> (B)(1) The actor, in fact, is at least 18 years of age,
>
> (2) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age; and
>
> (3) The actor recklessly disregards that complainant purports to be a person under 16 years of age.

RCC § 22A-1308, Arranging for sexual conduct of a minor.

While in general, OAG does not object to RCC § 22A-1308, the limitation on this offense is that "The actor and any third person, in fact are at least 18 years of age and at least four years older than the complainant" conflicts with the requirement that the actor recklessly disregards that the "complainant purports to be a person under 16 years of age, while, in fact, the complainant [is] a law enforcement officer."

The relevant part of the provision is as follows:

"(a) Arranging for Sexual Conduct with a Minor. An actor commits the offense of arranging for sexual conduct with a minor when that actor:
(1) Knowingly arranges for a sexual act or sexual contact between:
(A) The actor and the complainant; or
(B) A third person and the complainant; and
(2) The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant; and
(3) The actor recklessly disregards that:
(A) The complainant is under 16 years of age;
(B) The complainant is under 18 years of age, and the actor knows that he or she or the third person is in a position of trust with or authority over the complainant; or
(C) The complainant purports to be a person under 16 years of age, while, in fact, the complainant a law enforcement officer.

The following example demonstrates the problem. Say the Actor is 20 years old and the complainant is an undercover police officer pretending to be 14 years of age. Notwithstanding that there is a mental state in subparagraph (3)(c) that requires that "The actor recklessly disregards that… The complainant purports to be a person under 16 years of age, while, in fact, the complainant [is] a law enforcement officer…", arguably we never get to that mental state. That's because the mental state concerning the law enforcement officer is never reached because we can't jump the hurdle, in paragraph (a)(2) that "The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant…"

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 21, 2018

SUBJECT: First Draft of Report #27, Human Trafficking and Related Statutes

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of First Draft of Report #27 - Human Trafficking and Related Statutes.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1601 (2)(D), definition of Coercion.

RCC § 22A-1601 (2)(D) states that the definition of the word "coercion" includes when a person "Take[s] or withhold[s] action as an official…" The word "official" is not defined in the text nor is it specifically addressed in the Commentary. OAG assumes that the word was chosen to refer to government action and not to the official action of a corporation or other organization. It is unclear, however, whether the term should be read broadly as "takes or withholds government action" or more narrowly as "takes or withholds District government action." Because all government action is "official, we recommend that the definition be rewritten to refer to "government action" rather than "official action." We believe that this will aid clarity.

RCC § 22A-1602, Limitations on liability and sentencing for RCC Chapter 16 offenses.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

Paragraph (b) lists the "Exceptions to Liability." It states:

> Any parent, legal guardian, or other person who has assumed the obligations of a parent who requires his or her child under the age of 18 to perform common household chores under threat of typical parental discipline shall not be liable for such conduct under sections 22A-1603, 22A-1605, and 22A-1609 of this Chapter, provided that the threatened discipline did not include:
>
> (1) Burning, biting, or cutting;
> (2) Striking with a closed fist;
> (3) Shaking, kicking, or throwing; or
> (4) Interfering with breathing.

There are a few problems with this formulation. As drafted, the paragraph implies that burning, biting, or cutting, etc. are typical forms of parental discipline.[2] Second, the term "typical" is not defined. Surely it should not mean that merely because a number of people do something harmful that it would qualify as an exception for liability. For example, just because it may be "typical" in some places for parents to neglect their child, see D.C. Code § 16-2301(9), those neglectful actions should not be an exception to liability when they are used as parental discipline. Finally, subparagraphs (1)-(4) are stated as an exclusive list. There are, however, other harms, including neglect, that a parent may typically inflict on a child that should also be excluded.[3]

RCC § 22A-1603, Forced labor or services.

Paragraph (b) establishes the penalties for the offense of forced labor or services. Though businesses can be convicted of this offense, the penalty structure is the same as for offenses that can only be charged against a person. As businesses cannot be subject to incarceration and as their collective motivation for this offense is financial, there should be a separate fine penalty structure for businesses that is substantial enough to act as a deterrent.

Paragraph (c) provides for a penalty enhancement when it is proven that "The complainant was held or provides services for more than 180 days." This sentence should be redrafted to make it clear that the enhancement should apply when the combined period of time that a person is held

[2] The paragraph can be read to say "Any parent… who requires his … child … to perform common household chores under threat of typical parental discipline shall not be liable for such conduct provided that the threatened discipline did not include… [b]urning, biting, or cutting…;" [emphasis added]

[3] Similarly, in RCC § 22A-1603 (e) the drafters use the word "ordinary." It is unclear what that term means in the context of that paragraph.

and forced to provide services – together – total more than 180 days.[4] The same comment applies to the penalty enhancement for RCC § 22A-1603 Forced commercial sex.

RCC § 22A-1607, Sex trafficking of minors.

It is unclear how the penalty provision in paragraph (b) should be read with the offense penalty enhancements in paragraph (c).[5] For example, in determining the penalty for a repeat offender who holds the complainant for more than 180days, do you apply the penalty enhancement in RCC §§ 22A-805 and then go to up one class or do you go up one class and then apply the enhancement in RCC §§ 22A-805?[6]

RCC § 22A-1608, Benefiting from human trafficking.

RCC § 22A-1608 (a)(2) states that the offense of first degree benefiting from human trafficking includes, as an element, "By participation in a group of two or more persons." It is unclear if whether this element is met when a business of two people are engaged in human trafficking. In other words, because its two people that participate is this element met? Or, because it is one business, albeit with two people, is this element not met?[7]

The Commentary to RCC § 22A-1608 (a)(2) states, "Subsection (a)(2) specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons." Subsection (a)(2) does not contain this limitation. See text in previous paragraph.

RCC § 22A-1609, Misuse of documents in furtherance of human trafficking.

RCC § 22A-1609(a)(2) includes as an element of the offense that the person or business acted "With intent to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person." [emphasis added] OAG recommends deleting the phrase "without lawful authority." The inclusion of the "without lawful authority" clause assumes that there are situations that it would be justified to, "With intent to prevent or restrict, or attempt to prevent or restrict the person's liberty to move or travel in order to maintain the labor, services,

[4] For example, the enhancement should apply to someone who holds a person in their basement for 90 days "while training them" and then forces them to provide services for the next 91 days.
[5] Paragraph (b) states, "Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both." Paragraph (c) states, "The penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, the complainant was held or provides commercial sex acts for more than 180 days."
[6] This may be a global issue that applies to all penalty provisions where there are both general enhancements and offense specific enhancements.
[7] The same questions apply to element (b)(2) in the offense of second degree benefiting from human trafficking.

or performance of a commercial sex act by that person." We submit that that would never be the case. The Commentary does not explain why the phrase "without lawful authority" is necessary.

RCC § 22A-1609, Forfeiture.

It is unclear whether the forfeiture clause in RCC § 22A-1609 follows the holding in *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (DC 1998). In that case, the government sought forfeiture of a vehicle valued at $15,500 that was owned by a person who was arrested for solicitation of a prostitute. The Court held that "the Constitution prevents the utilization of civil forfeiture as a penalty for the commission of an offense where the value of the property forfeited stands in gross disproportion to the gravity of the offense. Such a disproportion exists in the case at bar and the attempted forfeiture therefore violates the Excessive Fines Clause of the Eighth Amendment."

RCC § 22A-1613. Civil Action.

RCC § 22A-1613 permits victims of offenses prohibited by § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 may bring a civil action in the Superior Court. The provision should explicitly state that the defendant in the civil action must be a person who can be charged as a perpetrator of one of those offenses.

RCC § 22A-1613 (b) contains the following provision. "(b) Any statute of limitation imposed for the filing of a civil suit under this section shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a violation of § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 or until a minor plaintiff has reached the age of majority, whichever is later." OAG believes that a person who was a minor should have an opportunity to sue on their own behalf. As written, just as the minor was able to sue, because they reached the age of majority, they would be precluded from suing because they reached the age of majority. Instead, OAG suggests that the Commission adopt the language used in the engrossed original of B22-0021, the Sexual Abuse Statute of Limitations Amendment Act of 2018. That bill provides, "for the recovery of damages arising out of sexual abuse that occurred while the victim was less than 35 years of age— the date the victim attains the age of 40, or 5 years from 40 when the victim knew, or reasonably should have known, of any act constituting sexual abuse, whichever is later;""

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 21, 2018

SUBJECT: First Draft of Report #28, Stalking

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #28 - Stalking.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1801, Stalking.

RCC § 22A-1801(d)(4) contains the following definition, "The term "financial injury" means the reasonable monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, a member of the specific individual's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:" [emphasis added] As written, the term "specific individual" refers to the person who is doing the staking. However, the lead in language to the stalking offense contains the sentence "Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following…" [emphasis added] See RCC § 22A-1801(a)(1). Using the term "specific individual" to refer to both the perpetrator and victim would be confusing. However, given the context, OAG believes that what The Commission meant in RCC § 22A-1801(d)(4) is, "as a result of the stalking of the specific individual."

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

RCC § 22A-1801(d)(8) states that the term "significant emotional distress" means "substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling." On page 10 of the Commentary it clarifies the government's obligation by stating, "The government is not required to prove that the victim sought or needed professional treatment or counseling." OAG believes that that for the sake of clarity and to avoid needless litigation. The sentence in the Commentary should be in the text of the substantive provision in RCC § 22A-1801(d)(8).

RCC § 22A-1801(e) contains the exclusions from liability. Subparagraph (e)(3) states:

> (e) A person shall not be subject to prosecution under this section for conduct, if:
> (A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, process server, pro se litigant, or compliance investigator; and
> (B) Is acting within the reasonable scope of his or her official duties.

While it may be intuitive to understand what the official duties of a law enforcement officer, licensed private investigator, process server, and compliance investigator is within the context of this offense, it is unclear what the official duties of a pro se litigant is. Since a pro se litigant does not appear to have "official duties" (or "professional obligations," to borrow the phrase used on page 12 of the report) in the ordinary meaning of that phrase, OAG believes that the subparagraph needs to be redrafted. In addition, there are questions as to whether an attorney or journalist necessarily has "official duties" as opposed to professional obligations. Therefore, OAG recommends that this provision be redrafted as follows:

> (A) The person is a law enforcement officer, licensed private investigator, or compliance investigator and is acting within the reasonable scope of his or her official duties; or
> (B) The person is a journalist, attorney, or pro se litigant and is acting within the reasonable scope of that role.

RCC § 22A-1801(f) provides for the parental discipline affirmative defense. This defense is available to "A parent, legal guardian, or other person who has assumed the obligations of a parent engaged in conduct constituting stalking of the person's minor child…" However, there are situations when this defense should not be given to a parent or legal guardian. For example, a parent or legal guardian may abuse their child and loose visitation rights or be subject to court orders limiting the person's contact with the child. The actions of these people in violating the provisions of RCC § 22A-1801 (a) may actually constitute stalking and, as such, these people should be subject to this offense.[2] RCC § 22A-1801(f) should be redrafted to ensure that

[2] RCC § 22A-1801(a) provides that a person commits stalking when that person:

"(1) Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following:

(A) Physically following or physically monitoring;

(B) Communicating to the individual, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, after knowingly having

parents, legal guardians, or other people who have assumed the obligations of a parent can only avail themselves of this offense when they are exercising legitimate parental supervision and not when their rights are limited or nonexistent.

received notice from the individual, directly or indirectly, to cease such communication; or

(C) In fact: committing a threat as defined in § 22A-1204, a predicate property offense, a comparable offense in another jurisdiction, or an attempt to commit any of these offenses…"

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 21, 2018

SUBJECT: First Draft of Report #30, Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #30 - Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 213, Withdrawal defense to legal accountability

RCC § 213 states that it as affirmative defense to a prosecution when

> a defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:
> (1) Wholly deprives his or her prior efforts of their effectiveness;
> (2) Gives timely warning to the appropriate law enforcement authorities; or
> (3) Otherwise makes proper efforts to prevent the commission of the offense.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

The RCC does not define the phrase "proper efforts." The Commentary does note, "This catchall "proper efforts" alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably calculated towards disrupting it. This standard should be evaluated in light of the totality of the circumstances." [internal footnotes omitted] Neither the RCC nor the Commentary, however, explain the parameters of this defense. For example, it is unclear if the phrase "proper efforts" is meant to be broader, narrower, or the same as "reasonable efforts." The RCC should give more guidance on the applicability of this defense.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	March 1, 2019
Re:	Comments on First Draft of Report No. 31, Escape from Institution or Officer

PDS has the following comments about the RCC offense of Escape from Institution or Officer.

1. PDS recommends defining the term "custody" in subsection (c) of the statute. The commentary, citing *Davis v. United States*,[1] explains that "'[c]ustody' requires a completed arrest; there must be actual physical restraint or submission of the person to arrest."[2] Because of the range of interactions that law enforcement can have with persons on the street that fall short of custody, it is important for the statute to be as clear as possible about when leaving the presence of law enforcement crosses the line to becoming criminal "escape." Specifically, PDS recommends the following definition:

   > Lawful custody exists where a law enforcement officer has completed an arrest, substantially physically restrained a person, or where the person has submitted to a lawful arrest.

   This definition is supported by *Davis* and by *Mack v. United States*.[3] While completed arrest is not necessary for custody, fleeting or minor physical contact between an arresting officer and the individual does not qualify as custody for the purposes of escape. For example, in *Davis*, a law enforcement officer walked behind the defendant, grabbed the back of his pants and his belt and then unsnapped the handcuff case on his utility belt in order to handcuff the defendant. The defendant turned around, shoved the officer and took off running. On these facts, the Court of Appeals held that the officer did not have "sufficient physical control over appellant for him to be 'in custody' at the time of the purported escape."[4] Rather, custody for the escape statute requires some manifestation of physical restraint. In *Mack v. United States*, grabbing the

[1] 166 A.3d 944 (D.C. 2017).

[2] Report #31, page 4.

[3] 772 A.2d 813 (D.C. 2001).

[4] *Davis*, 166 A.3d at 949.

defendant, picking him up, and throwing him to the ground showed sufficient physical restraint. In *Mack*[5], the Court of Appeals announced its intention to follow the "physical restraint legal principle" from a line of cases from other jurisdictions that stand for the proposition that custody exists where there a person's liberty of movement is successfully restricted or restrained."[6] That liberty has been substantially, albeit briefly, restrained should be reflected in the definition.

2. PDS recommends that the offense be rewritten to clarify that a person escapes the "custody" of a law enforcement officer and escapes the "confinement" of a correctional facility. Given the definition of "custody," at least in the commentary and, if PDS's first recommendation is accepted, in the RCC statutory definitions, it does not make sense for the second element to be framed in terms of "custody", to wit "failing to return to custody," or "failing to report to custody." Even with respect to "leaving custody," the term only makes sense in the context of leaving the custody of law enforcement, because correctional facilities do not "physically restrain" persons "pursuant to a [lawful] arrest."

3. PDS recommends restructuring the penalties to better reflect the relative seriousness of the criminal conduct. RCC § 22E-3401(b) currently proposes to grade "leaving custody" as first-degree escape and "failing to return to custody" and "failing to report to custody" as second-degree escape. Leaving the custody of a law enforcement officer is not as serious as leaving the confinement of a correctional facility such as the DC Jail. Therefore, PDS recommends grading the latter as first-degree and grading the former, along with failing to return and failing to report, as second-degree.

4. PDS opposes mandating consecutive sentencing for this offense. PDS supports maximizing judicial discretion with respect to sentencing to allow the sentence (punishment) to fit the specific offense and specific offender. The conduct of a person who escapes from the DC Jail where he is confined to serve a sentence is more serious than the conduct of a person who is on probation and escapes from the lawful custody of a law enforcement officer on the street.[7] As drafted, RCC § 22E-3401 would mandate consecutive sentencing in both instances. Whether either or neither scenario would warrant consecutive sentencing should depend on a number of

[5] *Mack*, 772 A.2d at 817.

[6] *Medford v. State*, 21 S.W.3d 668, 669 (Tex. App. 2000), cited by *Mack*, 772 A.2d at 817.

[7] Report #31 does not explain what it means to "serve a sentence" and therefore leaves open the possibility that a person who was "sentenced" to probation would be considered to be "serving a sentence" when he encounters a police officer on the street. *Veney v. United States*, 738 A.2d 1185 (D.C. 1999), cited in footnote 58 at page 9 of Report #31, does not answer the question. In that case, Mr. Veney "while being detained by police …slipped out of the police station." *Id*. at 1190. As the Court noted, "Even if the term 'prisoner' is read broadly to include all persons detained by the police [as the government argued], the statute still requires, as a second element, an original sentence." *Id*. at 1199. Because at the time Mr. Veney was in police custody, he had not been "tried and convicted," the Court concluded that he was not "under an original sentence, or any sentence as far as the record shows" and therefore the mandatory consecutive sentencing provision did not apply. *Id*.

factors, but the unquestionable difference in severity of the two scenarios argues strongly in favor of judicial discretion at sentencing.

Accordingly, PDS recommends rewriting subsections (a) and (b) of RCC § 22E-3401 as follows:

(a) *Escape from Institution or Officer*. A person commits escape from institution or officer when that person:
  (1) In fact:
    (A) Is subject to a court order that authorizes the person's confinement in a correctional facility; or
    (B) Is in the lawful custody of a law enforcement officer of the District of Columbia or of the United States; and
  (2) Knowingly, without the effective consent of the correctional facility or law enforcement officer:
    (A) Leaves confinement ~~custody~~;
    (B) Fails to return to confinement ~~custody~~; ~~or~~
    (C) Fails to report to confinement ~~custody~~; or
    (D) Leaves custody.

(b) *Gradations and Penalties*.
  (1) *First Degree.* A person commits first degree escape from institution or officer when that person violates subsection (a)(2)(A). First degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree.* A person commits second degree escape from institution or officer when that person violates subsection (a)(2)(B), ~~or~~ (C) or (D). Second degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  ~~(3) *Consecutive Sentencing*. If the person is serving a sentence at the time escape from institution or officer is committed, the sentence for escape from institution or officer shall run consecutive to the sentence that is being served at the time of the escape from institution or officer.~~

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	March 1, 2019
Re:	Comments on First Draft of Report 32, Tampering with a Detection Device

The Public Defender Service makes the following comments on Report #32, Tampering with a Detection Device.

1. Pursuant to RCC § 22E-3402(a)(2)(B) a person commits tampering with a detection device when she or he "alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so." The terms alter and mask appear to be redundant of "interfere with the operation of the detection device." The commentary provides that "alter" means to change the device's functionality, not its appearance, and that "mask" means changing the device's detectability, not its appearance.[1] Under those definitions, masking and altering are means of interfering with the operation of the device. The operation of the device, since its purpose is to monitor the individual wearing it, necessarily includes detection and function. However, by including mask and alter in the statute, but placing the definitions for those terms only in the commentary, the terms appear to criminalize something other than interference with the operation of the device. An individual looking at the statute could come to the conclusion that altering includes decorating or vandalizing the device and that masking means covering from view. For simplicity and clarity, PDS recommends that the RCC remove mask and alter from the statutory language. Clarity in the statutory language itself rather than the commentary would be particularly helpful in this instance as it is easy to imagine that this statute would be read by the court or supervision officers to individuals who are required to wear detection devices.

[1] Report #32, page 4.

2. The commentary for RCC § 22E-3402 states that "'interfere' includes failing to charge the power for the device or allowing the device to lose the power required to operate."[2] For clarity and to assist any reader, PDS recommends that the commentary specifically mention the applicable *mens rea* in the failure to charge language. Failure to charge is a common infraction for individuals wearing detection devices in part because the charging requirements are onerous for individuals without secure housing. Under current practice, the failure to charge often results in an admonishment from the court rather than a new criminal charge. PDS does not believe the Commission intends to change that practice and does not expect that RCC § 22E-3402 as written necessarily would. However, the RCC should recognize that practitioners may sometimes only quickly read the commentary before advising individuals about pleas or the strength of the government's case. Therefore, for the sake of clarity and out of an abundance of caution, PDS recommends that the commentary state that failing to charge a detection device falls within the scope of interference only when it is done with the conscious desire to cause the device to fail.[3]

   PDS recommends adding the following language to the commentary:

   "Interfere" includes failing to charge the power for the device or allowing the device to lose the power required to operate <u>when done purposely, meaning with the conscious desire to interfere with the operation of the device</u>.

3. RCC § 22E-3402(a)(1) should specify that the defendant is required to wear a detection device as a result of an order issued in relation to a D.C. Code offense or by a judge in D.C. Superior Court. The offense should not reach violation of court orders imposed by other jurisdictions, where the District has no role in ensuring the fulfillment of due process protections for defendants or control over the underlying statutes that allowed for the placement of a detection device.

4. PDS suggests the modifications below.

RCC § 22E-3402. <u>Tampering with a Detection Device.</u>

(a) *Tampering with a Detection Device*. A person commits tampering with a detection device when that person:
   (1) Knows he or she is required to wear a detection device <u>pursuant to a D.C. Code offense or order issued by a judge of the Superior Court of the District of Columbia</u> while:
      (A) Subject to a protection order;
      (B) On pretrial release;
      (C) On presentence or predisposition release;

[2] Report #31, page 4.

[3] See RCC § 22A-206(a).

(D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or

(E) On supervised release, probation, or parole; and

(2) Purposely:

(A) Removes the detection device or allows an unauthorized person to do so;

(B) ~~Alters, masks, or i~~Interferes with the operation of the detection device or allows an unauthorized person to do so.

(b) *Penalties*. Tampering with a detection device is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:

(1) The terms "knows" and "purposely" have the meaning specified in § 22E-206; and

(2) The term "detection device" means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology; and

(3) The term "protection order" means an order issued pursuant to D.C. Code § 16-1005(c).

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	March 1, 2019
Re:	Comments on First Draft of Report 33, Correctional Facility Contraband

The Public Defender Service makes the following comments on Report #33, Correctional Facility Contraband.

1. RCC § 22E-3403(c)(5) includes halfway houses within the definition of "correctional facility." PDS objects to this expansion of the definition of correctional facility and requests that halfway houses be removed from the definition. Many of the concerns about possession of contraband inside of a jail or secure juvenile facility are not applicable to halfway houses. For instance, the possession of handcuff keys, hacksaws, and tools for picking locks and bypassing doors are not a realistic concern in halfway houses where individuals already have a degree of freedom and access to the outside. RCC § 22E-3403(c)(6)(K) prohibits the possession of a correctional officer's uniform, law enforcement uniform, medical staff clothing and any other uniform. It is certainly common for individuals in halfway houses to work at jobs that require uniforms. Those individuals should be able to keep their uniforms at the location where they may be housed for months. RCC § 22E-3403(c)(6)(C) prohibits the possession of flammable liquid – meaning a lighter. A person who lawfully smokes cigarettes while outside of the halfway house should not be subject to a separate criminal offense for returning to the halfway house at the end of a day of work with a lighter.

   Further, the possession of controlled substances inside a halfway house is not dissimilar from possession of controlled substances in the community. There is little difference between a halfway house resident who possesses a controlled substance across the street from the halfway house and a halfway house resident who possesses a controlled substance inside the halfway house for personal use. Since individuals at halfway houses typically have regular and unsupervised access to the community, there are not the same concerns about a coercive or violent drug trade taking root inside a halfway house as in the setting of complete confinement. Rather than expanding the criminal offense of correctional facility contraband to include halfway houses, under the RCC, possession or distribution of

unlawful items in a halfway house should be prosecuted under the general statutes applicable to all individuals. Possession of items listed in RCC § 22E-3403 and other rule-violating behaviors while in a halfway house will still be punished, either as a criminal offense that applies equally in the community or by remand to the D.C. Jail for failure to comply with halfway house rules.

2. PDS recommends the following changes to RCC § 22E-3403 (d), exclusions from liability, to ensure that the medical exclusion covers each instance that lawyers, investigators, social workers, experts and other professionals carry otherwise prohibited items to secure facilities for their health and safety.

(d) Exclusions from Liability.

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

(2) A person does not commit correctional facility contraband when the item:

(A) Is a portable electronic communication device used by an attorney during the course of a legal visit; or

(B) Is a controlled substance, <u>syringe, needle, or other medical device that is prescribed to the person and for which there is a medical necessity to access immediately or constantly</u>.

PDS recommends adding explanatory language to the commentary that section (d)(2)(B) applies to medicines and medical devices necessary to treat chronic, persistent, or acute medical conditions that would require constant or immediate medical response such as diabetes, severe allergies, or seizures.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 1, 2019

SUBJECT: First Draft of Report #31, Escape from Institution or Officer

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #31 - Escape from Institution or Officer.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3401. Escape from Institution or Officer.

OAG suggests that the RCC § 22E-3401 be amended to specifically state that a person commits the offense of Escape from Institution or Officer when that person, in fact, leaves, a correctional facility without effective consent when that person "Is committed to the Department of Youth Rehabilitation Services and is placed in a correctional facility."

RCC § 22E-3401 (a) provides that:

> (a) *Escape from Institution or Officer*. A person commits escape from institution or officer when that person:
> (1) In fact:
> (A) Is subject to a court order that authorizes the person's confinement in a correctional facility; or

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(B) Is in the lawful custody of a law enforcement officer of the District of Columbia or of the United States; and

(2) Knowingly, without the effective consent of the correctional facility or law enforcement officer:

(A) Leaves custody;

(B) Fails to return to custody; or

(C) Fails to report to custody.

According to the Commentary, this offense replaces D.C. Code § 22-2601, Escape from institution or officer, and D.C. Code § 10-509.01a. Unlike D.C. Code § 22-2601,[2] RCC § 22E-3401 does not specifically state that it is an offense to escape from, "An 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."[3] Unlike in when a person is detained in adult cases or in pre-adjudicated juvenile cases, a juvenile who is committed to the Department of Youth Rehabilitation Services (DYRS) is not detained, "subject to a court order" nor is a DYRS staffer or contractor necessarily a "law enforcement officer of the District of Columbia." While in a disposition hearing, a judge may commit a juvenile to DYRS, the judge does not have the authority to order that the respondent be confined. The confinement decision for juveniles is vested solely in DYRS.[4]

The Criminal Code Amendment Act of 2010 amended D.C. Code § 22-2601 to add to that offense the situation where a youth escaped from, "An 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." On page 14 of the Committee Report, the Council explained, in relevant part, that this language:

[2] D.C. Code § 22-2601, Escape from institution or officer, states:

(a) No person shall escape or attempt to escape from:

(1) Any penal or correctional institution or facility in which that person is confined pursuant to an order issued by a court of the District of Columbia;

(2) The lawful custody of an officer or employee of the District of Columbia or of the United States: or

(3) An 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.

(b) Any person who violates subsection (a) of this section shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, said sentence 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.

[3] OAG understands that the Commission meant for this offense to cover escapes from DYRS placements and it acknowledges that the Commentary states that the "word 'authorizing' makes clear that an order permitting a custodial agency to choose a secured or unsecured residential placement is sufficient."

[4] See generally, D.C. Code § 16-2320 (c)(2), *In Re P.S.*, 821 A.2d 905 (D.C. 2003), and In re J.M.W., 411 A.2d 345, 348 (D.C. 1980).

> Amends D.C. Code § 22-2601 (escape) to include persons committed to the Department of Youth Rehabilitation Services (DYRS). This amendment will close a loophole. Under current law, it is illegal for a youth to escape or attempt to escape from a DYRS facility pre-disposition because he or she is confined pursuant to a court order. It is also illegal for a youth to escape while in transit because he or she will be in the lawful custody of an officer of the District of Columbia or the United States. It is not illegal, however, for the same youth to escape or attempt escape from a DYRS facility after he or she has been adjudicated delinquent because, first, a court order committing a youth to DYRS is not a court order to confine that person in an institution or facility. DYRS makes the decision whether to place the youth in an institution or facility. Second, a youth committed to DYRS who is placed in a contract facility is not necessarily "in the lawful custody of an officer or employee of the District of Columbia or the United States."

Given the history of the amendments to this offense and the Council's rational for them, the Commission's mandate to use language in the recommendations that are clear and plain [5], and to avoid needless litigation, OAG suggests that RCC § 22E-3401 (a) (1) be amended to add a paragraph (C) which states, "Is committed to the Department of Youth Rehabilitation Services and is placed in a correctional facility."

OAG recommends that the definition of "correction facility" be amended to clarify that it includes DYRS congregate care facilities for purposes of the proposed escape statute. RCC § 22E-3401 (c) defines the term "correction facility." It states that the term means:

> (A) 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;
> (B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
> (C) 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.

> Subparagraphs (A) and (C) use the term "secure confinement." Subparagraph (B) does not. The Commentary states that subparagraph (B) is meant to apply only to adult facilities, such as halfway houses.[6] The juvenile version of a halfway house is called a shelter house, when a delinquent youth is placed there pre-adjudication, and a group home, when a youth is placed there post-adjudication. Youth are also placed in congregate care, halfway house like settings, in some residential placements. All of these congregate care facilities are staff

[5] See D.C. Code § 3-152 (a)(1) which states that the comprehensive criminal code reform recommendations "use clear and plain language."
[6] See page 6 of the commentary.

secure. Under current law, youth who leave a shelter house or group home placements without consent have committed an escape.[7]

OAG recommends that RCC § 22E-3401 (c)(4)(C) be amended so that the definition of "correctional facility" explicitly includes DYRS congregate care facilities.[8] One way that the Commission could do this is to amend this definition to read as follows, "(C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the hardware secure or staff secure confinement of persons committed to the Department of Youth Rehabilitation Services."

[7] Youth who leave shelter houses, or a shelter care placement, without consent violate court orders. Therefore, they are guilty of escaping from a "penal or correctional institution or facility in which that person is confined pursuant to an order issued by a court of the District of Columbia." See D.C. Code § 22-2601(a)(1). Committed youth who leave group homes, or other congregate care facilities, without consent are also guilty of escape because they left "An 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." See D.C. Code § 22-2601(a)(3).

[8] OAG is not suggesting that a youth who leaves any DYRS placement be guilty of escape. Just as the Commentary notes that for adults "the definition [of a correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs…", for youth, the definition should exclude family placements, foster care placements, and independent living programs.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 1, 2019

SUBJECT: First Draft of Report #32 - Tampering with a Detection Device

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #32 - Tampering with a Detection Device.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3402. Tampering with a Detection Device.

RCC § 22E-3402 (a)(1) specifies that for criminal liability to attach the person must know that he or she is required to wear a detection device while:

(A) Subject to a protection order;
(B) On pretrial release;
(C) On presentence or predisposition release;
(D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or
(E) On supervised release, probation, or parole

Persons who are in the juvenile justice system may be required to wear a detection device while awaiting trial and placed in a shelter house or shelter care facility. These people are not on

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

pretrial or predisposition release, nor are they incarcerated or committed to the Department of Youth Rehabilitation. RCC § 22E-3402 (a)(1) should be amended to make it clear that it applies to people who are required to wear detention devices while placed in a shelter house or in shelter care facility.

There is a separate issue with the phrasing RCC § 22E-3402 (a)(1)(D). It states, "Incarcerated or committed to the Department of Youth Rehabilitation Services." While OAG believes that the Commission meant that the word "incarcerated" pertain to adults in the criminal justice system and "committed" pertain to persons in the juvenile justice system, the phrasing is ambiguous. As drafted, it is not clear whether the phrase "to the Department of Youth Rehabilitation Services" modifies just the word "committed" or whether it modifies the word "incarcerated" also. To ensure that this phrase is correctly interpreted, OAG suggests that this subparagraph be changed to read, "committed to the Department of Youth Rehabilitation Services or incarcerated."

RCC § 22E-3402 (a) states that a person commits tampering with a detection device when that person is required to wear a detection device, in specified circumstances, and the person, "(2) Purposely… (B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so."

Although the Commentary suggests what the terms "alter," "mask," and "unauthorized person" are intended to mean, those definitions need to be included in the statute because they are not apparent from the current language nor from the words' dictionary definitions. On page 4 of the Report, in the Commentary, it states:

> Subsection (a)(2)(B) prohibits altering the operation of the device, masking the operation of the device, interfering with the operation of the device, and allowing an unauthorized person to do so. "Alter" means changing the device's functionality, not its appearance. "Mask" means changing the device's detectability, not its appearance. "Interfere" includes failing to charge the power for the device or allowing the device to lose the power required to operate. An unauthorized person is a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device.

Just as RCC § 22E-3402 (c) states the definitions for the terms "knows", "purposely", "detection device", and "protection order", all terms used in this offense, so that the reader can easily understand the scope of the provision, subparagraph (c) should also list the definitions for "mask", "interfere", and "unauthorized person." These are terms that go to the heart of the offense.

There is a separate issue as to the definition of an "unauthorized person." As noted above the Commentary limits this phrase to "a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device." [emphasis added] However, RCC § 22E-3402 (a)(1)(D) also brings under the scope of this offense the unauthorized

tampering of a detection device that a person is required to wear by the Department of Youth Rehabilitation Services. The definition of an unauthorized person should be amended to include that agency.

As noted above, RCC § 22E-3402 (a) states that a person commits tampering with a detection device when that person is required to wear a detection device, in specified circumstances, and the person, "(2) Purposely… (B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so." It is unclear from the text of the offense whether the phrase "with the operation of" only modifies the word "interferes" or whether it modifies the words "alters" and "mask" as well. In other words, subparagraph (B) can either be read to mean, "Interferes with the operation, alters, or masks the detection device" or "alters the operation of the detention device, masks the operation of the detention device, or interferes with the operation of the detention device."[2] The provision should be redrafted to make clear which interpretation is correct.[3]

[2] In pointing out the ambiguity in the way the offense language is written, OAG acknowledges that in the Commentary, as noted on the previous page of this memo, it states "Subsection (a)(2)(B) prohibits altering the operation of the device, masking the operation of the device, interfering with the operation of the device, and allowing an unauthorized person to do so." That language should appear in the text of the offense.

[3] D.C. Code § 22-1211, the current tampering with a detection device provision, does not explicitly tether "masking" or "interfering" to the operation of the device. Section 22-1211(a) states:

> (A) Intentionally remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device;
>
> (B) Intentionally allow any unauthorized person to remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device; or
>
> (C) Intentionally fail to charge the power for the device or otherwise maintain the device's battery charge or power.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 1, 2019

SUBJECT: First Draft of Report #33, Correctional Facility Contraband

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #33 - Correctional Facility Contraband.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3403. Correctional Facility Contraband

RCC § 22E-3403 provides that a person commits correctional facility contraband when they knowingly bring a prohibited item into a correctional facility without the effective consent of a specified individual. Subparagraph (c) (6) RCC § 22E-3403 (6) defines "Class A contraband" and RCC § 22E-3403 (c) (7) defines Class B contraband. The term "correctional facility" is defined in RCC § 22E-3403 (c)(5).

"Class A Contraband" means:

(A) A dangerous weapon or imitation dangerous weapon;
(B) Ammunition or an ammunition clip;
(C) Flammable liquid or explosive powder;

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;
(E) A shank or homemade knife;
(F) Tear gas, pepper spray, or other substance capable of causing temporary blindness or incapacitation;
(G) A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;
(H) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;
(I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool capable of cutting through metal, concrete, or plastic;
(J) Rope; or
(K) A correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, or any other uniform.

"Class B contraband" means:

(A) Any controlled substance listed or described in [Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01];
(B) Any alcoholic liquor or beverage;
(C) A hypodermic needle or syringe or other item that can be used for the administration of a controlled substance; or
(D) A portable electronic communication device or accessories thereto.

The term "correctional facility" is defined in RCC § 22E-3403 (c) (5). It states that "correctional facility" means:

(A) 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;
(B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
(C) 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.

Subparagraphs (A) and (C) use the term "secure confinement." Subparagraph (B) does not. The Commentary states "With the exception of halfway houses, the definition [of correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs."[2] The juvenile version of a halfway house is called a shelter house, when a delinquent youth is placed there pre-adjudication, and a group home, when a youth is placed there post-adjudication. Youth are also placed in congregate care, halfway house like settings, in some residential placements. All of these congregate care facilities are staff secure. Just as it

[2] See page 7 of the Commentary.

dangerous for adults to bring Class A contraband (e.g. dangerous weapons, explosive powder, and shanks) and Class B contraband (controlled substances and hypodermic needles) into halfway houses, it is dangerous for persons charged as juveniles to bring those items into DYRS congregate care facilities.[3]

One way that the Commission could amend the Correctional Facility Contraband offense, to include DYRS congregate care facilities, is to amend RCC § 22E-3403 (c) (5) (C) to read, "Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the hardware secure or staff secure confinement of persons placed by the Department of Youth Rehabilitation Services."[4]

As mentioned above, the definition of Class B contraband includes "(D) A portable electronic communication device or accessories thereto."[5] The definition of "accessories" mentioned in the Commentary, drawn from an earlier Council committee report, should be incorporated into the definitions section of the proposed statutory language if it's intended to be controlling. OAG suggests that subparagraph (D) be redrafted to say, "A portable electronic communication device, chargers, batteries, or other accessories thereto."

RCC § 22E-3403 (e) establishes the facility's authority to detain a person. OAG has two suggestions on how to amend this provision. RCC § 22E-3403 (e) states:

> *Detainment Authority*. If there is probable cause to suspect a person of possession of contraband, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a police officer with the Metropolitan Police Department.

Page 6 of the report says subsection (e) of the proposed statute "limits the correctional facility's authority to detain a person on suspicion <u>of bringing contraband</u> to a period of two hours." [emphasis added] However, subsection (e) does not refer to suspicion of bringing contraband into a facility, the offense described in subsection (a)(1). It refers to suspicion of possessing contraband by someone confined to a correctional facility, something prohibited only in (a)(2). There is no reason, however, to limit the amount of time someone can be detained, for possessing contraband in violation of (a)(2) because that person is already "someone confined to a correctional facility." OAG suggests that the text of RCC § 22E-3403 (e) be amended so that it covers persons who bring

[3]OAG is not suggesting that youth who bring contraband into all Department of Youth Rehabilitation Services (DYRS) be guilty of this offense. Just as the Commentary notes that for adults "[the definition of a correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs…", for youth, the definition should exclude family placements, foster care placements, and independent living programs.

[4] The Commentary should then make it clear that the phrase "placed by the Department of Youth Rehabilitation Services" includes situations where DYRS places the person in a facility pre-adjudication, pursuant to a court order, as well as after commitment to that agency.

[5] See RCC § 22E-3403 (c)(7)(D).

contraband into the facility (and, therefore, is consistent with the explanation in the Commentary).

The detainment authority in RCC § 22E-3403 (e) specifically states that the head of the facility "may detain the person… pending surrender to a police officer with the Metropolitan Police Department" (MPD). For the following reasons, OAG suggests that this provision be amended to say "law enforcement" rather than MPD.

D.C. Code § 10-509.01 authorizes the Mayor to designate any employee of the District of Columbia to act in a law enforcement capacity at the property which includes the current site of New Beginnings, in Laurel, Maryland.[6] In addition, for a period of time ending in 2002, the Department of Human Services, Youth Services Administration (the predecessor to the District's Department of Youth Rehabilitation Services) had an MOU with U.S. Park Police (USPP), pursuant to authority granted to it by the Mayor, obligating USPP to enforce the laws and regulations at the Oak Hill Youth Facility (now the site of New Beginnings). There is no reason why RCC § 22E-3403 (e) should limit the Mayor's authority to designate which law enforcement agency has responsibility for investigating and arresting people at this location.

OAG recommends that, pursuant to the two suggestions noted above, the Commission redraft this provision to state

> Detainment Authority. If there is probable cause to suspect a person who is not confined to the facility of possessing or bringing contraband into the facility, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a law enforcement officer.

[6] This authority was granted to the Mayor by Congress in 1956. See 70 Stat. 488, ch. 508, § 1.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 1, 2019

SUBJECT: First Draft of Report #34, De Minimis Defense

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #34 - De Minimis Defense.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 215. DE MINIMIS DEFENSE.

RCC § 215 provides for an affirmative defense to all misdemeanor and certain felony offenses. Currently, District law does not provide for a "defense for those actors whose conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction." See the Commentary on page 8. This provision states:

> (a) De Minimis Defense Defined. It is an affirmative defense to any misdemeanor or a Class 6, 7 or 8 felony that the person's conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances.
>
> (b) Relevant Factors. In determining whether subsection (a) is satisfied, the factfinder shall consider, among other appropriate factors:

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(1) The triviality of the harm caused or threatened by the person's conduct;

(2) The extent to which the person was unaware that his or her conduct would cause or threaten that harm;

(3) The extent to which the person's conduct furthered or was intended to further legitimate societal objectives; and

(4) The extent to which any individual or situational factors for which the person is not responsible hindered the person's ability to conform his or her conduct to the requirements of law.

(c) Burden of Proof. The defendant has the burden of proof and must prove all requirements of this affirmative defense by a preponderance of the evidence.

While OAG appreciates the value of some protection from convictions based upon de minimis behavior, we are not entirely clear how this defense is supposed to work and want to make sure that it is not used improperly as a way to argue for and obtain jury nullification. In particular, at least three aspects of this defense seem unclear:

(1) Are the expressly identified factors the factfinder must consider to be treated as pure questions of fact, or are any of them partially questions of law (e.g., whether a particular societal objective is "legitimate")?

(2) When a de minimis defense is raised, how does a judge decide what evidence can be excluded, given that the factfinder can consider seemingly anything that the factfinder thinks goes to blameworthiness? Can the judge make some decision on what constitutes relevant evidence of blameworthiness notwithstanding this expansive factfinder discretion – and if so, based on what?

(3) Suppose a de minimis defense is raised and then rejected by the jury. Assuming the jury instructions were proper, could the jury's rejection of that defense be challenged – and if so, what criteria would a reviewing court deploy?

These questions are especially significant because the proposal here – notably broader than many of the laws the Report cites from other jurisdictions – is very different from the court's power to govern its proceedings in the interest of judicial economy, a comparison the report repeatedly seeks to make. The proposal goes to the fundamental question of whether someone really deserves to be convicted of a crime.

OAG is particularly concerned about how this affirmative defense will operate as it only prosecutes adult misdemeanor offenses and some of these offenses are fine only or carry the penalty of fine or jail time. We are concerned that this provision will encourage jury

nullification of appropriate prosecutions, which is not encouraged in the District.[2] To put this another way, any de minimis defense provision has to be crafted in such a way that it is clear to the trier of fact that there must be something special concerning the individual circumstances of a defendant's actions when he or she commits an offense and not that the offense itself only criminalizes behavior that the trier of fact may believe is in and of itself, de minimis. It is up to the legislature to determine what behavior is criminal; the trier of fact should not be able to second guess that determination. OAG will continue to work with the Commission to try and craft an appropriate provision.

OAG does have one suggestion, however, at this point. To ensure that this defense is appropriately applied, RCC § 215 should include a requirement that in bench trials the judge must issue a written opinion stating his or her reasoning in determining that the requirements of this defense is met.

[2] As the Court stated in *Reale v. United States*, 573 A.2d 13 (D.C. 1990), at 15, "The common-law doctrine of jury nullification permits jurors to acquit a defendant on the basis of their own notion of justice, even if they believe he or she is guilty as a matter of law. *Watts v. United States*, 362 A.2d 706, 710 (D.C. 1976). While we cannot reverse such an acquittal, see *Fong Foo v. United States*, 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962), we do not encourage jurors to engage in such practice. Thus, we have upheld convictions in cases where, as here, the trial court instructs the jury that it is obligated to find the defendant guilty if the government meets all the elements of the charged offense. *Watts*, supra, 362 A.2d at 710-11."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: March 1, 2019

SUBJECT: Second Draft of Report #9, Recommendations for Theft and Damage to Property Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's Second Draft of Report #9, Recommendations for Theft and Damage to Property Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-2101, Theft

In the Commentary, on page 6, it says, "…non-violent pickpocketing or taking property from the immediate actual possession of another person is no longer subject to a penalty enhancement for the presence or use of a dangerous weapon or for the status of the complainant." [emphasis added] The Commentary does not explain how the "use of a dangerous weapon" can be classified as non-violent. On page 7 of the Commentary, however, it states, "In addition, any actual use or display of a dangerous weapon during the taking would constitute robbery under the RCC." OAG suggests that for the sake of clarity, these two comments be joined as follows, "…non-violent pickpocketing or taking property from the immediate actual possession of

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

another person is no longer subject to a penalty enhancement for the presence or use of a dangerous weapon, as the use or display of the weapon during the taking would constitute robbery under the RCC." The Commentary would then have a separate sentence explaining how the provision deals with the status of the complainant.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	April 11, 2019
Re:	Comments on First Draft of Report No. 35, Cumulative update to sections 201-213 of the Revised Criminal Code

PDS has the following comments about causation, RCC § 22E-204.

PDS has concerns that as drafted, the legal cause requirement in RCC § 22E-204(c) is vague and leaves juries ill-equipped to apply a defined legal standard to the facts of a case. Under RCC § 22E-204, a person's conduct is the legal cause of a result if the result is *not too unforeseeable* in its manner of occurrence and *not too dependent* upon another's volitional conduct to have a *just bearing* on the person's liability. The terms "not too dependent" and "not too unforeseeable" are indeterminate and are not further defined within causation or elsewhere in the RCC or commentary. And the term "just bearing" injects a completely subjective element of moral judgment that would lead to arbitrary and unpredictable results.

The current language raises issues of vagueness, fair notice, and arbitrariness that would likely run afoul of the Due Process Clause. Because RCC § 22E-204(c) does not indicate what it means for something to be "not too unforeseeable" or "not too dependent upon another's volitional conduct to have a just bearing," "lower courts would be left to guess." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014). In *Burrage*, the Supreme Court rejected an analogous causation standard that would "exclude[]causes that are 'not important enough' or '*too insubstantial*.'" *Id.* (emphasis added) (citation omitted). Recognizing that no one could definitively say what it means for a cause to be "too insubstantial," the Court held that "[u]ncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Id.* Given the Supreme Court's rejection of a "too insubstantial" causation standard as unconstitutional, it is highly likely that the phrases "not too unforeseeable . . . and not too dependent . . . to have a just bearing" would be unconstitutional as well. *See id.*; *see also Seward v. Minneapolis Ry. Co.*, 25 N.W.2d 221, 224 (Minn. 1946) (rejecting vague "substantial factor" test because it "leave[s] the jury afloat without a rudder," "would leave a jury free to include remote causes or conditions as proximate causes and to decide the case according to whim rather than law"). Other precedent adds to this concern. In *Kolender v. Lawson*, 461 U.S. 352, 360 (1983), the Supreme Court considered a California statute that required individuals to

provide, when stopped by police, identification that was "credible and reliable," and that provided a "reasonable assurance of its authenticity." The Supreme Court found this statute – which is considerably more descriptive than "not too unforeseeable" and "not too dependent" to be void for vagueness. The language, without standards or precise definitions, left complete enforcement discretion to police. *Id*. at 361; *see also Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law."). Similarly, in the context of punitive damages awards, the Supreme Court has held that due process requires states to provide a legal standard that "will cabin the jury's discretionary authority." *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007). Otherwise, a "punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose'; [and] it may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'" *Id.* (citations omitted). The concepts of "not too unforeseeable" and "not too dependent" to have a "just bearing" require law enforcement and jurors to proceed on a personal and highly subjective notion of fairness rather than a clear legal standard. Legal scholars have criticized a "just bearing" standard of causation for this reason. *See, e.g.*, Don Stuart, *Supporting Gen. Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective*, 4 Buff. Crim. L. Rev 13, 43 (2000) ("There is also reason to be concerned at the vagueness of the 'just bearing' formulation. Although nobody has been able to suggest a totally satisfactory approach; lawyers and triers of fact need a more workable test."); George P. Fletcher, *Dogmas of the Model Penal Code*, 2 Buff. Crim. L. Rev 3, 6 (1998) ("Including the word 'just' in this proviso, of course, leaves all the difficult problems unresolved, and therefore the attempted verbal compassing of the concept turns out to be words with little constraining effect.").

PDS agrees that the underlying purpose of the doctrine of legal causation is fairness, but that purpose should be served by the development of clear, definitive standards rather than an open appeal to the factfinder decide a case based on subjective moral intuition. While some jurists have described legal causation in terms such as "a rough sense of justice,"*Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 352 (1928) (Andrews, J., dissenting), these descriptions are generally pejorative rather than aspirational, *see id.* at 354 ("We draw an uncertain and wavering line, but *draw it we must as best we can*. Once again, it is all a question of fair judgment, always keeping in mind the fact that *we endeavor to make a rule in each case that will be practical* and in keeping with the general understanding of mankind." (emphasis added)). And in light of the constitutional concerns described above, such an open appeal to a sense of fairness is not a viable legal framework.

Moreover, a jury's sense of what is "just" would likely be skewed by entirely arbitrary and inappropriate factors. For example, a jury may be unaware that a defendant charged with a result-element offense could be charged and convicted of different offenses that lack the result element, including attempts. The jury may therefore erroneously believe that a guilty verdict is "just" because a culpable defendant would otherwise go unpunished. Similarly, the jury's sense of justice or fairness could be skewed by whether co-defendants are tried jointly or separately. Imagine, for example, a multi-car collision that kills a bystander. If all of the culpable drivers are tried jointly, then the jury's sense of fairness might lead it apportion blame amongst the different individuals and find that only the most directly responsible or culpable among them was the "legal cause" of the

death. If a driver is tried separately, however, then the jury's ability to apportion blame in this manner is curtailed, and the jury's sense of what is just might lead it to convict the only person that stands before them. Other unintended disparities would like arise. For example, the jury might deem it "just" to find that a principal is the legal cause of a result but not an accomplice, even though District of Columbia law "makes no distinction between one who acts as a principal and one who merely assists the commission of a crime as an aider and abettor." *Barker v. United States*, 373 A.2d 1215, 1219 (D.C. 1977). Or the jury might use *mens rea*, which is generally used to demarcate the degree of an offense, as a proxy for what is "just." Gradations of *mens rea* would not determine the degree of the offense of conviction, but whether a defendant is convicted at all.

An additional concern is the confusing use of a double negative in the phrase "not too unforeseeable." PDS proposes rephrasing this as "reasonably foreseeable," which eliminates the double negative. The "reasonably" qualifier also clarifies that the question is not whether it was *possible* to have foreseen the manner of occurrence (which would almost always be the case), but whether a reasonable person would have foreseen it.

PDS is also concerned that the concepts of foreseeability and volitional conduct incorporated into RCC § 22E-204 do not capture the entire field of relevant considerations for legal causation. The Supreme Court has said that legal causation encompasses a set of "judicial tools," *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992), and took "many shapes . . . at common law," *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 12 (2010) (plurality). PDS agrees that foreseeability and volitional conduct of a third party are two of the most important of these "judicial tools" or "shapes," but they are not exclusive. The Supreme Court has also looked to whether the conduct caused a result directly or indirectly through a series of subsequent events, whether the conduct and the result are remote in time or space, and whether the causal connection was contingent on other events. *See, e.g.*, *Hemi Group*, 559 U.S. at 9 ("A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." (quoting *Holmes*, 503 U.S. at 271, 274) (alteration in *Hemi Group*)). In several cases, the Supreme Court has held that legal causation was lacking without looking to either foreseeability or a third party's volitional conduct. In *Holmes*, for example, the Court held that defendants who defrauded stock broker-dealers, rendering them insolvent and unable to pay their customers, were not the legal cause of the customers' losses. *See Holmes*, 503 U.S. at 271. The notion that defrauding a broker-dealer of substantial sums would render the broker-dealer insolvent is certainly foreseeable. And the insolvency of the broker-dealers could hardly be deemed "volitional." Still, the Supreme Court held legal causation was lacking because "the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers." *Id.* Similarly, in *Hemi Group*, the Court addressed a claim that a cigarette seller had caused New York City to lose tax revenue by refusing to provide a list of customers that would allow the city to collect unpaid taxes. *See* 559 U.S. at 5-6. The city's loss of tax revenue was certainly foreseeable — indeed, the seller's business model depended on its ability to undercut competitors who collected the tax from customers upfront. *See id.* at 12. And there was no indication that the customers' failure to pay the taxes was volitional — the customers may have been ignorant of their tax obligations, or perhaps merely negligent in failing to pay. Still, the Court held that the seller was not the legal cause of the tax loss because there were too many steps in the causal chain. *Id.* at 10 ("Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet [the] direct relationship requirement."). Both *Holmes* and *Hemi*

Group concerned application of a criminal statute, the Racketeer Influence and Corrupt Organizations Act, which also had a provision for civil damages. Given that, it is possible that criminal cases will arise in which legal causation would not be satisfied under present law, but would not be covered by the language in RCC § 22E-204(c). PDS therefore proposes that the language be broadened to include a "catch-all" provision that covers other concepts that the Supreme Court has held will defeat legal causation.

PDS recommends redrafting RCC § 22E-204 as below:

(a) *Causation Requirement.* No person may be convicted of an offense that contains a result element unless the person's conduct is the factual cause and legal cause of the result.

(b) *Factual Cause Defined.* A person's conduct is the factual cause of a result if:

(1) The result would not have occurred but for the person's conduct; or

(2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

(c) *Legal Cause Defined.* A person's conduct is the legal cause of a result if:

(1) the result is ~~not~~ reasonably ~~too~~ ~~un~~foreseeable in its manner of occurrence, and

(2)(A) the result is not directly ~~not~~ ~~too~~ dependent upon another's volitional conduct~~, to have a just bearing on the person's liability~~, or

(B) the connection between the conduct and the result is not otherwise remote, indirect, or purely contingent on other factual causes.

(d) *Other Definitions*. "Result element" has the meaning specified in RCC § 22E-201(c)(2).

APPENDIX D:

DISPOSITION OF ADVISORY GROUP COMMENTS & OTHER CHANGES TO DRAFT DOCUMENTS

RCC § 22E-214. Merger of Related Offenses.

(1) *PDS, App. C at 158, recommends revising the general merger provision to offer a concrete rule of merger rather than a mere presumption of merger. Because "[p]resumptions are often difficult to apply and require either additional drafting language or appellate interpretation," PDS contends that this revision is necessary "[i]n order to provide clarity for defendants, practitioners, and judges, and to avoid the need for appellate litigation of basic principles."*

- The RCC incorporates PDS's recommendation by restyling RCC § 22E-214 to reflect a concrete rule or merger rather than a mere presumption of merger.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *PDS, App. C at 158, and OAG, App. C at 169-170, recommend clarifying the rule of priority for determining which of any group of merging offenses should remain. Specifically, both PDS and OAG state that it is necessary to statutorily clarify the phrase "most serious offense." To address the issue, OAG recommends codifying the following text, which is drawn from footnote 27 in the Commentary: "The most serious offense will typically be the offense that is subject to the highest offense classification," but that "if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense is 'most serious.'" PDS, in contrast, believes that: "Although footnote 27 to the Commentary explains what the most serious offense 'will typically be,' the phrase is still open to interpretation and argument by the parties in individual cases." With that in mind, PDS recommends that, "[r]ather than leaving the matter of which offense is most serious to the parties to dispute," the RCC should instead "define 'most serious offense' as the offense with the highest statutory maximum." PDS states that this approach best serves "the purposes of clarity and certainty."*

- The RCC incorporates both PDS' and OAG's recommendation for statutory clarity on this merger issue. Specifically, the rule of priority in subsection (d) has been revised to read: "When two or more convictions for different offenses arising from the same course of conduct merge, the offense that remains shall be: (1) The offense with the *highest statutory maximum* among the offenses in question; or (2) If the offenses *have the same statutory maximum*, any offense that the court deems appropriate."
- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *OAG, App. C at 170, recommends revising paragraph (a)(3), which addresses logically inconsistent offenses, to clarify—consistent with the Commentary—that the relevant merger principle applies when the facts required to prove offenses arising from the same course of conduct are inconsistent with each other* as a matter of law. *OAG believes that this "clarification is too central to the analysis to be left in the Commentary and that it should be moved to the text of the merger provision."*

- The RCC incorporates OAG's recommendation by revising paragraph (a)(3) to incorporate the phrase "as a matter of law." The RCC also incorporates the same phrase into paragraph (a)(1), which addresses necessarily included offenses, given that this merger principle is also intended operate in the same manner.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *OAG, App. C at 170, recommends clarifying how the merger section would "apply to situations where the court is considering whether a mixed RCC and non-RCC offense merge." OAG believes that RCC § 22E-103, which provides that "Unless otherwise provided by law, a provision in this title applies to this title alone," is ambiguous on this point.*[1]

- The CCRC incorporates OAG's recommendation by clarifying in a footnote to the merger commentary that: "The merger policies set forth in this section only apply to *RCC* offenses (in contrast to *all* criminal offenses in the D.C. Code). This limitation is consistent with RCC § 22E-103(a), which establishes that '[u]nless otherwise provided by law, a provision in this title applies to this title alone.' Because of this limitation, the principles and procedures established in section 214 would not govern the merger of multiple District offenses located outside the RCC, nor would they apply to multiple convictions for an RCC offense and one or more non-RCC District offenses."
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *OAG, App. C at 170, recommends a minor clarification to subsection (e), which establishes that "no person may be subject to a conviction for more than one of those [merging] offenses after . . . [t]he judgment appealed from has been affirmed." Specifically, OAG states: "As the Court of Appeals may affirm, affirm in part, or remand . . . paragraph (e)(2) [should] be amended to say, 'The judgment appealed from has* ***been decided****.'"*

- The RCC incorporates OAG's recommendation, such that paragraph (e)(2) now reads: "The judgment appealed from has been decided."
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(6) *The CCRC recommends expanding the Commentary's Explanatory Notes accompanying RCC § 22E-214 to provide more detailed explanations—including*

[1] Specifically, OAG understands it to be:

> clear that RCC § 22A-103's provision that "Unless otherwise provided by law, a provision in this title applies to this title alone." would clearly mean that the RCC's merger provision would not apply in situations where the court is examining whether two non-RCC offenses merge, the text of 22A-103's would also seem to apply to situations where the court is considering whether a mixed RCC and non-RCC offense merge. To avoid litigation on this point, the Commission should clarify its position on this issue in a subsequent Report.

references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on sentencing merger.

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

RCC § 22E-301. Criminal Attempts.

(1) *PDS, App. C at 46, recommends omitting the last sentence of a Commentary footnote, which poses the following hypothetical: "For example, to determine whether a person arrested by police just prior to pulling a firearm out of his waistband acted with the intent to kill a nearby victim entails a determination that the person planned to retrieve the firearm, aim it at the victim, and pull the trigger." PDS states that this hypothetical improperly indicates that "this conduct, without more, would be []sufficient to sustain a conviction for attempted assault with intent to kill." In addition, PDS observes that "the example raises complex questions that this group has yet to resolve concerning the interplay between attempt and gradations of assault offenses."*

- The RCC incorporates PDS' recommendation by omitting the example as unnecessary under the circumstances.
- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *PDS, App. C at 46-47, recommends omitting an example in a Commentary footnote, which references "the attempted felony assault prosecution of a person who suffers a debilitating heart attack just as he or she is about to exit a vehicle and repeatedly beat the intended victim." PDS states that "these facts, without more, provide an insufficient basis for an attempted felony assault conviction." In addition, PDS observes that this hypothetical "likewise raises questions about the type of proof necessary to establish an attempted felony assault, where felony assault requires a specific degree of harm."*

- The RCC partially incorporates PDS' recommendation by modifying the example to clarify that the person acts with the "intent to cause significant bodily injury." As revised, the example *assumes* that the requisite intent to cause significant bodily injury exists, and, therefore, should not raise any sufficiency issues for purposes of attempted felony assault liability. It appears relatively clear that such conduct, *assuming* the requisite intent exists, would satisfy the dangerous proximity test based on prior DCCA case law.[2]
- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *PDS, App. C at 47, proposes modifying the general definition of attempt, RCC § 22E-301(a), to incorporate the term "conduct" following "person" to "make more explicit that the jury's focus should be on the conduct of the defendant" in the context of evaluating the dangerous proximity test.*

- The RCC incorporates this recommendation by revising RCC § 22E-301(a) to make it explicit that it is specifically the person's *conduc*t, not the person in general, that must be analyzed under the dangerous proximity test.

[2] *See Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978) (armed bank robbers arrested 1-4 blocks away from their intended target are dangerously close to committing armed bank robbery).

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *PDS, App. C at 47, proposes modifying the general definition of attempt, RCC § 22E-301(a), so that the reasonable adaptation requirement applies to all attempts, including those that do not implicate impossibility. PDS states that "[t]he current draft, which uses the 'reasonably adapted' language only in subsection (B), creates the impression—at odds with case law—that this requirement does not exist for [some] attempts." PDS also observes that "[i]nclusion of the 'reasonably adapted' language in subsection (A) would have the additional benefit of giving some substance to the 'dangerously close' requirement and ensuring that innocent conduct is not punished as an attempt."*

- The RCC incorporates this recommendation by revising RCC § 22E-301(a) to establish that the reasonable adaptation requirement applies to all attempts, including those that do not implicate impossibility.
- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *PDS, App. C at 48, recommends replacing the phrases "committing that offense" and "commission of that offense" in the general definition of attempt, RCC § 22E-301(a), with the phrase "the accomplishment of that offense." PDS notes that the "accomplishment language appears in both the current Redbook instruction on Attempt and DCCA case law," thereby "provid[ing] continuity and consistency." PDS also observes that this would "avert confusion about the point at which the target offense has been 'committed.'"*

- The RCC partially incorporates this recommendation by replacing the term "committing" in RCC § 22E-301(a) with the terms "completing" and "completion." Substantively, "completing" and "accomplishment" communicate the same point; however, the term "completing" is more intuitive, accessible, and better supported by national legal trends.
- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(6) *USAO, App. F at 49, notes that the "Advisory Group should discuss further whether the DCCA sees a meaningful distinction between the 'dangerous proximity' and 'substantial step' tests, considering Hailstock."*

- The Advisory Group discussed USAO's comment, which does not recommend a specific revision. In addition, the Commentary accompanying RCC § 22E-301(a) analyzes District law governing the conduct requirement of attempt, and offers various reasons why the dangerous proximity test remains distinct from the substantial step test under current DCCA case law.

(7) *OAG, App. C at 93, recommends revising the general attempt penalty provision, RCC § 22E-301(d), or its corresponding commentary to more clearly communicate that it permits the imposition of a sentence "that is up to ½ the stated imprisonment amount for the completed offense, ½ the stated fine amount, or up to ½ the stated imprisonment term and up to ½ the stated fine amount." OAG believes that this point is currently unclear under RCC § 22E-301(d), as currently drafted.*

- The RCC incorporates OAG's recommendation by revising the commentary to RCC § 22E-301(d) to read: "For purposes of this section, 'punishment' means: (1) Imprisonment and fine if both are applicable to the target offense; (2) Imprisonment only if a fine is not applicable to the target offense; or (3) Fine only if imprisonment is not applicable to the target offense."
- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(8) *PDS, App. C at 104, recommends lowering the penalties applicable to many attempts below a fifty percent reduction.*[3] *PDS generally agrees "with the principle embodied in proposed RCC § 22A-301 of a substantial punishment reduction between completed and attempted criminal conduct." At the same time, PDS "strenuously objects to any revision of the criminal code that will result in longer periods of incarceration for individuals convicted of crimes." PDS observes that "[t]he principal benefit of the RCC's default rule of a 50% reduction between attempted and completed criminal conduct is bringing order and uniformity to legislation that has evolved piecemeal." And PDS states that "[i]ncreased incarceration is too high a price to pay for the benefit of a clearer statutory scheme."*[4]

- The RCC does not incorporate PDS' recommendation based on considerations of proportionality. A proportionate grading scheme is one that accounts for harm and culpability in a consistent and principled manner. Consistent with both national legal trends and public opinion surveys, the RCC affords each a commensurate role in the grading of

[3] Specifically, PDS proposes the following three policies:

> (1) Maintaining the sentencing consequences of D.C. Code § 22-1803, with a maximum punishment of 180 days of incarceration, for property offenses and other non-violent offenses covered in that section and the RCC equivalent;
>
> (2) Maintaining the sentencing consequences of D.C. Code § 22-1803, with a five year maximum sentence for attempted crimes of violence such as burglary, as defined in D.C. Code § 23-1331; and
>
> (3) Replacing D.C. Code § 22-401 (assault with intent to kill, rob, or poison or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse) with the RCC proposal to make the statutory maximum for the attempt crime half of that for the completed offense.

[4] PDS notes that "it is difficult to say exactly how many and by how much sentences will increase under RCC § 22A-301(c)," but contends that it is nevertheless "clear that many sentences will increase under RCC § 22A-301." PDS also observes that the RCC recommendation could "have negative consequences for persons' prospects for housing, education, and employment." For example, "[b]y making some attempt offenses felonies rather than misdemeanors, options for record sealing and diversion programs would also likely decrease." And "[s]ince the District has no locally accountable control over how offenses are ultimately prosecuted, whether diversion programs are offered, and what sort of plea offers are available to defendants, the District must take exceptional care in labeling offenses felonies and establishing statutory maxima."

offenses, which is reflected in—among other areas—the lower penalties affixed to unintentional homicides as well as the RCC's general rejection of strict liability. In contrast, subjecting criminal attempts to a penalty reduction significantly greater than 50% would suggest that harm is the primary component of grading. Lastly, any attempt to increase the proportionality of a criminal code on a principled basis is likely to authorize longer periods of incarceration for some individuals convicted of crimes—even where the overall effect of the code is to shorten periods of incarceration for most individuals convicted of crimes.

(9) *The CCRC recommends restructuring the culpability requirement for criminal attempts to conform with the approach to drafting employed in the revised solicitation, conspiracy, and complicity statutes. This includes use of the phrase "with the culpability required by that offense" in the prefatory clause of subsection (a) as well as communicating the principle of culpable mental state elevation governing results through a new subsection (b). This restructuring is non-substantive, and preserves the same policies reflected in the prior draft.*

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(10) *The CCRC recommends revising subsection 301(b) to reference "result element" rather than "result." This clarifies that the principle of culpable mental state elevation applies to the objective elements of an offense, as defined in RCC § 22E-201.*

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(11) *The CCRC recommends incorporating the phrase "course of conduct" in the merger clause of RCC § 22E-301(c) to conform with the language employed in the RCC's general merger provision. This revision is non-substantive, and preserves the same policies reflected in the prior draft.*

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(12) *The CCRC recommends adding an "other definitions" subsection, which highlights terms that are defined in another section.*

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(13) *The CCRC recommends reorganizing the Commentary so that all of the Explanatory Notes and Relation to Current District Law entries are grouped alongside one another.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(14) *The CCRC recommends expanding the Commentary's Explanatory Notes accompanying RCC § 22E-301 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on attempt liability.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(15) *The CCRC recommends incorporating an expanded introduction to the Commentary's Relation to Current District Law section, which summarizes the need for RCC § 22E-301 in light of current District law.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

RCC § 22E-302. Criminal Solicitations.

(1) *The CCRC recommends revising subsection 302(b) to more clearly state the principle of culpable mental state elevation governing objective elements. Specifically, subsection (b) separates the principle applicable to results from the principle applicable to circumstances, so that it now reads: "Notwithstanding subsection (a), to be guilty of a solicitation to commit an offense, the defendant must: (1) Intend to cause any result element required by that offense; and (2) Intend for any circumstance element required by that offense to exist." These non-substantive revisions ensure conformity with the corresponding provision governing general conspiracy liability, section 303(b), which has been revised in light of agency feedback.*[5]

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends revising subsection 302(b) to reference "result* element*" and "circumstance* element*" rather than "result" and "circumstance." This clarifies that the principle of culpable mental state elevation applies to the objective elements of an offense, as defined in RCC § 22E-201.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends adding an "other definitions" subsection, which highlights terms that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends expanding the Commentary's Explanatory Notes accompanying RCC § 22E-302 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on solicitation liability.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends incorporating the same "specific conduct" standard employed in the encouragement prong of the RCC definition of accomplice liability into the RCC definition of solicitation liability (under paragraph (a)(1)).*[6] *This standard, as the accompanying Explanatory Notes discuss in further detail, is intended to safeguard "prevailing free speech principles" (as is the case in the context of accomplice liability). To establish this standard, again as further discussed in the accompanying Explanatory Notes, "it must be proven that the defendant's communication, when viewed in the context of the knowledge and position of the intended recipient, carries meaning in terms of some concrete*

[5] *See* PDS, App. C at 086 (discussed in adjudication of agency feedback on section 303).

[6] *Compare* RCC § 22E-302(a)(1) ("Purposely commands, requests, or tries to persuade another person to engage in or aid the planning or commission of *specific conduct*, which, if carried out, will constitute that offense or an attempt to commit that offense[.]") (italics added), *with* RCC § 22E-210(a)(2) ("Purposely encourages another person to engage in *specific conduct* constituting that offense.") (italics added).

course of conduct that, if carried to completion, would constitute a criminal offense."

- This revision does not appear to change current District law, and it improves the clarity and consistency of the revised statutes.

(6) *The CCRC recommends grading criminal solicitations at one-half the penalty applicable to the target offense. Specifically, paragraph (d)(1) states that: "(1) A solicitation to commit an offense is subject to one-half the maximum punishment applicable to that offense, unless a different punishment is specified in paragraph (d)(2)." Thereafter, paragraph (d)(2) states that, "[n]otwithstanding paragraph (c)(1), conspiracies to commit the following offenses may be punished accordingly: [RESERVED: List of exceptions and accompanying penalties.]" This penalty provision is based on the RCC general attempt and conspiracy penalty provisions, and, as such, establishes a uniform and proportionate grading scheme for criminal solicitations.*

- This revision changes current District law as described in the commentary, and it improves the consistency and proportionality of the revised statute.

(7) *The CCRC recommends unbracketing the phrase "crime of violence" in paragraph (a)(2). This clarifies that the phrase will be employed in the RCC generally, and as a specific limitation on the scope of general solicitation liability. This point is also further clarified through a new bracketed footnote in the Explanatory Notes, which states that: "{A new definition of 'crime of violence' will be added to the RCC at a later date. It is expected to be similar to the current definition in D.C. Code § 23-1331(4).}"*

RCC § 22E-303. Criminal Conspiracies.

(1) *PDS, App. C at 84-85, recommends limiting general conspiracy liability to felonies in the interests of enhancing proportionality and limiting prosecutorial discretion. PDS states that "[a] conspiracy to commit a misdemeanor offense frequently lacks the complex planning and commitment to criminal enterprise that warrants the punishment of the agreement and a single overt act as a separate additional offense." PDS also notes that "allowing conspiracy liability where the underlying offense is a misdemeanor creates unfettered discretion for prosecutors." PDS further observes that "conspiracy to commit a misdemeanor offense is almost never charged by the Office of the United States Attorney."*

- The RCC does not incorporate PDS' recommendation because it may create unnecessary gaps in liability. By limiting the scope of conspiracy liability in the District to criminal objectives, the CCRC approach avoids the most significant problems of proportionality and prosecutorial discretion reflected in District law. As described below, the CCRC recommends that general conspiracy liability be subject to the same proportionate penalty discount applicable to attempts under the RCC § 22E-301, which avoids PDS' concern that "prosecutors could escalate misdemeanor conduct into a felony conviction without any showing of greater societal harm in the majority of instances when defendants act together."[7] Providing for conspiracy liability for all criminal offenses is a common practice nationally. [8]

(2) *PDS, App. C at 85, "supports having the RCC continue the District's current bilateral approach to conspiracy," but "believes[] that the requirement that a criminal conspiracy must be bilateral or mutual could be written more clearly." Specifically, PDS proposes amending RCC § 22A-303(a)(1) to require proof that the parties: "Purposely came to an agreement to engage in or aid the planning or commission of conduct which, if carried, out, will constitute every element of that planned [felony] offense or an attempt to commit that planned [felony] offense." PDS states, first, that "[r]eplacing 'purposefully agree' with 'purposefully come to an agreement' more clearly conveys the mutuality of the agreement that is the sine quo non of the District's current approach to conspiracy." PDS then states, second, that "[c]larifying that the (alleged) coconspirators must agree to engage in (or aid the planning or commission of) conduct which would constitute every element of the planned offense further bolsters the joint nature of the agreement required for criminal conspiracy liability."*[9]

- The RCC partially incorporates PDS' recommendation by revising the

[7] *See* RCC § 22E-303(c) (potential language limiting penalty for conspiracy to half of the target offense).

[8] A "majority" of jurisdictions apply general conspiracy liability to *all* criminal objectives. WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3 (3d ed. Westlaw 2019); *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.04 (6th ed. 2012).

[9] In PDS' view, the phrase "will constitute every element of that planned offense" better articulates the "requirement that the 'coconspirators' come to an agreement about the same conduct, conduct that if engaged in would result in the commission of the specific planned (charged) offense."

commentary. The general definition of conspiracy currently in 303(a) of the prior draft directly expresses the bilateral, mutual agreement requirement by requiring proof that "the person *and at least one other person . . . [p]urposely agree* 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*[.]" The CCRC retains the prior draft's language on this point because it is consistent with other jurisdictions and PDS' recommended use of the phrase "come to an agreement," or "every element of that planned [felony] offense" does not materially improve upon this approach.[10] However, the CCRC has revised the Commentary's Explanatory Notes to further clarify the nature of the bilateral approach.[11]

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *PDS, App. C at 86, "recommends amending the Principles of Culpable Mental State Elevation subsection, RCC § 22A-303(b), to substitute 'and any' where the draft uses the disjunctive 'or,'" such that this provision would read: "[T]he defendant and at least one other person must intend to bring about any result and any circumstance required by that planned felony offense." PDS states that "[t]he use of 'or' as the bridge might wrongly suggest to a reader that the mental state elevation requirement is satisfied if applied to a required circumstance or result."*

- The RCC incorporates PDS' recommendation, in accordance with the offered rationale, while making organizational changes to subsection (b) which address PDS' underlying concern about possible misperception of the mental state elevation requirement. Specifically, subsection 302(b) in the prior draft has been revised to read: "Notwithstanding subsection (a), to be guilty of a conspiracy to commit an offense, the defendant and at least one other person must: (1) Intend to cause any result element required by that offense; and (2) Intend for any circumstance element required by that offense to exist."
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *PDS, App. C at 86, "recommends that the RCC include language that*

[10] PDS' recommended phrases do not appear to be employed in any other American conspiracy statutes.

[11] For example, in support of its recommended revisions, PDS gives the following hypothetical: "So if the charge is conspiracy to commit a robbery and the evidence demonstrates that while coconspirator X believed the agreed upon conduct was to rob someone, coconspirator Y believed the agreed upon conduct was to assault someone, the lack of mutual agreement would result in a not guilty finding for the conspiracy to commit robbery charge."

In accordance with this hypothetical, the Explanatory Notes accompanying section 303 have been revised to state:

> So, for example, if the evidence in a two-person criminal scheme demonstrates that X believed the agreed-upon conduct was to rob V, but Y believed the agreed-upon conduct was to assault V, a charge for conspiracy to commit robbery against V cannot be sustained against X or Y due to the lack of mutual agreement concerning the taking-related element of robbery.

acknowledges that where a conspiracy crosses jurisdictional lines and the conspiracy is planned in a jurisdiction where the conduct is not against the law, the legality of the conduct in the place where the agreement was formed may be relevant to the determination of whether the government has proved sections (a) and (b)." Specifically, PDS contends that, "[a]s currently drafted section (e) could be read to bar the defense from arguing that the cross-jurisdiction disparity in legality is relevant to the considerations in (a) and (b)." To that end, PDS proposes that subsection (e) strike the term "immaterial" and incorporate the proviso that the fact that "the object of the conspiracy would not constitute a criminal offense under the laws of the jurisdiction in which the conspiracy was formed . . . may be relevant to whether the defendant acted with the mental states required by RCC § 22A-303(a) and (b)."

- The RCC partially incorporates PDS' recommendation by striking the term "immaterial" from subsection (f) of the prior draft. This change should avoid the potential issues raised by PDS. Given the complexity and rarity of those issues, the CCRC does not believe incorporation of the phrase "may be relevant to whether the defendant acted with the mental states required by RCC § 22A-303(a) and (b)" into subsection (f) to be warranted. The commentary's Explanatory Note accompanying subsection (f) has also been revised to state: "Nothing in this section should be construed as lessening the government's burden to prove the culpable mental state requirement for conspiracy under RCC § 22E-303(a) and (b)."
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *OAG, App. C at 89, recommends that "either RCC § 22A-303 be redrafted so that the Code continues to criminalize conspiracy to defraud 'the District of Columbia or any court or agency thereof' or that the Commission draft a separate offense which reaches this behavior." In OAG's view, "[t]he Commission should not recommend the repeal of D.C. Code § 22-1805a unless the replacement(s) criminalizes both conspiracy to commit a crime and conspiracy to defraud the District of Columbia or any court or agency thereof."*

- The RCC does not incorporate OAG's recommendation insofar as it relates to expanding the scope of general conspiracy liability under RCC section 303 because it may lead to disproportionate penalties. The District is an outlier nationally insofar as it criminalizes conduct involving non-criminal objectives (e.g., civil fraud) within the scope of general conspiracy liability.[12] This RCC approach also has strong support in common law legal authorities, which highlight, among other considerations, the importance of fair notice[13] and the concomitant risk of

[12] "All but three state penal code revisions since the adoption of the final draft of the [Model Penal] Code in 1962 have" limited general conspiracy liability to the achievement of criminal objectives. Model Penal Code § 5.03, cmt. at 397.

[13] As one commentator phrases it:

"prosecutorial and judicial abuse" created by conspiracy statutes of uncertain scope.[14] It should be noted, however, that the RCC general conspiracy provision is applicable to the RCC fraud offense.[15]

(6) *OAG, App. C at 89-90, recommends that that "either RCC § 22A-303 (b) be redrafted so that a person may be convicted of conspiracy notwithstanding that the "co-conspirator" is an undercover officer working a sting operation or that the Commission draft a separate offense which reaches this behavior." OAG says that the prior draft conspiracy provisions are unclear whether they narrow conspiracy liability with respect to conspiring with an undercover officer. OAG says that while there is no binding case law on point, "such behavior should be illegal."*

- The RCC does not incorporate OAG's recommendation because it would be inconsistent with the bilateral approach under current law and the RCC, and may lead to disproportionate penalties. First, the exclusion of two person sting operations from general conspiracy liability per RCC section 303 is consistent with the District's current general conspiracy statute, under which "two or more persons" must conspire.[16] This statutory language, as construed by the DCCA, requires proof of "[t]he existence of an agreement between [the defendant] and at least one other person, in the sense of a 'joint commitment' to a criminal endeavor."[17] Second, this bilateral approach is supported by the "special dangers in group criminality" rationale at the heart of conspiracy liability.[18] Finally, it

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> People are entitled to fair notice that their planned conduct is subject to criminal sanction. In an age in which legislatures rather than courts define criminal conduct, people should be able to turn to a written code for reasonable guidance in the conduct of their lives. If the legislature has not made a specified act criminal it is unfair to surprise people by punishing the agreement to commit the noncriminal act.

DRESSLER, *supra* note__, at § 29.04; *see, e.g, Commonwealth v. Bessette*, 217 N.E.2d 893, 896 n.5 (Mass. 1966).

[14] *E.g.*, LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.3; *see also* Francis Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 397 (1922) (noting that the common law rule was likely "based on what is probably an incorrect reading of the early cases").

[15] Special conspiracy provisions may be recommended for particular offenses. For example, the CCRC will consider, at a future date, whether and to what extent public corruption offenses should be revised to provide special conspiracy liability.

[16] D.C. Code § 22-1805a(a)(1).

[17] *In re T.M.*, 155 A.3d at 413 (Beckwith, J., *concurring in part and dissenting in part*) (quoting *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016)). Construing the "two or more persons" language in the federal conspiracy statute, multiple federal courts have held that, "as it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy." *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965) (citing *United States v. Wray*, 8 F.2d 429 (N.D.Ga.1925)). Many other circuits have explicitly adopted the *Sears* rule. *See United States v. Escobar de Bright*, 742 F.2d 1196, 1198–99 (9th Cir. 1984); *United States v. Moss*, 591 F.2d 428, 434 n. 8 (8th Cir. 1979); *United States v. Chase*, 372 F.2d 453, 459 (4th Cir. 1967); *see also United States v. Barnes*, 604 F.2d 121, 161 (2d Cir. 1979), ("[T]he Government showed that [the defendant's] involvement was more far-ranging than simply having conspired with Government agents, for which no conspiratorial liability could be imposed.").

[18] DRESSLER, *supra* note__, at § 29.04. In support of the bilateral approach, and concomitant rejection of the unilateral approach, various courts and commentators have argued that:

should be noted that a defendant who requests, commands, or tries to persuade an undercover officer to commit a crime of violence may—even absent true agreement on that officer's part—be found guilty of solicitation under section 302.[19]

(7) *OAG, App. C at 90, says that, in the prior draft, "RCC § 22A-303 (c) and (d) would narrow the current scope of the District's jurisdiction to prosecute offenses when the object of the conspiracy is located outside the District or when the conspiracy is formed outside the District." This is because both paragraphs reference criminal offenses under the "D.C. Code," which would "only encompass offenses in enacted titles (such as this one)," rather than "District law" more generally. "OAG, therefore, recommends that all references to "D.C. Code" in paragraphs (c) and (d) be changed to "District law."*

- The RCC partially incorporates OAG's recommendation by substituting the prior draft's reference to "D.C. Code" with "statutory laws of the District of Columbia." However, the CCRC also will further research whether, under current District law, statutory references to crimes "in" or "under" the "D.C. Code" exclude crimes in unenacted titles of the D.C. Code per OAG's assertion. Referring to crimes "in" or "under" the "D.C. Code" is a general drafting convention in the RCC that may be applied in other provisions and, where used, is intended to reach offenses in both enacted and unenacted titles of the D.C. Code, and a general solution to drafting is needed. Notably, however, in the context of the conspiracy provision in D.C. Code § 22-1805a, OAG's recommended language to refer to "District law" would appear to criminalize new conduct insofar as "District law" would include crimes promulgated in the D.C. Municipal Regulations and recognized in common law. The current statutory language in D.C. Code § 22-1805a(c)-(d) refers to "conduct that would constitute a criminal offense under an act of Congress exclusively

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> The primary reason for making conspiracy a separate offense from the substantive crime is the increased danger to society posed by group criminal activity[.] However, the increased danger is nonexistent when a person "conspires" with a government agent who pretends agreement. In the feigned conspiracy there is no increased chance the criminal enterprise will succeed, no continuing criminal enterprise, no educating in criminal practices, and no greater difficulty of detection[.] Indeed, it is questionable whether the unilateral conspiracy punishes criminal activity or merely criminal intentions[.] The "agreement" in a unilateral conspiracy is a legal fiction, a technical way of transforming nonconspiratorial conduct into a prohibited conspiracy[.] When one party merely pretends to agree, the other party, whatever he or she may believe about the pretender, is in fact not conspiring with anyone. Although the deluded party has the requisite criminal intent, there has been no criminal act[.]

State v. Pacheco, 125 Wash. 2d 150, 156–57, 882 P.2d 183, 186–87 (1994) (quoting from and citing to state case law, federal case law, and various scholarly articles); *see also id.* (highlighting the "potential for abuse" in a unilateral regime because "the State not only plays an active role in creating the offense, but also becomes the chief witness in proving the crime at trial"); *compare* Model Penal Code § 5.03 cmt. at 393 (highlighting crime prevention concerns that support unilateral approach).

[19] RCC § 22E-302(a); *see id.*, Explanatory Notes.

applicable to the District of Columbia…." Consequently, the current D.C. Code § 22-1805a conspiracy provision appears limited to statutory law, and the revised statute is so limited.

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(8) *The CCRC recommends revising RCC subsection 303(b) to reference "result* element*" and "circumstance element" rather than "result" and "circumstance." This clarifies that the principle of culpable mental state elevation applies to the objective elements of an offense, as defined in RCC § 22E-201.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(9) *The CCRC recommends adding an "other definitions" subsection, which highlights terms that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(10) *The CCRC recommends reorganizing the Commentary so that all of the Explanatory Notes and Relation to Current District Law entries are grouped alongside one another.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(11) *The CCRC recommends expanding the Commentary's Explanatory Notes accompanying RCC § 22E-303 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on conspiracy liability.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(12) *The CCRC recommends incorporating an expanded introduction to the Commentary's Relation to Current District Law section, which summarizes the need for RCC § 22E-303 in light of current District law.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(13) *The CCRC recommends grading criminal conspiracies at one-half the penalty applicable to the target offense. Specifically, paragraph (c)(1) states that: "(1) A conspiracy to commit an offense is subject to one-half the maximum punishment applicable to that offense, unless a different punishment is specified in paragraph (c)(2)." Thereafter, paragraph (c)(2) states that, "[n]otwithstanding paragraph (c)(1), conspiracies to commit the following offenses may be punished accordingly: [RESERVED: List of exceptions and accompanying penalties.]" This penalty provision is based on the RCC general attempt penalty provision, and, as such, establishes a uniform and proportionate grading scheme for criminal conspiracies, which clarifies, simplifies, and changes District law.*

RCC § 22E-304. Exceptions to General Inchoate Liability.

(1) *The CCRC recommends expanding the Commentary's Explanatory Notes accompanying RCC § 22E-304 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on exceptions to general inchoate liability.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

RCC § 22E-305. Renunciation.

(1) *OAG, App. C at 116-117, recommends more clearly addressing impossibility situations in the renunciation defense. Specifically, OAG contends that, "in order for the conduct to be 'sufficient to prevent the commission of the target offense,' the defendant's actions must have at least decreased the likelihood of the offense happening. But when a defendant is 'persuading' an informant not to act, the defendant's actions have no effect on the probability that the criminal conduct will take place." With that in mind, OAG recommends revising the conduct requirement of renunciation to read: "The defendant engaged in conduct sufficient to prevent commission of the target offense or would have been sufficient to prevent the commission of the target offense if the circumstances were as the defendant believed them to be."*

- The RCC partially incorporates OAG's recommendation by replacing the phrase "engaged in *conduct sufficient to prevent* commission of the target offense" with "engaged in *reasonable efforts to prevent* commission of the target offense." This new reasonable efforts standard is drawn from the RCC general provision on withdrawal from legal accountability. It should avoid any confusion that might arise in impossibility situations, yet may also be simpler and more straightforward than the specific language in the OAG proposal. In addition, the Commentary's Explanatory Notes incorporate a footnote specifically addressing how the reasonable efforts standard operates in impossibility changes.
- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 117, comments that the heading of the provision as a "Voluntary and Complete Renunciation Defined" does not match the content of RCC § 22E-304(b), which, when read in light of one another, "implies that a renunciation is voluntary and complete as long as none of the elements in (b) are satisfied."*

- The RCC addresses OAG's point by retitling RCC § 22E-304(b), "Scope of 'Voluntary and Complete' Defined."
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *PDS, App. C at 123-124, objects to the non-consummation requirement governing the availability of the renunciation defense in RCC § 22E-304(a), and recommends revisions that would make a renunciation defense available regardless of consummation. PDS states that these revisions would "encourage[] a person to take steps that might be sufficient to prevent the target offense and to take those steps even when they cannot guarantee they will be sufficient."*[20] *PDS further notes that "[s]ociety benefits more from encouraging*

[20] The particular situation PDS has in mind has two features: (1) "there is some chance that the crime will not actually be thwarted despite a person's reasonable efforts"; and (2) the person "believ[es] there is little chance that his involvement (solicitation or conspiracy or even steps sufficient to comprise attempt) will be prosecuted or maybe even realized by law enforcement authorities." Under these circumstances, PDS states that "there is more incentive to walk away and less incentive to make efforts to thwart the target

a potential participant to take a chance on preventing the crime rather than taking a chance on getting away with the crime (the crime of attempt, solicitation and/or conspiracy).”

- The RCC does not incorporate PDS’ recommendation. Preservation of the non-consummation requirement governing the availability of a renunciation defense is supported by a few different rationales. First, the requisite encouragement for an actor to try and prevent the target offense already exists in the form of a withdrawal defense to accomplice liability, which *does not* require proof that the target offense actually was prevented.[21] Practically speaking, this means that the defendant still benefits from trying to disrupt the criminal effort even where he’s unsuccessful.[22] Second, eliminating the non-consummation requirement would allow for the possibility that a culpable actor, who intends to bring about an offense and is a but-for cause of that offense’s occurrence, could escape liability entirely.[23] Third, eliminating the non-consummation

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offense, particularly by contacting law enforcement.”

[21] *See* RCC § 22E-213(a) (“It is an affirmative defense to a prosecution under RCC § 22E-210 and RCC § 22E-211 that the defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either: (1) Wholly deprives his or her prior efforts of their effectiveness; (2) Gives timely warning to the appropriate law enforcement authorities; or (3) Otherwise makes reasonable efforts to prevent the commission of the offense.”).

[22] The following example is illustrative. V personally insults P. P is predisposed to let the insult slide, but A persuades P over the phone that P must respond with lethal violence to protect P’s reputation. In providing this encouragement, A consciously desires to bring about the death of V, who A also has an outstanding beef with due to a prior perceived slight that V earlier made against A. One day later, A has a change of heart, which is motivated, in large part, by A’s having been alerted to the fact that the police were monitoring the phone call and are therefore very likely to catch and arrest both P and A. So A decides to again call P, and does his very best to persuade P to desist from violence against V, and, ultimately, to forgive V for the slight. However, A’s reasonable efforts at dissuading P from carrying out the planned execution is unsuccessful; P goes on to kill V anyways.

On these facts, A satisfies the standard for withdrawal under section 213, and, therefore, cannot be deemed an accomplice to P’s murder of V under section 210. A would not, however, be able to avail himself of a renunciation defense under section 305 to avoid liability for his original solicitation of P (to commit murder) under the RCC’s general solicitation statute. *See* RCC § 22E-302(a) (“A person is guilty of a solicitation to commit an offense when, acting with the culpability required by that offense, the person: (1) Purposely commands, requests, or tries to persuade another person; (2) 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; and (3) The offense solicited is, in fact, [a crime of violence].”). Specifically, a renunciation defense would not be available to A under section 305 because: (1) the target offense at the heart of A’s solicitation, the murder of V, was completed; and (2) A’s renunciation was not voluntary (i.e., it was motivated by a desire to avoid getting caught).

[23] The above example is illustrative. In the absence of a non-consummation requirement, A could escape liability entirely—notwithstanding the fact that he intended to bring about the death of V, who would not have died in the absence of X’s initial solicitation of P.

Relatedly, it has been observed that:

> Where the defendant abandons his complicity in a way that generally neutralizes the assistance he provided—as is generally assured by the “proper effort” requirements described above—he no longer merits liability for the full substantive offense. His culpability is more akin to that of an attemptor: while he has not in fact caused or

requirement leads to the unintuitive outcome that a solo actor could be prosecuted for a completed offense but not an attempt to commit the same.[24]

(4) *The CCRC recommends removing the non-consummation requirement from the prefatory clause of subsection 305(a) and restyling it as a new paragraph (a)(3), which reads: "The target offense was not committed." This restructuring is non-substantive, and preserves the same policies reflected in the prior draft.*

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends expanding the Commentary's Explanatory Notes accompanying RCC § 22E-305 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on the renunciation defense.*

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

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contributed to the offense, he did try to do so. In other words, where the "proper effort" standard is met, the defendant ought to escape complicity liability for the full offense, but ought nonetheless be eligible for liability for an inchoate offense, unless he also satisfies the more demanding complete and voluntary renunciation defense for inchoate offenses.

PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019).

[24] Consider the following example. X, intending to kill V, places lethal poison in V's water supply. A few hours later, X has a change of heart, and tries to contact V, but is unable to reach him. So X warns police, who arrive a moment too late. V dies. On these facts, X can be prosecuted for murder. But X could not—assuming his efforts were reasonable/his warning timely—be prosecuted for attempted murder if the non-consummation requirement were to be eliminated.

RCC § 22E-701. Definitions.

(1) *The CCRC recommends deleting the definition of "**adult**." The RCC offenses against persons consistently refer to a person that is "18 years of age or older" instead of using the term "adult."*

- This revision does not change current District law. This revision improves the clarity and consistency of the RCC offenses against persons.

(2) *The CCRC recommends amending the definition of "**actor**" to mean a person accused of a criminal offense, instead of a criminal offense "proscribed under this chapter." The prior version definition only included offenses under Chapter 13. The updated definition now applies to persons accused of any criminal offense.*

- This revision does not change current District law. This revision improves the clarity and consistency of the revised criminal code.

(3) *PDS, App. C at 106-107, recommends revising the definition of "**bodily injury**" that was initially limited to non-sex offenses against persons ("physical pain, illness, or any impairment of physical condition") to require "moderate physical pain" as opposed to "physical pain."*

- The RCC does not incorporate PDS's recommendation. The proposed recommendation would reduce the scope of liability for assault and several other RCC offenses against persons. The proposed recommendation would also create a new ambiguity as to what constitutes a "moderate" degree of pain. Infliction of a trivial instance of bodily injury may be subject to review under the RCC § 22E-215 De Minimis Defense.

(4) *The CCRC recommends deleting the definition of "**bodily injury**" that was in a prior draft was specific to RCC sex offenses ("significant physical pain, illness, or any impairment of physical condition") and using the definition that in a prior draft was applicable to non-sexual offenses in the RCC ("physical pain, illness, or any impairment of physical condition"). Infliction of a trivial instance of bodily injury may be subject to review under the RCC § 22E-215 De Minimis Defense.*

- This revision may change current District law, as described in the updated commentary to the RCC sexual assault offense. This revision improves the consistency of the RCC offenses against persons.

(5) *OAG, App. C at 186, recommends modifying the revised definition of "**bodily injury**" that was initially specific to RCC sex offenses ("significant physical pain, illness, or any impairment of physical condition") so it is clear whether "significant" modifies only "physical pain" or both "physical pain and illness."*

- The RCC does not incorporate OAG's suggestion because of another change, namely, as discussed above, the revised definition of "bodily injury" no longer requires "significant physical pain."

(6) *The CCRC recommends deleting the definition of "**child**." The RCC offenses against persons consistently use the term "minor" or refer to a person that is "under 18 years of age."*

- This revision does not appear to change current District law. This revision improves the clarity and consistency of the RCC offenses against persons.

(7) *The CCRC recommends deleting the term "**citizen patrol.**" The term is no longer used in the RCC definition of "protected person" or the gradations of the revised offenses against persons that prohibit inflicting harm "with the purpose of harming the complainant because of the complainant's status." Current sentencing practices in the District indicate that this penalty enhancement rarely, if ever, is necessary for proportionate sentences.*

- This revision changes current District law, as described in the updated commentaries to the definition of "protected person" and several of the RCC offenses against persons. This change improves the consistency and proportionality of the revised offenses against persons.

(8) *PDS, App. C at 68-69, recommends re-drafting the portion of the commentary to the definition of "**coercion**" as used in property offenses. PDS objects to the characterization of a threat to lower a student's grade as constituting a threat to cause "material harm to a person's health, safety, business, career, reputation, or personal relationships."*

- The RCC commentary incorporates this recommendation, and the portion of the revised commentary that discusses the catch-all provision of the revised coercive threat definition does not include this hypothetical. CCRC agrees that such a threat is not a clear example, and evaluating such a threat would depend on the facts of the particular case.
- This revision to the commentary does not change current District law. The change clarifies the revised commentary.

(9) *PDS, App. C at 68, recommends modifying the portion of the commentary on "**coercion**" that explains the meaning of "wrongful economic injury."*

- The RCC does not incorporate this recommendation because the revised definition of coercive threat no longer includes threats to inflict wrongful economic injury as a *per se* coercive threat.

(10) *PDS, App. C at 174, recommends revising the "**coercion**" definition to omit "ridicule" from paragraph (C).*

- The RCC does not incorporate this recommendation because it may result in a gap in liability. The revised definition includes threats to expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording that would tend to subject a person to hatred, contempt or ridicule. This language does not include threats of ridicule. Rather, this form of coercive threat requires a threat to reveal or publicize a secret, fact, photograph, or video that would tend to subject the person to hatred, contempt, or ridicule. Merely threatening to ridicule another is not sufficient for this form of coercive threat. Moreover, this language is intended to only include threats to reveal the types of secrets, facts, photographs, or videos that would have constituted blackmail. Threats to reveal a secret, fact, photograph, or video that would tend to subject a person to mild humiliation would not be sufficient. The revised definition clarifies this by specifically referring to threats to expose a fact that would cause "other *significant* injury to personal reputation." Notably, about the

time that PDS submitted this comment, the Council passed the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018, which includes multiple references to "ridicule"[25] in the context of a coercive threat, and has a projected law date of May 9, 2019.

(11) *PDS, App. C at 175 recommends revising the "**coercion**" definition to omit a threat that would tend to subject a "deceased person" to "hatred," "contempt," or "ridicule" from the definition of coercion.*

- The RCC incorporates this recommendation. The revised definition of "coercive threat" does not specify threats to reveal a secret, fact, photograph, or video of a deceased person. Coercion premised on threats to reveal a secret, fact, photograph, or video of a deceased person would not constitute a *per se* coercive threat, but may still be subject to liability under the catch-all provision.
- This change improves the proportionality and clarity of the revised criminal code.

(12) *PDS, App. C at 175, recommends amending the "**coercion**" definition to require that the asserted fact in paragraph (C) of the revised definition of "coercion" "would substantially impair" the [other person's/the complainant's] credit or business repute.]*

- The RCC incorporates this recommendation. The revised definition of coercive threats includes threats to expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording that tends to subject another person to "significant injury to credit or business reputation[.]" Threats to expose a secret or assert a fact that would only tend to cause a minor injury to a person's credit or business reputation would not constitute a *per se* coercive threat, but may still be subject to liability under the catch-all provision.
- This change improves the clarity and proportionality of the revised criminal code.

(13) *PDS, App. C at 175, recommends replacing "another person" with "complainant" in paragraph (C) of the revised definition of "**coercion**."*

- The RCC does not incorporate this recommendation because it may result in a gap in liability. This provision is intended to include threats to accuse persons other than the complainant of a crime. For example, threatening

[25] D.C. Code § 22-3252(a). ("A person commits the offense of blackmail when that person, with intent to obtain property of another or to cause another to do or refrain from doing any act, threatens to: (1) Accuse another person of a crime; (2) Expose a secret or publicize an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation; (3) Impair the reputation of another person, including a deceased person; (4) Distribute a photograph, video, or audio recording, whether authentic or inauthentic, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation; or (5) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status.").

to accuse a person's child of a crime may constitute this form of coercive threat.

(14) *OAG, App. C at 187, recommends amending the definition of "**coercion**" to include asserting a fact about a person that would tend to subject the person to "embarrassment."*

- The RCC does not incorporate this recommendation because it is unnecessary and potentially confusing. It is not clear what types secrets, facts, photographs, or videos that would tend to subject a person to "embarrassment," but not "hatred, contempt, or ridicule," that would warrant criminalization.

(15) *PDS, App. C at 175, recommends amending the "**coercion**" definition to require that the official be a "public" official in subsection (D) of the revised definition of "coercion."*

- The RCC addresses this recommendation by incorporating a similar recommendation made by OAG, which specifies that this form of coercive threat requires threatening to take or withhold action as a government official, or cause a government official to take or withhold action.
- This revision does not appear to change current District law. The change improves the clarity of the revised criminal code.

(16) *PDS, App. C at 176, recommends requiring "restrict" instead of "limit" in subsection (F) of the revised definition of "**coercion**" and using the definition of "controlled substance" in D.C. Code § 48-901.02.*

- The RCC partially incorporates this recommendation. Under the revised definition, this form of "coercive threat" requires that the accused *restricts* a person's access to controlled substances. This form of "coercive threat" requires more than merely limiting a person's access to a controlled substance. For example, a person who provides a controlled substance in exchange for something of value has not necessarily made a "coercive threat." However, the RCC does not incorporate the recommendation to cross reference the definition of "controlled substance" in D.C. Code § 48-901.02.
- This revision changes current District law as described in the commentary. This revision improves the clarity and proportionality of the revised criminal code.

(17) *PDS, App. C at 175-176 recommends amending (3)(F) in the revised definition of "**coercion**" to require that the defendant threatened to restrict a person's access to a controlled substance, to which the person is addicted.*

- The RCC does not incorporate this recommendation as unnecessary and potentially confusing. The causal requirement that threats to restrict a person's access to a controlled substance, in addition to the separate CCRC recommended revision that requires that the complainant owns the controlled substance, is sufficient to exclude actors who do not warrant criminal liability.

(18) *PDS, App. C at 176, recommends specifying that the prescription medication in paragraph (F) of the revised definition of "**coercion**" must belong to the person to whom access is restricted.*

- The RCC incorporates this recommendation. Under the revised definition, this form of "coercive threat" requires that the accused threatened to restrict a person's access to prescription medication "that the person owns." This form of "coercive threat" requires threatening to restrict access to medication that the other person already owns. Under this revised language, a pharmacist refusing to sell prescription medication would not commit this form of coercive threat. However, under certain circumstances, threats to restrict access to prescription medication that the other person does not own may still constitute a "coercive threat" under the catchall provision.
- This revision changes current District law as described in the commentary. This change improves the clarity and proportionality of the revised criminal code.

(19) *PDS, App. C at 176, recommends adding language to the commentary on the revised definition of "**coercion**" that discusses paragraph (F) of the revised definition. PDS requests that the Commentary specify that merely refusing to sell or provide an addictive substance or refusing to fill a prescription does not alone constitute restricting a person's access to a controlled substance or prescription medication.*

- The RCC partially incorporates this revision by amending the definition of "coercive threats" such that a pharmacist refusing to sell or provide a controlled substance or prescription medication cannot constitute a *per se* coercive threat.
- This revision changes current District law as described in the commentary. This change improves the clarity and proportionality of the revised criminal code.

(20) *OAG, App. C at 187-188, recommends modifying subsection (G) of the revised definition of "**coercion**" so that the final clause states "a reasonable person of the same background and in the same circumstances as the complainant to comply."*

- The RCC incorporates this recommendation in the revised definition of "coercive threat."
- This revision does not further make a substantive change to current District law. This change improves the clarity of the revised criminal code.

(21) *OAG, App. C at 192 recommends specifying that **coercion** premised on threats to take or withhold official action should specify that this requires threats to take or withhold "government action."*

- The RCC incorporates this recommendation. The revised definition of coercive threats specifies that it includes threats to take or withhold action

as a government official, or to cause a government official to take or withhold action.

- This revision does not substantively change current District law. This change improves the clarity of the revised criminal code.

(22) *The CCRC recommends changing the term* ***"coercion"*** *to "****coercive threats****." This is not a substantive change, but clarifies that this conduct requires threats of future harms.*

- This revision does not substantively change current District law. This change improves the clarity of the revised criminal code.

(23) *The CCRC recommends amending paragraph (A) of the definition of a* ***coercion****, which requires that the accused threatened that anyone will commit an offense against persons or a property offense, to specify that strict liability applies. Coercive threats premised on threats to commit an offense against persons or a property offense do not require any additional culpable mental state. It is not required that the accused knew that the threatened conduct constitutes an offense against persons or a property offense.*

- This revision does not appear to change current District law as described in the commentary. This change improves the clarity of the revised criminal code.

(24) *The CCRC recommends amending the definition of* ***coercion*** *to omit as a per se type a threat to inflict a wrongful economic injury. The prior definition of "coercion" included threats to inflict the wrongful economic injury, which was intended to cover a very narrow, unusual type of threats involving corrupt business practices. These threats of wrongful economic injuries may still constitute a "coercive threat" under the catch-all provision.*

- This revision may change current District law as described in the commentary. This change improves the clarity of the revised criminal code.

(25) *The CCRC recommends amending the definition of* ***coercion*** *to include threats to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status. The prior definition of "coercion" included threats to accuse another person of violating an immigration regulation. The revised "coercive threat" definition more broadly covers threats to notify government agencies or officials, or to publicize, a person's immigration or citizenship status, regardless of any specific violation. This revision captures cases in which an actor threatens to reveal a person's immigration or citizenship status without threatening to accuse a person of any specific violation. The revised language includes cases that may involve highly coercive threats that arguably would have been excluded under the prior definition. For example, threatening to reveal that another person is not a U.S. citizen under certain circumstances may be highly coercive, even absent a threat of a specific immigration violation. Notably, this recommendation follows similar language that the Council passed in the Sexual Blackmail Elimination and*

Immigrant Protection Amendment Act of 2018,[26] *which has a projected law date of May 9, 2019.*

- This revision may change current District law as described in the commentary. This change improves the clarity and proportionality of the revised criminal code.

(26) *The CCRC recommends amending paragraph (F) of the "**coercion**" definition to require that the actor threatened to restrict a person's access to a controlled substance* that the other person owns, *or to prescription medication* that the person owns. Under this revision, this form of coercive threat only applies to threats to restrict access to controlled substances or prescription medication that the other person already owns. Therefore, any cases in which a person threatens to withhold sale or gift of a controlled substance or prescription medication are categorically excluded from this form of coercive threat. However, it is possible that in certain circumstances, threatening to restrict access to a controlled substance or prescription medication that the other person does not own may still constitute a coercive threat under the catch-all provision.

- This revision changes current District law as described in the commentary. This revision improves the clarity and proportionality of the revised criminal code.

(27) *The CCRC recommends defining "**consent**" as a "word or act" instead of "words or actions." This revision clarifies that a single word or act may suffice for "consent," in addition to multiple words or acts.*

- This revision does not substantively change current District law. This revision improves the clarity and completeness of the revised definition.

(28) *The CCRC recommends defining "**consent**" as a word or action that indicates agreement "expressly or implicitly." This revision clarifies that consent may be express or implied. As the definition pertains to sex offenses, this language covers the sentence "Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances" which has been deleted from the revised definition (discussed below).*

- This revision does not change current District law. This revision improves the clarity and completeness of the revised definition.

(29) *The CCRC recommends defining "**consent**," in part, as agreement to a "particular result." This revision clarifies that the subject of a given agreement may be to the result rather than to the particular conduct.*

[26] D.C. Code § 22-3252(a). ("A person commits the offense of blackmail when that person, with intent to obtain property of another or to cause another to do or refrain from doing any act, threatens to: (1) Accuse another person of a crime; (2) Expose a secret or publicize an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation; (3) Impair the reputation of another person, including a deceased person; (4) Distribute a photograph, video, or audio recording, whether authentic or inauthentic, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation; or (5) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status.").

- This revision does not change current District law. This revision improves the clarity and completeness of the revised definition.

(30) *The CCRC recommends deleting from the revised definition of "**consent**" that was specific to sex offenses the sentence, "Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances." This language is surplusage because the revised definition states that agreement can be shown "expressly or implicitly."*

- This revision does not change current District law. This revision improves the clarity of the revised definition.

(31) *The CCRC recommends deleting from the revised definition of "**consent**" the following provision that was specific to property offenses: "Consent includes words or actions that indicate indifference towards particular conduct." Whether indifference towards particular conduct constitutes an agreement, expressly or implicitly, is a determination for the factfinder, as well as whether the defendant satisfies any culpable mental state requirement as to lack of consent.*

- This revision does not change current District law. This revision improves the clarity and completeness of the revised definition.

(32) *The CCRC recommends deleting from the revised definition of "**consent**" the following provision that was specific to property offenses: "Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so." This language is unnecessary and potentially confusing because the RCC relies on civil law for determining agency.*

- This revision does not change current District law. This revision improves the clarity and consistency of the revised definition.

(33) *The CCRC recommends defining "**consent**" to exclude consent given by a person who is "legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof," as well as consent given by a person who "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." This revision ensures that consent is given by a competent individual.*

- This revision does not change current District law. This revision improves the clarity and consistency of the revised definition.

(34) *PDS, App. C at 107, recommends clarifying in the commentary for the definition of "**dangerous weapon**" that the issue of whether an object or substance "in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury" is a question of fact, not a question of law.*

- The RCC incorporates PDS's recommendation, by clarifying in commentary to the definition of a "dangerous weapon" that this is a matter of fact, not law.
- This revision does not appear to change current District law. This revision improves the clarity of the revised definition of "dangerous weapon."]

(35) *PDS, App. C at 069, notes that the definition of "**deception**" does not require materiality when the deception is based on failure to disclose a known lien disclose a known lien, adverse claim, or other legal impediment to the*

enjoyment of property. PDS notes that this form of deception is most likely to arise in the context of fraud or forgery. PDS recommends that the commentary to the RCC fraud offense clarifies that fraud premised on this form of deception requires a causal link between the deception and obtaining consent.

- The RCC commentary incorporates this recommendation. The commentary to the RCC fraud offense has been amended to clarify that the offense requires that deception must actually cause the property owner to consent to giving or transferring property.
- This change to the commentary will improve the clarity and proportionality of the revised criminal code.

(36) *OAG, App. C at 67, recommends retaining the current statutory definition of "**demonstration.**"*

- The RCC incorporates this recommendation by retaining the current statutory definition in RCC § 22E-701 and updating commentary accordingly.
- This revision does not change District law. This change improves the clarity of the revised offense.

(37) *The CCRC recommends deleting the term "**District official or employee**" because the term is no longer used in the RCC definition of "protected person" or the gradations of the revised offenses against persons that prohibit inflicting harm "with the purpose of harming" the complainant because of the complainant's status. As is described below, the penalty enhancement in current District law for District officials and employees is limited to "District officials" that have special obligations in District government.*

- This revision changes current District law, as described in the updated commentaries to the definition of "protected person" and several of the RCC offenses against persons. This revision improves the consistency and proportionality of the revised offenses against persons.

(38) *The CCRC recommends deleting the term "**duty of care**" because the RCC offenses against persons no longer use that term.*

- This revision does not change current District law. This revision improves the clarity and completeness of the revised statutes.

(39) *The CCRC recommends requiring for the definition of "**effective consent**" that the consent be "induced by physical force, a coercive threat, or deception." Previously, only the definition of "effective consent" that applied to sex offenses included "physical force."*[27]

- This revision does not change current District law. This revision improves the clarity and completeness of the revised statutes.

(40) *The CCRC recommends deleting the term "**family member**" because the term is no longer used in the gradations of RCC offenses against persons that prohibit inflicting harm "with the purpose of harming the complainant because of the complainant's status." As is described below, the penalty enhancement in*

[27] As described below, the RCC no longer defines "physical force."

current District law for District officials and employees and their family members is limited to District officials that have special obligations in District government.

- This revision changes current District law, as described in the updated commentaries to several of the RCC offenses against persons. This revision improves the consistency and proportionality of the revised offenses against persons.

(41) *The CCRC recommends defining the term "**halfway house**" to mean "any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program." This term was previously included in the definition of "correctional facility," but is now defined as a separate term.*

- This revision may change current District law as discussed in the commentary to escape from a correctional facility[28] and correctional facility contraband.[29]

(42) *The CCRC recommends defining the terms "**healthcare provider**" and "**health professional.**" These terms are used in the sexual exploitation of an adult statute, and the definitions refer to current D.C. Code civil provisions.[30] The definitions refer to a wide array of medical and cognate professions, including massage therapists and addiction counselors, and are consistent with the scope of the current D.C. Code statute.*

- This revision may change current District law, as described in the commentary. This revision improves the clarity of the revised offense.

(43) *OAG, App. C at 096, recommends revising the definition of "**law enforcement officer**" to include the jurisdictional provision in current D.C. Code § 22-405(a) for District officers or employees charged with the supervision of juveniles.*

- The RCC incorporates OAG's recommendation as subsection (E) of the revised definition.
- This revision may change current District law for some RCC offenses against persons, as described in the updated commentaries to the definition of "law enforcement officer" and several RCC offenses against persons. This change improves the clarity and completeness of the revised definition.

(44) *OAG, App. C at 096, recommends revising the definition of "**law enforcement officer**" to include "any officer, employee, or contractor of the Department of Youth Rehabilitation Services" (DYRS).*

- The RCC does not incorporate OAG's recommendation. The proposed language potentially includes individuals at DYRS that are not working in a law-enforcement capacity, and, as OAG notes in its comments, "contractor" would be an expansion of current District law. Instead, subsection (F) of the CCRC definition includes specified officers or employees of DYRS and subsection (H) is a broad catchall provision.

[28] RCC § 22E-3401.
[29] RCC § 22E-3403.
[30] D.C. Code §§ 3–1205.01; 16–2801.

- The RCC draft improves the clarity and completeness of the revised definition.

(45) *The CCRC recommends including employees of the Department of Youth Rehabilitation Services and the Family Court Social Services Division of the Super Court, in subsection (F) of the definition of "**law enforcement officer.**" A substantively identical provision is included in the current definition of "law enforcement officer" in D.C. Code § 22-405(a).*

- This revision may change current District law for some RCC offenses against persons, as described in the updated commentaries to the definition of "law enforcement officer" and several RCC offenses against persons. This revision improves the clarity and completeness of the revised definition.

(46) *The CCRC recommends deleting "An employee of the Family Court Social Services Division of the Superior Court charged with the intake, assessment, or community supervision" as a separate category of "**law enforcement officer**" and instead codifying it in subsection (F) of the revised definition.*

- The revision does not change current District law. This revision improves the clarity and organization of the revised definition.

(47) *The CCRC recommends modifying subsection (H) of the revised definition of "**law enforcement officer**" so that it includes all subparagraphs of the revised definition through subparagraph (G).*

- This revision may change current District law for some RCC offenses against persons, as described in the updated commentaries to the definition of "law enforcement officer" and several RCC offenses against persons. This revision improves the clarity and completeness of the revised definition.

(48) *PDS, App. C at 72, recommends revising the definition of "**motor vehicle**" so it is clear that a "truck tractor" is a motor vehicle, not a semitrailer or trailer. PDS recommends deleting the first reference to "truck tractor" in the definition and revising the second reference to specify a "truck tractor with or without a semitrailer or trailer."*

- The RCC incorporates PDS's recommendation by changing the "motor vehicle" definition accordingly.
- This revision does not change current District law. This revision improves the clarity of the revised definition.

(49) *PDS, App. C at 72, recommends revising the definition of "**motor vehicle**" to exclude modes of transportation that can be propelled by human effort, such as a moped. PDS recommends deleting the reference to "moped" in the revised definition, adding a reference to "scooter," and requiring that vehicles other than those specified in the revised definition be "solely" propelled by an internal-combustion engine or electricity."*

- The RCC partially incorporates PDS's recommendation. The revised definition deletes the reference to "moped" and requires that vehicles other than those specified in the revised definition are "designed to be propelled only by an internal-combustion engine or electricity." The revised

definition does not include a reference to a "scooter" because of the many connotations of that term, including some vehicles that are propelled by human effort, as opposed to internal-combustion engine or electricity. The revised unauthorized use of property offense provides liability for unauthorized use of other vehicles, such as mopeds.

- These revisions change current District law, as described in the updated commentary to the revised definition and various RCC offenses. These revisions improve the clarity, consistency, and proportionality of the revised offenses against property by clearly defining what is required to be a "motor vehicle."

(50) *PDS, App. C at 72, recommends revising the final clause in the definition of "**motor vehicle**" to require that any "such" vehicle be "temporarily" non-operational."*

- The RCC does not incorporate PDS's recommendation because, as discussed below, the revised definition of "motor vehicle" no longer includes this provision.

(51) *The CCRC recommends deleting the final clause of the revised definition of "**motor vehicle**," including any non-operational vehicle that is being restored or repaired." The scope of this language is unclear and any non-operational vehicle that is being restored or repaired would still qualify as a "motor vehicle" if the other requirements of the revised definition are met.*

- This revision does not substantively change current District law. This revision improves the clarity of the revised definition.

(52) The CCRC recommends deleting the definition of "**obstruct**," and replacing it with the term "block." The term "block" is defined the same as "obstruct" previously was drafted.

- This revision changes District law as described in the commentary. This change clarifies and improves the consistency of the revised statute.

(53) The CCRC recommends deleting the definition of "**occupant**." This term is no longer used in the revised trespass statute, and there is no need to provide a definition.

- This revision may change District law as described in the commentary. This change clarifies and improves the consistency of the revised statute.

(54) *The CCRC recommends revising the definition of "**owner**" so that it is defined as a person holding an interest in property with which the actor is not privileged to interfere "without consent." This change clarifies that the term owner has the power to grant consent to use or interfere with property, and the drafting is parallel to the RCC and current District definition of "property of another."*

- This revision does not substantively change current District law. This revision improves the clarity of the revised definition.

(55) *The CCRC recommends deleting the definition of "**person**" because it is no longer necessary. The new draft provision in RCC § 22E-2002, Definition of*

"Person" for Property Offenses, provides a definition for property offenses in RCC Subtitle III that includes corporations and other legal entities[31] *and is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A),*[32] *applicable to Theft, Fraud, Stolen Property, Forgery, and Extortion offenses. For other RCC offenses, a definition of person is not codified in the RCC, although the general definition of "person" in D.C. Code § 45-604,*[33] *applicable to the D.C. Code generally, may still provide guidance.*

- This revision does not change current District law. This revision improves the clarity and consistency of the revised statutes.

(56) *PDS, App. C at 171-172 recommends revising the definition of "**person of authority in a secondary school**" to "mean any teacher, counselor, principal, or coach in a secondary school attended by the complainant or where the complainant receives services or attends regular programming."*

- The RCC partially incorporates PDS's recommendation, which is discussed in the Appendix entry for the sexual exploitation of an adult statute (RCC § 22E-1305).
- This revision changes current District law, as described in the commentary. This revision improves the clarity of the revised sexual exploitation of an adult statute (RCC § 22E-1305).

(57) *The CCRC recommends deleting the definition of "**person of authority in a secondary school**" because it is no longer a defined term in the RCC. Instead, the sexual exploitation of an adult statute codifies an updated definition directly in the revised statute. This revision is discussed in the Appendix entry for the sexual exploitation of an adult statute (RCC § 22E-1305).*

- This revision may substantively change current District law, as described in the commentary. This revision improves the clarity of the revised definition.

(58) *PDS, App. C at 184, recommends codifying the definition of "physically following" that appears in the commentary: "to maintain close proximity to a person as they move from one location to another."*

- The RCC incorporates this recommendation by adding the definition to RCC § 22E-701.
- This revision does not further change current District law. This change

[31] RCC § 22E-2002. Definition of "Person" for Property Offenses. ("Notwithstanding the definition of "person" in D.C. Code § 45-604, in Subtitle III of this Title, "person" means an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity.").

[32] 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.").

[33] D.C. Code §§ 45-601 ("In the interpretation and construction of this Code the following rules shall be observed."); 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.").

improves the clarity of the revised offense.

(59) *The CCRC recommends deleting the definition of "**physical force**" because it is no longer a defined term in the RCC. Previously, the term was defined to mean "the application of physical strength." The definition does little to clarify the meaning of the term and may be misleading as to the intended scope of the term as used in RCC statutes. To the extent that "the application of physical strength" may be construed to exclude indirect use of physical contact (e.g. hitting someone with a thrown object), such a meaning is not intended. The more general, undefined meaning of "physical force" accurately conveys the concept of a physical contact in the RCC.*

- This revision does not substantively change current District law. The change improves the clarity of the revised statutes.

(60) *PDS, App. C at 173, recommends replacing "includes" with "means" in the revised definition of "**position of trust with or authority over**." PDS states that "A position of trust and authority should be more than a label based on the defendant's employment or status. The definition should capture situations where the defendant's close relationship to the complainant or minor allow for an abuse of trust or additional harm."*

- The RCC incorporates PDS's recommendation by amending the definition to use "means." However, the RCC definition also includes a catchall provision in subsection (D), "or other person responsible under civil law for the care and supervision of the complainant." This provision is consistent with the current definition of "significant relationship" in the sex offenses and ensures that individuals in positions of trust or authority are included in the definition even if they are not specifically listed. The PDS recommendation, without a catchall provision, would unnecessarily limit the scope of "position of trust with or authority over" and exclude situations that are coercive due to the defendant's relationship with the complainant. Making the definition an exclusive list also would likely focus interpretation solely on the actor's job title, contrary to PDS' comment.
- This revision may change current District law, as described in the updated commentaries to the definition and several of the RCC sex offenses that use this term. The RCC draft improves the consistency of the revised definition and offenses that use this term.

(61) *PDS, App. C at 173, recommends replacing "victim" with "complainant" in subsection (B) of the revised definition of "**position of trust with or authority over**."*

- The RCC incorporates PDS's recommendation, using the standard reference to "complainant."
- This revision does not change current District law. This revision improves the clarity and consistency of the revised definition.

(62) *PDS, App. C at 173, recommends requiring in subsection (D) of the revised definition of "**position of trust with or authority over**" that the complainant is "an active participant or member" at the specified religious institutions and at the specified facilities, organizations, or programs. PDS states*

that "A position of trust and authority should be more than a label based on the defendant's employment or status. The definition should capture situations where the defendant's close relationship to the complainant or minor allow for an abuse of trust or additional harm."

- The RCC does not incorporate PDS's recommendation. The proposed recommendation may create a gap in liability by excluding situations that are coercive due to the actor's position in relation to the complainant—even where participation at the institution or facility is rare.

(63) *PDS, App. C at 173, recommends limiting the specified individuals in subsection (D) of the revised definition of "**position of trust with or authority over**" to a "teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff" by replacing "including" with "meaning," and requiring that these individuals have "regular contact with the complainant in the above settings.*

- The RCC does not incorporate PDS's recommendation. The proposed recommendation may create a gap in liability by excluding situations that are coercive due to the actor's position in relation to the complainant—even where participation at the institution or facility is rare.

(64) *The CCRC recommends codifying in subsection (D) of the revised definition of "**position of trust with or authority over"** "or other person responsible under civil law for the care and supervision of the complainant." This provision ensures that persons who by law are held to a higher standard of care for a person are subject to the offense even if they are not specifically listed.*

- This revision may change current District law, as described in the updated commentary to the definition and several of the RCC sex offenses that use this term. This change improves the clarity and consistency of the revised definition.

(65) *The CCRC recommends revising the definition of "**possess,**" to eliminate the temporal requirement in the earlier draft, so that the definition more closely aligns with current District law.*[34]

- This revision does not change current District law. This revision improves the clarity of the revised definition.

(66) *The CCRC recommends revising the definition of "**property of another**" so that it is defined as property that a person has an interest in with which the actor is not privileged to interfere "without consent." This change clarifies that the reference to a privilege to interfere with the property is contingent on consent to use or interfere with property, and the drafting is parallel to the RCC and current District definition of "owner."*

- This revision does not change current District law. This revision improves the clarity and consistency of the revised definition.

[34] [Innocent possession and temporal delays with disposal of items possessed will be addressed separately in forthcoming recommendations.]

(67) *The CCRC recommends adding subsection (B) to the definition of "**public safety employee**" (investigators, vehicle inspection officers, and code inspectors) and modifying the catchall provision in subsection (C) to include subsection (B). This revision creates consistency between the RCC definition of "public safety employee" and the RCC definition of "law enforcement officer."*

- This revision changes current District law, as described in the updated commentaries for the definitions of "public safety employee," "law enforcement officer, and several RCC offenses against persons. This revision improves the clarity and completeness of the revised definitions.

(68) *The CCRC recommends requiring at least a four year age gap instead of a two year age gap between an actor that is 18 years of age or older and a complainant that is under the age of 18 years in subsection (A) of the revised definition of "**protected person**." This change creates uniformity with the required age gap in several current offenses[35] as well as in the RCC sex offenses.*

- This revision changes current District law, as described in the updated commentaries to the definition of "protected person" and several of the RCC offenses against persons. This revision improves the consistency and proportionality of the revised offenses against persons.

(69) *The CCRC recommends requiring in subsection (B) of the revised definition of "**protected person**" that the actor is, in fact, under 65 years of age and at least 10 years younger than the complainant. This change creates uniformity with the penalty enhancement in the revised sexual assault statute and limits the provision to situations where the actor takes advantage of the complainant's age.*

- This revision changes current District law, as described in the updated commentaries to the definition of "protected person" and several of the RCC offenses against persons. This change improves the consistency and proportionality of the revised offenses against persons.

(70) *The CCRC recommends limiting subsection (G) of the definition of "**protected person**" to "District official" instead of "District official or employee" and defining "District official" to have the same meaning as "public official" in D.C. Code § 1-1161.01(47). This definition narrows the penalty enhancement to individuals that have special obligations in District government.*

- This revision changes current District law, as described in the updated commentaries to the definition of "protected person" and several of the RCC offenses against persons. This revision improves the consistency and proportionality of the revised offenses against persons.

[35] The District's current child sexual abuse, enticing a child, and arranging for a sexual contact with a real or fictitious child statutes require at least a four year age gap between the actor and a complainant under the age of 16 years. D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3010 (enticing a child); 22-3010.02 (arranging for a sexual contact with a real or fictitious child); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). The District's current contributing to the delinquency of a minor statute requires at least a four year age gap between the actor and a complainant under the age of 18 years. D.C. Code § 22-811.

(71) *The CCRC recommends deleting "citizen patrol member" from the definition of "**protected person**."*

- This revision changes current District law, as described in the updated commentaries to the definition of "protected person" and several of the RCC offenses against persons. This change improves the consistency and proportionality of the revised offenses against persons.

(72) *OAG, App. C at 096, recommends revising the definition of "**protected person"** as it pertains to law enforcement officers, public safety employees, transportation workers, and District officials or employees to include actions taken "on account of [these individuals'] official duties." OAG recognizes that the current provision applies to crimes occurring "in the course of his or her duties," but says that it "is unclear, however, whether one of these people would fall under this definition if they were assaulted, as a direct result of action they took in their official capacity, after they clocked out of work or whether they must be working at the time of the assault."*

- The RCC does not incorporate this recommendation because the proposed "on account of" language would overlap with provisions in many relevant RCC offenses against persons that prohibit committing an offense "with the purpose of harming the complainant because of the complainant's status" as a "law enforcement officer, public safety employee, or District official." While the "protected person" definition does not reach OAG's hypothetical, that fact pattern is addressed by the "with the purpose of harming the complainant because of the complainant's status…" language in particular RCC offenses that enhances penalties for assaults on law enforcement officers, etc. The recommendation also would expand criminal penalties compared to current District law as it pertains to crimes against transportation workers (which are within the RCC "protected persons" definition, and so covered when the crime occurs in the course of their duties).

(73) *OAG, App. C at 96, states that the CCRC should consider clarifying in the RCC definition of "serious bodily injury" or the corresponding commentary as to whom the "disfigurement" must be obvious—to the general public or to the complainant. OAG does not specify any particular language that it recommends.*

- The RCC addresses this matter by revising the commentary to the RCC definition of "serious bodily injury" to state that the definition is meant to preserve case law interpreting the parts of the current definition, including "disfigurement" that were carried over to the RCC definition. The language "protracted and obvious disfigurement" in the revised definition of "serious bodily injury" is from the current definition of "serious bodily injury. Current DCCA case law does not draw a bright line rule regarding when disfigurement is "obvious."
- This revision does not change current District law, and clarifies the meaning of the revised statute.

(74) *The CCRC recommends defining the term "**secure juvenile detention facility**" 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" This term was previously included in the definition of "correctional facility," but is now defined as a separate term.

- This revision may change current District law as discussed in the commentary to escape from a correctional facility[36] and correctional facility contraband.[37]

(75) *PDS, App. C at 72, recommends revising the definition of "**services**" to exclude "transportation in vehicles owned and/or operated by the Washington Metropolitan Area Transit Authority or other governmental entity" so that this type of fare evasion is exclusively an OAG offense. In addition, PDS's written comments state that it supported the fare decriminalization legislation that was then pending before the Council (Bill 22-0408).*

- The RCC does not incorporate PDS's recommendation because the fare decriminalization (Bill 22-0408) specifically amends the current theft statute to exclude fare evasion, as criminalized by D.C. Code § 32-252. The RCC theft statute retains this exception to liability.

(76) *The CCRC recommends codifying a separate subsection (subsection (A)) in the revised definition of "**sexual act**" for the penetration of the anus or vulva by a penis without requiring an additional intent to sexually degrade, arouse, etc. The prior revised definition of "sexual act" combined penile penetration of the anus or vulva with penetration by an object or body part and required an intent to sexually degrade, arouse, or gratify any person. A separate subsection for penile penetration with no additional intent requirement recognizes that this kind of penetration is inherently sexual in nature and avoids suggesting that there may be legitimate hygienic, medical, or law enforcement purposes. To clarify that otherwise identical RCC sex offenses that differ only in requiring a "sexual act" and "sexual contact," the revised definition of "sexual contact" now includes a "sexual act."*

- This revision does not change current District law.[38] This revision improves the clarity and consistency of the revised definition.

(77) *The CCRC recommends removing from subsection (B) of the revised definition of "**sexual act**" the intent to "sexually degrade, arouse, or gratify any person." The prior revised definition of "sexual act" required an intent to sexually degrade, arouse, or gratify any person for contact between the mouth and specified body parts. Removing this intent requirement recognizes that this kind of act is inherently sexual in nature and avoids suggesting that there may be legitimate hygienic, medical, or law enforcement purposes. To clarify that otherwise identical RCC sex offenses that differ only in requiring a "sexual act"*

[36] RCC § 22E-3401.
[37] RCC § 22E-3403.
[38] The current definition of "sexual act" has a substantively identical subsection (A). D.C. Code § 22-3001(8)(A) ("'Sexual act" means: (A) The penetration, however slight, of the anus or vulva of another by a penis.").

and "sexual contact," the revised definition of "sexual contact" now includes a "sexual act."

- This revision does not change current District law.[39] This revision improves the clarity and consistency of the revised definition.

(78) *The CCRC recommends requiring penetration by "a hand or finger" instead of a "body part" in subsection (C) of the revised definition of "**sexual act**." The prior revised definition of "sexual act" combined penile penetration of the anus or vulva with penetration by an object or body part and required an intent to sexually degrade, arouse, or gratify any person. As discussed above, the revised definition of "sexual act" now has a separate subsection (A) for penile penetration of the anus or vulva. Limiting specified body parts in subsection (C) of the revised definition of "sexual act" to a "hand or finger" clarifies the definition.*

- This revision does not change current District law.[40] This revision improves the clarity and consistency of the revised definition.

(79) *The CCRC recommends requiring "with the desire to" instead of "with the intent to" in subsection (C) of the revised definition of "**sexual act**." "Intent" is a defined culpable mental state in RCC § 22E-206. Using "with the desire to" avoids codifying a culpable mental state within a definition while conveying the same meaning.*

- This revision does not change current District law. This revision improves the clarity and consistency of the revised definition.

(80) *The CCRC recommends requiring with the desire to "abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person" in subsection (C) of the revised definition of "**sexual act**" instead of "sexually degrade, arouse, or gratify any person." Removing this intent requirement recognizes that this kind of penetration is inherently sexual in nature and avoids suggesting that there may be legitimate hygienic, medical, or law enforcement purposes.*

- This revision does not change current District law. This revision improves the clarity and completeness of the revised definition.

(81) *The CCRC recommends including in the revised definition of "**sexual contact**" a subsection (A) for a "sexual act." This revision clarifies that otherwise identical RCC sex offenses that differ only in requiring a "sexual act" and "sexual contact," are lesser included offenses, an issue that is undecided in current District law.*

- This revision changes current District law, as described in the updated commentary. This revision improves the clarity, completeness, and

[39] The current definition of "sexual act" has a substantively identical subsection (B). D.C. Code § 22-3001(8)(B) ("'Sexual act" means: (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus.").

[40] The current definition of "sexual act" limits specified body parts in subsection (C) to "hand or finger." D.C. Code § 22-3001(8)(C) ("'Sexual act" means: (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

proportionality of the revised sex offenses, and removes unnecessary overlap between offenses.

(82) *The CCRC recommends requiring "with the desire to" instead of "with the intent to" in subsection (B) of the revised definition of "**sexual contact**." "Intent" is a defined culpable mental state in RCC § 22E-206. Using "with the desire to" avoids codifying a culpable mental state within a definition while conveying the same meaning.*

- This revision does not change current District law. This revision improves the clarity and consistency of the revised definition.

(83) *The CCRC recommends requiring with the desire to "sexually degrade, sexually arouse, or sexually gratify any person" in subsection (B) of the revised definition of "**sexual contact**" instead of "sexually degrade, arouse, or gratify any person." This revision clarifies that "sexually" modifies degrade, arouse, and gratify.*

- This revision changes current District law, as described in the updated commentary. This revision improves the clarity and completeness of the revised definition.

(84) *OAG, App. C at 96, recommends defining "**significant bodily injury**" so that whenever the government fails to prove "serious bodily injury" it necessarily proves "significant bodily injury." For example, OAG says that, "if the government proves that the person was disfigured, but doesn't prove that it was obvious, then the disfigurement should qualify as a significant bodily injury."*

(85) The RCC does not incorporate this recommendation because it may result in disproportionate punishment in some cases. Degrees of bodily injury recognized in the D.C. Code and the RCC are not continuous in the manner suggested by OAG. For instance, in the hypothetical offered by OAG, neither current District law nor the RCC would hold that a cut behind the ear requiring no professional medical treatment that scars and leaves a mark that disfigures (but is not "obvious") is therefore a significant bodily injury subject to punishment equivalent to breaking a bone. Some injuries, such as disfigurement, may be either a bodily injury or a serious bodily injury, without being a "significant bodily injury."

(86) *The CCRC recommends replacing "registered" with "licensed" in Subsection (D) of the revised definition of "**transportation worker**." This revision makes the licensing requirement in subsection (D) of the definition consistent with the licensing requirement in subsection (A) and subsection (C) of the definition.*

- This revision does not appear to change current District law. This revision improves the clarity and consistency of the revised definition.

RCC § 22E-1101. Murder.

(1) *OAG, App. C at 118, recommends redrafting the statutory language and/or commentary to clarify what is required to prove the "substantial planning" aggravating factor. OAG specifically inquires as to whether "substantial planning" requires a certain degree of intricacy or whether a prolonged period of time suffices, and if the latter, how the length of time for the aggravating factor compares to the premeditation and deliberation requirement.*

- The RCC partially incorporates this recommendation by revising the commentary to clarify that the "substantial planning" aggravating factor is intended to codify current District law.[41] Substantial planning does not refer solely to how "intricate" an actor's planning is. The precise time that is required for the aggravator, beyond premeditation and deliberation, is not statutorily specified. This change clarifies, but does not change the meaning of, the revised offense.

(2) *OAG, App. C at 119, recommends revising the enhancement for murder "by means of a dangerous weapon" to apply anytime a weapon is displayed or used, whether or not it in fact caused the death.*

- The RCC does not incorporate this recommendation because, per another change described below, committing murder "by means of a dangerous weapon" is no longer an aggravating factor. The current murder statute does not recognize committing murder while armed as an aggravating factor. However, the RCC removal of the aggravator for killing "by means of a dangerous weapon" ends the separate penalty provisions authorize a penalty enhancement for murders committed while armed with a dangerous weapon.[42] As discussed by the Advisory Group, nearly all murders involve a firearm, knife, or other weapon, and raising the gradation of murder in all instances using a firearm 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 affects sentences for murder.

(3) *OAG, App. C at 119, recommends the commentary clarify whether a reasonable but mistaken belief that deadly force was necessary mitigates to manslaughter or is a complete defense.*

- The RCC incorporates this recommendation by revising the commentary to clarify that a reasonable but mistaken belief that deadly force was necessary is a complete defense to a charge of murder or manslaughter. The RCC's forthcoming codification of a general justification defense for self-defense will address this matter further. This revision does not change current District law.

(4) *OAG, App. C at 120, notes that the mitigation defense reduces all grades of murder to the same grade of manslaughter and the same penalty. OAG says that this means the penalties are no longer proportionate to the conduct and*

[41] D.C. Code § 22-2104.01(b)(11).
[42] D.C. Code § 22-4502.

recommends changes be made to make mitigated forms of murder have different punishments (e.g., by lowering the penalty class for gradations of murder by one level when there is mitigation).

- The RCC does not incorporate this recommendation because it would make offense penalties less proportionate and would contravene national norms.[43] The mitigating circumstances recognized for murder are not circumstances or results that exist independent from the culpability distinctions that distinguish degrees of murder. Rather, these mitigating circumstances directly address the culpability of the actor, and the presence of such circumstances makes the differences between purpose and extreme recklessness irrelevant. District homicide law and that of other jurisdictions has long recognized this effect of mitigating circumstances to negate distinctions in culpable mental states. Proportionality is improved when similarly serious conduct is punished equivalently, but creating a distinction in punishment among similarly serious conduct, decreases proportionality.

(5) *OAG, App. C at 120, recommends re-drafting the effect of mitigation provision to state that if the government can prove the elements of first or second degree murder, but cannot disprove the presence of mitigating circumstances, then the defendant is guilty of manslaughter, instead of stating that the factfinder "may" find the defendant guilty of manslaughter.*

- The RCC incorporates this recommendation by stating that when the government proves the elements of murder, but cannot disprove the presence of mitigating circumstances, the defendant "*is* guilty of voluntary manslaughter."
- This revision does not change current District law. The change improves the clarity of the revised offense.

(6) *PDS, App. C at 125, recommends removing as an aggravating factor that the murder was committed by means of a dangerous weapon because the effect would be to elevate over 90% of all homicides to the highest penalty, equivalent to more egregious forms of murder.*

- The RCC incorporates this recommendation. As discussed by the Advisory Group, 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 revision changes current District law. The current murder statute does not recognize committing murder while armed as an aggravating factor. However, the RCC removal of the aggravator for killing "by

[43] Several states mitigate more than one degree of murder to a single grade of manslaughter if there are mitigating circumstances. E.g., Alaska Stat. Ann. § 11.41.120; Ark. Code Ann. § 5-10-104; Haw. Rev. Stat. Ann. § 707-702; Iowa Code Ann. § 707.4; N.H. Rev. Stat. Ann. § 630:2; Or. Rev. Stat. Ann. § 163.118; 18 Pa. Stat. Ann. § 2503; Tex. Penal Code Ann. § 19.02.

means of a dangerous weapon" ends the separate penalty provisions authorize a penalty enhancement for murders committed while armed with a dangerous weapon.[44] This change improves the proportionality of the revised criminal code.

(7) *PDS, App. C at 125-126, recommends eliminating aggravated murder as a separate gradation and, if penalties higher than first degree murder are recommended (which PDS says are not necessary), PDS recommends that these higher penalties be provided through a separate enhancement or aggravator provision. PDS notes that this may avoid confusion over the relevance of some aggravating factors that, on their face, cannot be logically applied.*

- The RCC incorporates this recommendation by removing a distinct aggravated murder gradation and instead specifying aggravating factors, which if proven, may increase the penalty classification for first and second degree murder by one penalty class.
- This change improves the clarity and logical organization of the revised offense.

(8) *PDS, App. C at 126, recommends that if aggravating factors are retained, the factors should not include the decedent's status as a District employee or a family member of a District employee.*

- The RCC partially incorporates this recommendation by narrowing the scope of District employees covered by the aggravating factor for protected persons. The revised term "protected person" now includes only District officials, while in the course of official duties. The term does not cover District employees more broadly[45], and family members of District officials or employees are not included.
- This revision changes District law[46] by excluding any additional enhancement for murder of a District employee and improves the proportionality of the revised criminal code.

(9) *PDS, App. C at 126, recommends that for aggravating factors based on infliction of extreme physical pain or mental suffering, or mutilation or desecration of the decedent's body, proof of these factors should be presented at a separate hearing before the factfinder, following an initial guilty verdict.*

- The RCC incorporates this recommendation. Subsection (e) of the revised murder statute provides for a bifurcated procedure when a person is charged with penalty enhancements based on infliction of extreme physical pain or mental suffering, or mutilation or desecration of the body.
- This revision does not change current District law, as the current code provides for a separate sentencing hearing for all aggravating factors. This bifurcated procedure will prevent unfairly prejudicial evidence relating to these aggravating factors from being introduced in the initial trial.

[44] D.C. Code § 22-4502.
[45] "District official" has the same meaning as "public official" in D.C. Code § 1-1161.01 (47). Any District employees who do not satisfy this definition are not "protected persons" as defined in RCC § 22E-901.
[46] D.C. Code § 22-851.

(10) *PDS, App. C at 126, also recommends that if aggravator factors are retained the RCC's factors should not include homicides committed because the decedent was a witness in a criminal proceeding or had provided assistance to law enforcement. PDS says that such conduct is already punishable as obstruction of justice,*[47] *a separate offense.*

- The RCC incorporates this recommendation by eliminating these aggravating factors. Forthcoming revision of the obstruction of justice offense in the RCC will further address such conduct.
- This revision changes current District law, and improves the proportionality of the revised statutes and eliminates unnecessary overlap.

(11) *PDS, App. C at 127-128, recommends that first degree murder require a "purposeful" culpable mental state.*

- The RCC incorporates this recommendation, applying a "purposeful" mental state to first degree murder.
- This revision makes the revised criminal code more consistent with current District law and clarifies the revised first degree murder statute insofar as it allows for easier differentiation with the culpable mental state standard for second degree murder— recklessly, with extreme indifference to human life.

(12) *PDS, App. C at 128, recommends that first degree murder should retain the premeditation and deliberation requirements. PDS says that, in practice, this element is critical in current charging decisions.*

- The RCC incorporates this recommendation by revising first degree murder to require premeditation and deliberation, as those terms have been construed by prior District case law.
- This revision makes the revised criminal code more consistent with current District law and clarifies the revised first degree murder statute insofar as it allows for easier differentiation with second degree murder, which lacks such a requirement.

(13) *PDS, App. C at 129, recommends redrafting second degree murder to include knowingly causing the death of another person, but without premeditation and deliberation. PDS says that where the conduct is knowing, but without premeditation and deliberation, the offense definition and the instructions that a jury receives should include reference to "knowingly" which may more closely fit the conduct.*

- The RCC does not incorporate this recommendation because it is redundant, inconsistent with the drafting in all other revised statutes, and may inadvertently create uncertainty as to the meaning of other offenses. RCC 22E-206 describes the hierarchy of culpable mental states and plainly provides that a culpable mental state of recklessly (including recklessly in with extreme indifference to human life) in an offense can be satisfied by proof that a person acted knowingly (or intentionally or purposely). All RCC revised offenses rely on RCC 22E-206, which

[47] D.C. Code § 22-722.

obviates the need in each offense, to state all the culpable mental states that would establish liability and only state the lowest culpable mental state. It may be that jury instructions based on the RCC will be more intuitive if each culpable mental state that would satisfy the elements of an offense is described, but that is not a sound basis for drafting the D.C. Code. While it is true that proof that a person who knowingly killed another would satisfy the culpable mental state requirement for second degree murder, it is not necessary to codify that fact and doing so could inadvertently cast doubt on why such alternative culpable mental states are not specified in other offenses, and why purposely and intentionally are not specified for second degree murder.

(14) *PDS, App. C at 130, recommends rewriting part of the mitigation defense to recognize that the defendant may act with belief that deadly force was necessary to prevent someone other than the decedent from causing unlawful death or serious bodily injury.*

- The RCC incorporates this recommendation, changing the "the decedent" to "a person" in the mitigation defense and noting in commentary the scenario described by PDS of a person acting with belief that deadly force was necessary but accidentally shooting someone other than the aggressor.
- This revision clarifies the revised statute, and may change current District law.

(15) *PDS, App. C at 130-131, recommends re-drafting the burden of proof for mitigation defense provision to state that the government bears the burden of proving the absence of mitigating circumstances if "some evidence of mitigation, however weak, is present at trial[.]"*

- The RCC partially incorporates this recommendation by stating: "If any evidence of mitigation is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt" (emphasis added).
- This revision clarifies the revised statute and does not change current District law.

(16) *CCRC recommends amending the revised murder statute to include a new subsection (c), which allows imputation of awareness of risk required to prove that the actor was reckless, with extreme indifference to human life, if the actor's lack of awareness of the risk was due to self-induced intoxication. Under the general provision on voluntary intoxication, RCC § 22E-209, an actor may be convicted of an offense that requires recklessness, if the person was unaware of the a substantial risk as to a result or circumstance due to self-induced intoxication, if the person would have been aware of the risk had he or she been sober.*[48] *However, although recklessness requires conscious disregard of a substantial risk, recklessness with extreme indifference to human life requires conscious disregard of an extreme risk. RCC § 22E-209 does not address whether recklessness with extreme indifference to human life may be imputed. So,*

[48] RCC § 22E-209 also requires that the actor was negligent as to the result or circumstance.

without this new subsection in the murder statute, a defendant charged with second degree murder could argue that due to his self-induced intoxication, he was unaware of an extreme risk, negating the requirement for proving that he acted with extreme indifference to human life. That would be inconsistent with current District law, which rejects voluntary intoxication as a defense to second degree murder or voluntary manslaughter.[49]

The new subsection only allows imputation of the awareness of extreme risk, but a fact finder must still find that his or her conduct was sufficiently blameworthy to constitute extreme indifference to human life. Ordinarily, self-induced intoxication is blameworthy, but in some rare instances it may reduce blameworthiness, and negate finding that the actor had extreme indifference to human life. Therefore, in these rare cases, self-induced intoxication may serve as a defense to second degree murder.

- This revision changes current District law. This change improves the clarity and proportionality of the revised criminal code.

(17) *The CCRC recommends amending the murder statute to include new subsection (g), which bars accomplice liability for felony murder.*[50] *This subsection precludes accomplice liability for felony murder. Under this subsection, a person cannot be liable for felony murder under an accomplice theory when a co-felon commits the lethal act. When two or more parties participate in a predicate felony in which death results, the person who commits the lethal act may be liable for felony murder as a principal. However, without this revision, it is possible that fellow participants in the felony could be liable for felony murder under an accomplice theory, even though they did not commit the lethal act. This revision prevents this unjust application of the felony murder rule. However, this subsection should not be construed to limit homicide liability under any other theory. This revision bars felony murder liability in cases in which the defendant participates in, or aids and abets, the underlying felony, but a co-felon actually commits the lethal act. Although the co-felon may be liable as a principal for felony murder, it is unjust to hold the accomplice liable for felony murder.*

- This revision changes District law as described in the commentary. The change improves the clarity and proportionality of the revised criminal code.

(18) *Comments concerning typographical errors are incorporated.*

[49] *Davidson v. United States*, 137 A.3d 973, 975 (D.C. 2016)

[50] 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.").

RCC § 22E-1102. Manslaughter.

(1) *PDS, App. C. at 131, recommends eliminating the aggravated manslaughter offense, and codifying aggravating factors based on the status of the decedent separately.*

- The RCC incorporates this recommendation by not codifying aggravated manslaughter as a separate offense and instead listing aggravating factors in the penalty provisions for manslaughter.
- This change does not further change District law and improves the clarity and logical organization of the revised offense.

(2) *PDS, App. C. at 131, recommends a specific statutory provision that makes manslaughter a lesser included offense of murder even if the elements of the revised offenses do not align under the Blockburger test.*

- The RCC does not incorporate this recommendation because such a statutory provision is unnecessary to make manslaughter a lesser included offense of murder, and codifying such a provision where superfluous may be potentially confusing as to the construction of other offenses. The revised manslaughter offense's elements are a subset of the revised murder offense's elements, and proof of the latter necessarily proves the former.

(3) *CCRC recommends amending the revised manslaughter statute to include new subsection (c), which allows imputation of awareness of risk required to prove that the actor was reckless, with extreme indifference to human life, if the actor's lack of awareness of the risk was due to self-induced intoxication. Under the general provision on voluntary intoxication, RCC § 22E-209, an actor may be convicted of an offense that requires recklessness, if the person was unaware of the a substantial risk as to a result or circumstance due to self-induced intoxication, if the person would have been aware of the risk had he or she been sober.*[51] *However, although recklessness requires conscious disregard of a substantial risk, recklessness with extreme indifference to human life requires conscious disregard of an extreme risk. RCC § 22E-209 does not specifically address whether recklessness with extreme indifference to human life may be imputed. Without this new subsection, a defendant charged with voluntary manslaughter could argue that due to his self-induced intoxication, he was unaware of an extreme risk, negating the requirement for proving that he acted with extreme indifference to human life. This would be inconsistent with current District law, which rejects voluntary intoxication as a defense to second degree murder or voluntary manslaughter.*[52]

This subsection only allows imputation of the awareness of extreme risk, but a fact finder must still find that his or her conduct was sufficiently blameworthy to constitute extreme indifference to human life. Ordinarily, self-induced intoxication is blameworthy, but in some rare instances it may reduce

[51] RCC § 22E-209 also requires that the actor was negligent as to the result or circumstance.
[52] *Davidson v. United States*, 137 A.3d 973, 975 (D.C. 2016)

blameworthiness, and negate finding that the actor had extreme indifference to human life. Therefore, in these rare cases, self-induced intoxication may serve as a defense to second degree murder.

- This change improves the clarity and proportionality of the revised criminal code.

RCC § 22E-1103. Negligent Homicide.

[No Advisory Group Comments Received.]

RCC § 22E-1201. Robbery.

(1) *OAG, App. C. at 101, recommends additional Commentary hypotheticals to clarify that it is how much force is required for robbery. OAG specifically references hypothetical purse snatching and pickpocketing examples.*

- The RCC incorporates this recommendation by revising the robbery commentary to include further discussion and hypotheticals to clarify the degree of force required for robbery. Notably, contrary to the OAG understanding in its comment, grabbing a purse from someone's hand or from under their arm would not necessarily constitute robbery under the revised statute. To constitute robbery, there must at least be 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. 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), the actor is liable for robbery. Otherwise, absent such physical harm, physical interaction, or a specified type of threat, an actor who grabs and runs away with an object is guilty of theft from a person (fourth degree theft, RCC § 22E-2101). Conversely, contrary to the OAG understanding in its comment, 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). Generic labels of conduct as "snatch and grab" or "pickpocketing" are insufficient to determine whether conduct constitutes theft from a person or robbery in the RCC.
- This revision possibly changes current District law, as described in the revised commentary, and improves the clarity of the revised statute.

(2) *PDS, App. C at 112, recommends re-drafting robbery and second degree criminal menace so that the definitions are not circular, referencing each other's elements. OAG, App. C at 100 also notes that although drafting offense definitions to reference other offenses' elements is an acceptable drafting style, such a drafting style can lead to confusion.*

- The RCC incorporates this recommendation and comment. The revised robbery statute does not refer to the criminal menace offense, and instead specifically criminalizes taking property by threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act against the complainant or any person present other than an accomplice.

- This revision changes current District law as described in the revised commentary,[53] and improves the clarity of the revised statute.

(3) *PDS, App. C at 112-113, objects to including attempts to take property in the robbery offense rather than relying on the general attempt provision, noting that this is inconsistent with the RCC's general approach of grading attempted and completed offenses differently.*

- The RCC incorporates this recommendation by removing references to attempts to take property from the robbery offense, thereby making the revised robbery offense subject to the general attempt statute in RCC § 22E-301. Liability for the revised robbery offense requires that the actor actually takes or exercises control over property of another.
- This revision does not appear to change current District law. The revision improves the clarity, consistency, and proportionality of the revised statute.

(4) *PDS, App. C at 113-114, recommends re-drafting the robbery statute to omit liability for takings or misuse of property from a person when the only force used occurs after the taking or misuse, during flight from the scene.*

- The RCC incorporates this recommendation by removing as an alternative basis of liability the use of force to "facilitate flight." Under the revised fifth degree robbery statute (the elements of which must also be proven for higher degrees of robbery), liability requires that the actor takes property by causing bodily injury, threatening to kill, kidnap, inflict bodily injury, or commit a sexual act; or using physical force that overpowers. As explained in the revised commentary, the revised language is intended to cover cases in which the actor uses force or threats to repel an immediate attempt by the owner to re-obtain property, although the use of force or threats to facilitate flight with the property does not constitute robbery. The criminal use of force against any person during flight would constitute a separate, additional crime.
- This revision changes current District law,[54] as discussed in the revised commentary, and improves the clarity and proportionality of the revised statute.

(5) *PDS, App. C. at 114-115, recommends precluding multiple convictions for robbery, assault, criminal menace, threats, and offensive physical contact against the same complainant based on the same act or course of conduct by codifying a statutory limitation on multiple convictions.*

- The RCC partially incorporates this recommendation by referring to these offenses in the commentary to the merger provision under RCC § 22E-214 (providing general rules for determining when various offenses merge). This approach to merger for convictions of overlapping offenses based on

[53] As discussed in commentary, it is a change from current law to require an actual threat, force, or injury at all. Changing from a reference to "criminal menace" to threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act in this draft isn't specifically discussed as a change.

[54] As discussed in commentary, it is a change from current law to require force at all. Barring liability if forced used after taking isn't specifically discussed as a change.

the same act or course of conduct is consistent with the RCC approach to other offenses against persons.

- Application of the RCC § 22E-214 merger provision to these offenses may change current District law, as generally discussed in the commentary, and improves the proportionality of revised statutes.

(6) *The CCRC recommends specifying "displaying or using" a dangerous weapon in the weapons gradations of the revised statute instead of "by means of." This revision clarifies the means by which a dangerous weapon can cause the specified types of bodily injury. Mere verbal reference to a dangerous weapon, without more, does not satisfy the requirement for an enhanced assault penalty, even where such a verbal reference is a but-for cause of injury.*[55] *However, even brief, partial display of a dangerous weapon may satisfy the "displaying or using" requirement.*

- This revision changes current District law, as described in the updated commentary. This revision improves the clarity, consistency, and proportionality of the revised statute.

(7) *The CCRC recommends re-drafting the robbery statute to include an additional penalty grade to accommodate additional distinctions in severity that more closely align with assault gradations, and to regrading some current grading variants. The additional gradation does not affect the variations in the lowest or highest gradations of robbery. Compared to the prior draft, the revised statute specifically addresses in its gradations: (1) recklessly causing bodily injury [to any person] by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon; and (2) recklessly displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. Existing variations concerning causing significant bodily injury to a protected person and taking a motor vehicle by means of a dangerous weapon are regraded to be less serious than the infliction of serious bodily injury or infliction of significant bodily injury by a dangerous weapon. These grading distinctions and rankings bring the revised robbery statute into closer alignment with the grading distinctions in the revised assault offense and better reflects the variations in how a dangerous weapon may be used in committing robbery.*

- This revision changes current District law, as described in the commentary, and improves the proportionality of the revised statute.

(8) *The CCRC recommends revising the robbery statute so that third degree robbery includes committing robbery of a motor vehicle by displaying or using a dangerous weapon, equivalent to the gradation of a robbery that causes significant bodily injury to the complainant, or bodily injury caused by means of a dangerous weapon. In the prior draft of the robbery statute, committing robbery of a motor vehicle by means of a dangerous weapon was graded the same as*

[55] For example, an actor who verbally references his possible use of a gun is not liable for an enhanced robbery charge based on display or use of a dangerous weapon if that verbal reference causes the complainant to take a step backward and fall downstairs, suffering significant bodily injury. However, such an actor may be liable for causing significant bodily injury in the robbery if all other elements of the offense (including causation) are satisfied.

causing serious bodily injury, whereas in the revised robbery gradations, causing serious bodily injury is graded more severely than robbery of a motor vehicle by displaying or using a dangerous weapon.

- This revision changes District law, as described in the commentary,[56] and improves the proportionality of the revised criminal code.

(9) *The CCRC recommends renaming "aggravated robbery" as "first degree robbery," and accordingly renaming lower grades. Under the first draft of the robbery statute, the highest penalty grade of robbery was named "aggravated robbery," and the second highest grade was "first degree robbery." CCRC recommends re-naming the highest penalty grade "first degree robbery," the second highest penalty grade "second degree robbery," and so forth. This change is non-substantive and only changes the names of each penalty grade of the offense.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statute.

(10) *The CCRC recommends referring to the property at issue as property that "the complainant possesses either on his or her person or within his or her immediate physical control," rather than property "in the immediate actual possession or control of another person[.]" This revision uses the general definition of "possesses" in RCC § 22E-701.*[57] *The change is not intended to substantively change the revised robbery offense or change the extent to which constructive possession, through the phrase "immediate physical control," applies.*

- This revision does not change current District law, and improves the clarity and consistency of the revised statute.

[56] While this specific change is not discussed in the commentary, it more generally discusses incorporating carjacking as a form of robbery.

[57] ("Possesses" means: (A) Holds or carries on one's person; or (B) Has the ability and desire to exercise control over.).

RCC § 22E-1202. Assault.

(1) *OAG, App. C at 99, recommends one of two changes regarding the higher penalties for age-based categories of complainants in the definition of "protected person." One change would be to clarify in the commentary that a person who sees a 67 year old, but based on appearances decides the person is in their early 60s, would be reckless that the complainant was over 65 years of age. Alternatively, OAG recommends amending the RCC assault statute to require strict liability as to the age of complainants.*

- The RCC incorporates this recommendation by clarifying in commentary[58] that a fact pattern similar to that described by OAG likely would be subject to a higher penalty because the complainant is a protected person. 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. The relevant question for the factfinder is whether the actor's slight mistake in age was reasonable under the circumstances of the particular case.
- This revision does not further change current District law. The revision improves the clarity of the revised statute.

(2) *OAG, App. C at 99, recommends creating at least two additional gradations of assault that would provide greater penalties when an actor uses a dangerous weapon and the complainant is a protected person, as compared to the current RCC penalty enhancements that provide at most one increase in gradation for the use of a dangerous weapon or the complainant's status as a protected person or both.*

- The RCC does not incorporate the OAG recommendation because the resulting number of gradations (8) is potentially confusing, and stacking enhancements in such a manner may lead to penalty disproportionality. Proportionality is improved when similarly serious conduct is punished equivalently, but creating a distinction in punishment among similarly serious conduct decreases proportionality. Under the RCC penalty classes, stacking enhancements in the manner recommended would result in an increase of at least two penalty classes above the base-level harm for the use of a dangerous weapon and the age of the victim, multiplying the maximum imprisonment sentence 2-6 times for harms to such individuals.[59] Under the RCC and the OAG recommendations, assault gradations would also be subject to an increase of an additional one class when, for example, the harm is based on bias toward the complainant.[60]

[58] See RCC assault commentary, footnote to ninth change to District law.

[59] For example, a 6 month, class B misdemeanor elevated two classes would become a 3 year, Class 8 felony (a six-fold increase in maximum imprisonment penalty). A 10 year, class 6 felony elevated two classes would become a 20 year, class 4 felony (a two-fold increase in maximum imprisonment penalty).

[60] RCC § 22E-807.

These general penalty enhancements further expand the difference in seriousness between an "ordinary" victim who experiences an assault and other cases, multiplying the maximum imprisonment sentence 3-10 times.[61] However, it is doubtful whether providing for extremely different penalties for crimes that result in the same physical harm (i.e. bodily injury, significant bodily injury, or serious bodily injury) to victims accurately reflects the seriousness of those offenses. Notwithstanding the ability in current law to stack penalty enhancements such as age-based victim status and use of a weapon, current sentencing practices in the District indicate that stacking penalty enhancements rarely, if ever, is necessary to proportionate sentences. Sentencing guidelines and judicial discretion may account for more fine-tuned distinctions in seriousness where multiple aggravating factors are present. The RCC assault gradations provide significant enhancements where even one such aggravating factor is present, and leave further proportionality adjustments to judges based on the facts of the case.

(3) *PDS, App. C at 107 & 108, recommends statutorily clarifying that a complainant must, in fact, be a "protected person" in the RCC assault statute, and provides specific statutory language stating as much in separate subsections.*

- The RCC partially incorporates PDS's recommendation by statutorily specifying that the defendant must be "reckless as to the fact that the complainant is a protected person" in the relevant gradations of the revised assault statute. This CCRC word choice and syntax differs somewhat from the PDS recommends, however, to avoid unnecessary duplication.
- This revision does not appear to change District law. This revision improves the clarity and completeness of the revised statutes.

(4) *PDS, App. C at 108, recommends eliminating the culpable mental state "recklessly, under circumstances manifesting extreme indifference to human life" from the revised assault statute and instead codifying "knowingly" and "recklessly" in differing gradations to allow merger with the RCC robbery statute. PDS provides specific statutory language in relation to this comment that, in addition to changing culpable mental states to "knowingly" and "recklessly," regrades various bodily injuries and circumstances without discussion.*

- The RCC does not incorporate PDS's recommendation regarding elimination of "recklessly under circumstances manifesting extreme indifference to human life" or other regrading because the proposed changes are not necessary to address the stated problem of merger with robbery. Merger of related offenses is addressed through the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses, including robbery and assault, may be released at a later date.

[61] For example, a 6 month, class B misdemeanor elevated two classes would become a 5 year, Class 7 felony (a ten-fold increase in maximum imprisonment penalty). A 10 year, class 6 felony elevated two classes would become a 30 year, class 3 felony (a three-fold increase in maximum imprisonment penalty).

(5) *PDS, App. C at 110-112, recommends requiring a negligence culpable mental state as to whether the object causing the injury is a "dangerous weapon" instead of strict liability. PDS provides several detailed fact patterns to show that while strict liability and a negligence standard would generally lead to the same results, in one case, PDS asserts, it would not.*

- The RCC partially incorporates the recommended change by amending the assault statute to refer to "an object that, in fact, is a dangerous weapon" and amending commentary to clarify that the same object a person is recklessly displaying or using to cause the bodily injury must be, in fact, a dangerous weapon. This clarification addresses liability in the unusual fact pattern raised by PDS,[62] but does not change the statute to require proof of negligence. The revised assault statute requires the *same* "*object*" a person is recklessly displaying or using to cause the bodily injury to be, in fact, a dangerous weapon. Where a person believes that he or she is causing bodily injury by displaying or using a heavy bag, whatever its contents, the question is whether the heavy bag constitutes a dangerous weapon. Even if the heavy bag contains a dangerous weapon (which added to its weight), it would not suffice for enhanced assault liability for displaying or using a dangerous weapon if the actor did not know and should not have known that the hidden firearm was the cause of the bodily injury. 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.
- This revision does not appear to further change District law regarding enhanced assault penalties for involvement of a dangerous weapon. This revision improves the clarity of the revised statutes.

(6) *PDS, App. C at 112, recommends revising fifth degree of the RCC assault statute to prohibit negligently causing bodily injury by the discharge of a firearm, as opposed to negligently causing bodily injury "by means" of a firearm, regardless of whether it is loaded.*

- The RCC incorporates the PDS recommendation by changing the statutory gradation to require negligently causing bodily injury by "discharging" an object that, in fact, is a firearm. The RCC's new provision of liability for misuse of a firearm that causes bodily harm to another person based on mere negligence is designed to target negligent shootings, not inadvertent or unusual misuses of a firearm to harm someone. As the PDS comments state, what makes a firearm unique as compared to other dangerous objects

[62] The fact pattern offered by PDS concerns an actor wielding a cloth purse that, unknown to them, contains a firearm that causes bodily injury to the complainant by virtue of its weight. PDS says that such an instance would render the actor liable for an enhanced penalty because the conduct in fact involved use of a dangerous weapon even though (by hypothesis) the actor was not aware or reckless as to the fact the purse contained a firearm. Such a fact pattern—use of a firearm or other per se dangerous weapon indirectly, to give weight to another object that causes injury—is quite unusual compared to the many charges of assault with a firearm.

or weapons is its ability to "fire a projectile at a high velocity."

- This revision further changes current District law, as described in the updated commentary. The revision improves the clarity and proportionality of the revised statute.

(7) *PDS, App. C at 134, recommends codifying a provision to merge convictions for the abuse and neglect of vulnerable persons offenses and assault offense.*

- The CCRC partially incorporates PDS's recommendation. Merger of the abuse and neglect of vulnerable persons offenses (criminal abuse of a minor, criminal neglect of a minor, criminal abuse of a vulnerable adult or elderly person, and criminal neglect of a vulnerable adult or elderly person) and assault is governed by the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.
- This revision does not further change current District law, as described in the commentary. This revision improves the clarity of the revised statutes.

(8) *The CCRC recommends specifying "displaying or using" a dangerous weapon in the weapons gradations of the revised statute instead of "by means of." This revision clarifies the means by which a dangerous weapon can cause the specified types of bodily injury. Mere verbal reference to a dangerous weapon, without more, does not satisfy the requirement for an enhanced assault penalty, even where such a verbal reference is a but-for cause of injury.*[63] *However, even brief, partial display of a dangerous weapon may satisfy the "displaying or using" requirement.*

- This revision changes current District law, as described in the updated commentary. This revision improves the clarity, consistency, and proportionality of the revised statute.

(9) *The CCRC recommends deleting "physical force that overpowers" from fifth degree and sixth degree of the revised assault statute. With this change, the infliction of bodily injury, of varying severity, is the sole focus of the offense. Conduct, including physical force that overpowers, that does not cause "bodily injury" may be criminalized by the RCC offensive physical contact (§ 22E-1205) or criminal restraint offenses (RCC § 22E-1402).*

- This revision changes current District law, as described in the updated commentary. This revision improves the clarity, consistency, and proportionality of the revised statute, and reduces unnecessary overlap with other offenses.

(10) *The CCRC recommends deleting "participant in a citizen patrol," "District employee," and "family member of a District official or employee" from the gradations of the revised assault statute that prohibit committing assault "with the purpose of harming the complainant because of the complainant's*

[63] For example, an actor who verbally references his possible use of a gun is not liable for an enhanced assault charge based on display or use of a dangerous weapon if that verbal reference causes the complainant to take a step backward and fall downstairs, suffering significant bodily injury. However, such an actor may be liable for causing significant bodily injury if all other elements of the offense (including causation) are satisfied.

status." Current sentencing practices in the District indicate that these penalty enhancements rarely, if ever, are necessary for proportionate sentences.

- This revision changes current District law, as described in the updated commentary. This revision improves the proportionality of the revised assault statute.

(11) *The CCRC recommends revising subsection (g) to include "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" in the specified circumstances. This language clarifies that there may be other circumstances where a person has a justification defense or excuse defense to assault under future RCC justification and excuse defenses.*

- This revision does not appear to change current District law. This revision improves the completeness of the revised statute.

(12) *The CCRC recommends deleting the effective consent that was previously codified in the revised assault statute. Instead, the revised assault statute is subject to the general part's effective consent defense and other special justification defenses in RCC § 22E-40[X].*

- This revision may change current District law, as is described in the updated commentary. This revision improves the completeness and organization of the RCC.

(13) *CCRC recommends amending the revised assault statute to include new subsection (h), which allows imputation of awareness of risk required to prove that the actor was reckless, with extreme indifference to human life, if the actor's lack of awareness of the risk was due to self-induced intoxication. Under the general provision on voluntary intoxication, RCC § 22E-209, an actor may be convicted of an offense that requires recklessness, if the person was unaware of the a substantial risk as to a result or circumstance due to self-induced intoxication, if the person would have been aware of the risk had he or she been sober.*[64] *However, although recklessness requires conscious disregard of a substantial risk, recklessness with extreme indifference to human life requires conscious disregard of an extreme risk. RCC § 22E-209 does not specifically address whether recklessness with extreme indifference to human life may be imputed. Without this new subsection, a defendant charged with first or second degree assault under paragraphs (a)(3), (a)(4) or (b)(1) could argue that due to his self-induced intoxication, he was unaware of an extreme risk, negating the requirement for proving that he acted with extreme indifference to human life.*

This subsection only allows imputation of the awareness of extreme risk, but a fact finder must still find that his or her conduct was sufficiently blameworthy to constitute extreme indifference to human life. Ordinarily, self-induced intoxication is blameworthy, but in some rare instances it may reduce blameworthiness, and negate finding that the actor had extreme indifference to human life. Therefore, in these rare cases, self-induced intoxication may serve as a defense to second degree murder.

[64] RCC § 22E-209 also requires that the actor was negligent as to the result or circumstance.

- This revision may change current District law, as is described in the updated commentary. This change improves the clarity and proportionality of the revised criminal code.

(14) *The CCRC recommends bracketing the jury demandability provision in subsection (h) of the revised assault statute pending recommendations for penalties for all RCC offenses.*

- Jury demandability needs to be reviewed in the context of assigning penalties to RCC offenses.

RCC § 22E-1203. Menacing.

(1) *OAG, App. C at 102, recommends the RCC omit the word "criminal" in the title of the offense so as to use clear and plain language and avoid questions about what a non-criminal menacing is. PDS, App. C at 115, recommends the RCC omit the word "criminal" in the title of the offense so as to avoid redundancy and harshness in contexts of employment, housing, and education.*

- The RCC incorporates this recommendation by revising the offense title to "menacing."
- This revision does not substantively change current law. The change clarifies the revised statute.

(2) *OAG, App. C at 103, recommends the commentary clarify that the effective consent defense is the consent to being threatened, not consent to the underlying conduct that a person is menaced with (e.g. murder).*

- The RCC incorporates this recommendation by deleting the effective consent defense that was previously codified in the revised statute. Instead, the revised menacing statute is subject to the special defenses in RCC § 22E- 22-40[X], including a revised effective consent defense.
- This revision may change current District law, as described in the commentary to RCC § 22E- 22-40[X]. This change improves the clarity, completeness, and organization of the RCC.

(3) *PDS, App. C at 112, recommends rewriting the prior draft's Third Degree Robbery (on which all of the more serious gradations are based) and Second Degree Menacing so that they are not circular. As the prior draft was written, one of the ways to commit Third Degree Robbery was to take property of another from the immediate actual possession or control of another by means of committing conduct constituting Second Degree Menacing. Second Degree Menacing could be committed when a person communicates to another person physically present that the person immediately will engage in conduct against that person constituting Robbery.*

- The RCC incorporates this recommendation by replacing the cross-references to specific criminal statutes that were in the prior draft of menacing with the broader phrase "cause a criminal harm to any person involving a bodily injury, a sexual act, a sexual contact, or confinement." This change may make it easier for factfinders to determine whether the content of the threat is sufficient for menacing liability by eliminating consideration of extraneous elements to focus on the main aspect of the conduct. This change broadens somewhat the scope of the revised offense to include additional offenses—any offense involving bodily injury, a sexual act, a sexual contact, or confinement. However, consistent with the prior draft, the threatened harm must be "criminal," and the actor must know that what the threatened harm would be criminal.
- This revision may substantively change current law, as described in the commentary. The change improves the organization of the revised offense and may eliminate unnecessary gaps in liability.

(4) *PDS, App. C at 114-115, recommends the RCC include a section that limits convictions for multiple related offenses against persons. PDS recommends this section to apply to robbery, assault, criminal menacing, criminal threats, and offensive physical contact in the prior draft. PDS anticipates proposing expanding this section or proposing another one to limit multiple related offenses for those offenses and homicide, sexual assaults, and kidnapping.*

- The RCC partially incorporates this recommendation by codifying a general provision regarding merger in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.
- This revision does not change current District law. This change improves the clarity of the revised statute.

(5) *The CCRC recommends relabeling the speaker, recipient, and target of the threat as "actor," "complainant," and "any person," respectively, instead of using the word "person" to refer to each.*

- This revision does not substantively change current law. This change clarifies the revised statute.

(6) *The CCRC recommends replacing the phrase "the defendant or an accomplice will engage in conduct" with the phrase "the actor immediately will cause." This includes causation by directing an accomplice or other person to carry out the harm.*

- This revision does not substantively change current law. This change improves the clarity and consistency of the revised statute.

(7) *The CCRC recommends replacing the word "threat" in the statutory text with the more precise phrasing "serious expression that the actor would cause the harm."*

- This revision does not substantively change current District law. This change improves the clarity of the revised statute.

(8) *The CCRC recommends replacing the phrase "a reasonable recipient" with the phrase "a reasonable person in the complainant's circumstances," to clarify that the listener's fear of harm must be viewed objectively but considering the circumstances known to the parties. For example, where prior interactions between the parties lead the listener to believe the threatened harm is unlikely to occur, the speaker does not commit menacing.*

- This revision does not further change current District law. This change clarifies the revised statute.

(9) *The CCRC recommends adding an exclusion of liability paragraph, to clarify that this statute does not prohibit conduct protected by the Constitution, the District's First Amendment Assemblies Act of 2004, or the District's Open Meetings Act. The Commission has sought to tailor the threats offense to meet the constitutional standard of a "true threat." However, as applied, particularly in the context of speech relating to political policies, determination as to what is a true threat is difficult.*[65]

[65] *See Watts v. United States*, 394 U.S. 705, 708 (1969).

- This revision does not substantively change current District law. This change improves the clarity and consistency of the revised statute.

(10) *The CCRC recommends making all prosecutions of this offense jury-demandable, in light of First Amendment considerations and the community norms relevant to evaluating what conduct would reasonably cause a person to believe the harm would occur. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.*[66]

- This revision changes current law, as described in the commentary. This change improves the consistency and proportionality of the revised statute.

(11) *The CCRC recommends rewording the prior draft's phrase "…by displaying or making physical contact with a dangerous weapon…" to read, "…by displaying or using a dangerous weapon...." The term "use" is intended to include making physical contact with the weapon and any conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.*

- This revision does not further change current District law. This change clarifies the revised statute.

(12) *Comments concerning typographical errors are incorporated.*

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

RCC § 22E-1204. Criminal Threats.

(1) *OAG, App. C at 103, recommends the commentary clarify that the effective consent defense is the consent to being threatened, not consent to the threatened conduct.*

- The RCC incorporates this recommendation by deleting the effective consent defense that was previously codified in the revised statute. Instead, the revised stalking statute is subject to the special defenses in RCC § 22E- 22-40[X], including a revised effective consent defense.
- This revision may change current District law, as described in the commentary to RCC § 22E- 22-40[X]. This change improves the clarity, completeness, and organization of the RCC.

(2) *PDS, App. C at 114-115, recommends the RCC include a section that limits convictions for multiple related offenses against persons. PDS recommends this section to apply to robbery, assault, criminal menacing, criminal threats, and offensive physical contact in the prior draft. PDS anticipates proposing expanding this section or proposing another one to limit multiple related offenses for those offenses and homicide, sexual assaults, and kidnapping.*

- The RCC partially incorporates this recommendation by codifying a general provision regarding merger in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.
- This revision does not change current District law. This change improves the clarity of the revised statute.

(3) *PDS, App. C at 115, recommends the RCC omit the word "criminal" in the title of the offense so as to avoid redundancy and harshness in contexts of employment, housing, and education. OAG, App. C at 102, recommends the RCC omit the word "criminal" in the title of the offense so as to use clear and plain language and avoid questions about what a non-criminal threat is.*

- The RCC does not incorporate this recommendation. The word "criminal" in the title "Criminal Threats" usefully distinguishes the stand-alone criminal offense from the more generic references to the terms "threat" and "threaten" used elsewhere in the revised code and popular use.

(4) *The CCRC recommends clarifying in the statutory language that conditional threats are prohibited. The phrase "anytime in the future or if any condition is met" now modifies the verb "will."*

- This revision does not substantively change current law. This change clarifies the revised statute.

(5) *The CCRC recommends relabeling the speaker, recipient, and target of the threat as "actor," "complainant," and "any person," respectively, instead of using the word "person" to refer to each.*

- This revision does not substantively change current law. This change clarifies the revised statute.

(6) *The CCRC recommends replacing the phrase "the defendant or an accomplice will engage in conduct" with the phrase "the actor immediately will cause." This*

includes causation by directing an accomplice or other person to carry out the harm.

- This revision does not substantively change current law. This change improves the clarity and consistency of the revised statute.

(7) *The CCRC recommends replacing the word "threat" in the statutory text with the more precise phrasing "serious expression that the actor would cause the harm."*

- This revision does not substantively change current law. This change improves the clarity of the revised statute.

(8) *The CCRC recommends replacing the phrase "a reasonable recipient" with the phrase "a reasonable person in the complainant's circumstances," to clarify that the listener's fear of harm must be viewed objectively but considering the circumstances known to the parties. For example, where prior interactions between the parties lead the listener to believe the threatened harm is unlikely to occur, the speaker does not commit criminal threats.*

- This revision does not further make a substantive change to current District law. This change clarifies the revised statute.

(9) *The CCRC recommends adding an exclusion of liability paragraph, to clarify that this statute does not prohibit conduct protected by the Constitution, the District's First Amendment Assemblies Act of 2004, or the District's Open Meetings Act. The Commission has sought to tailor the threats offense to meet the constitutional standard of a "true threat." However, as applied, particularly in the context of speech relating to political policies, determination as to what is a true threat is difficult.*[67]

- This change clarifies that the statute is subject to constitutional limitations on the exercise of free speech but does not change the meaning of the revised statute.

(10) *The CCRC recommends making all threats of assault-type conduct subject to first degree liability and replacing cross-references to specific criminal statutes that were in the prior draft of criminal threats with the broader phrase "cause a criminal harm to any person involving a bodily injury, a sexual act, a sexual contact, or confinement" (first degree) and "cause a criminal harm to any natural person involving $250 or more loss or damage to property" (second degree). This change may make it easier for factfinders to determine whether the content of the threat is sufficient for criminal threats liability by eliminating consideration of extraneous elements to focus on the main aspect of the conduct. This change broadens somewhat the scope of the revised offense to include additional offenses—any offense involving bodily injury, a sexual act, a sexual contact, or confinement. However, consistent with the prior draft, the threatened harm must be "criminal" and the actor must know that what the threatened harm would be criminal. The reorganization re-grades threats of low-level assaults with other, more serious types of assaults, leaving only threats of property crime to second degree. Grading all assault-type conduct equally may make it easier to*

[67] *See Watts v. United States*, 394 U.S. 705, 708 (1969).

determine the appropriate gradation because many threats are ambiguous as to the extent of the bodily harm involved.

- This revision makes a substantively change to current law, as described in the commentary. This change improves the organization of the revised offense and may eliminate unnecessary gaps in liability.

(11) *The CCRC recommends limiting threats to commit a property offense to targets who are natural persons, codifying case law that threats to damage government or corporate property are not criminal.*[68]

- This revision does not make a substantive change to current District law. This change clarifies the revised statute.

(12) *Comments concerning typographical errors are incorporated.*

[68] *Ruffin v. United States*, 76 A.3d 845, 859 (D.C. 2013).

RCC § 22E-1205. Offensive Physical Contact.

(1) *The CCRC recommends revising subsection (c) to include "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" in the specified circumstances. This language clarifies that there may be other circumstances where a person has a justification defense or excuse defense to offensive physical contact under future RCC justification and excuse defenses.*

- This revision does not appear to change current District law. This revision improves the completeness of the revised statute.

(2) *The CCRC recommends deleting the effective consent defense that was previously codified in the revised offensive physical contact statute. Instead, the revised offensive physical contact statute is subject to the general part's effective consent defense and other special justification defenses in RCC § 22E-40X.*

- This revision may change current District law, as is described in the updated commentary. This revision improves the completeness and organization of the RCC.

(3) *The CCRC recommends bracketing the jury demandability provision in subsection (d) of the revised offensive physical contact statute pending recommendations for penalties for all RCC offenses.*

- Jury demandability needs to be reviewed in the context of assigning penalties to RCC offenses.

RCC § 22E-1206. Stalking.

(1) *PDS, App. C at 183, recommends requiring recklessness instead of negligence, so that a person who is acting with a benign or beneficent purpose is only liable if he or she is aware of a substantial risk that the conduct is frightening. PDS states that the previous draft punishes behavior of significantly lower culpability (negligently) the same as intentional conduct.*

- The RCC does not incorporate this recommendation because it may result in an unnecessary gap in liability. The revised statute in subparagraph (a)(2)(B) follows current District law in providing liability for persons who may be acting with beneficent intentions, but nonetheless actually cause emotional harm to another by their behavior. While it is highly unusual in American jurisprudence to provide criminal liability for unintentional wrongdoing, modern stalking statutes in several jurisdictions besides the District provide liability based on negligence. The District's decision in 2009 to provide a low culpable mental state requirement for stalking may be necessary to address some unique fact patterns involved in stalking-type behavior—e.g., involving a person who is unreasonably mistaken about the complainant's love for him or her, following the complainant without knowing that such behavior causes the complainant harm. In the revised statute, negligent and intentional conduct are not treated equally. The lower culpable mental state requirement in subparagraph (a)(2)(B) is paired with a requirement of actual harm, while the higher culpability requirement of subparagraph (a)(2)(A) is inchoate. Consequently, the two means of committing stalking are relatively balanced in the overall seriousness of the conduct.

(2) *PDS, App. C at 183-184, recommends increasing the separate occasions of conduct required to establish a pattern from two to three to assure that the harm being punished is "longer-term apprehension" and to better distinguish between conduct that constitutes stalking and conduct that would constitute a breach of the peace.*

- The RCC does not incorporate this recommendation because it may result in an unnecessary gap in liability. While requiring conduct on three occasions would better distinguish an ongoing pattern of misconduct, it would also decriminalize some conduct (that does not continue on a third occasion) and may result in a longer period of time before law enforcement intervention. A primary impetus for criminalizing stalking in the District[69] and nationwide[70] was to allow and encourage law enforcement to intervene before stalking escalates to violence. The revised statute maintains the requirement of two disturbing contacts that exists in current law, the model statute, and the majority of stalking statutes in other jurisdictions.

[69] D.C. Code § 22-3131(a).

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

(3) *PDS, App. C at 184, recommends rewriting the definition of "financial injury"—in this offense and in the revised property offenses—to limit attorneys' fees to those incurred for representation or assistance related to the other forms of financial injury listed.*

- The RCC partially incorporates this recommendation through changes to a revised definition of "financial injury" to be used across all revised offenses (including stalking). The definition in this draft of the revised stalking offense is limited to the reasonable expenses incurred "as a result of a criminal act." However, the revised definition does not limit attorneys' fees to only the items specifically included as financial injuries. The commentary explains, "The factfinder must determine that the expenditures were reasonably necessitated by the stalking." A footnote provides as an example, a person who relocates to an expensive, high-security apartment to avoid a stalker. It explains, the jury will first have to decide whether it was reasonable to relocate under the circumstances. Then the jury will have to decide which expenses incurred as a result of the move were reasonably necessary, e.g., the moving truck, the rent increase, the cost of furnishing the new apartment.
- This revision does not further change current District law. This change improves the clarity and consistency of the revised offenses.

(4) *PDS, App. C at 184, recommends adding "person acting as an agent of an attorney" to the list of excluded professionals, because PDS and Criminal Justice Act investigators are not "licensed private investigators."*

- The RCC partially incorporates this recommendation by amending the term "licensed private investigators" to "professional investigators."
- This revision may change current District law as described in the commentary. This change improves the clarity of revised statute.

(5) *PDS, App. C at 184, recommends codifying the definition of "physically following" that appears in the commentary: "to maintain close proximity to a person as they move from one location to another."*

- The RCC incorporates this recommendation by adding the definition to RCC § 22E-701.
- This revision does not further change current District law. This change improves the clarity of the revised offense.

(6) *PDS, App. C at 184, recommends deleting footnote 10 in the commentary, which uses the Do Not Call registry as an example of an indirect source of notice to cease communication.*

- The RCC incorporates this recommendation by deleting the specified footnote.
- This revision does not further change current District law. This change improves the clarity of the revised offense.

(7) *PDS, App. C at 184-185, recommends that the commentary clarify that the actor must know that the notice to cease communication is from the complainant, even if the notice is indirect.*

- The RCC incorporates this recommendation by adding a clarification to the commentary.

- This revision to the commentary does not further change current District law. This change improves the clarity of the revised offense.

(8) *OAG, App. C at 196, comments that the definition of "financial injury" which includes "costs, debts, and obligations incurred as a result of the stalking by a specific individual" is unclear as to whether the text here refers to the complainant and not the accused.*

- The RCC addresses this comment by, throughout the offense, using the term complainant to refer to the person subject to stalking (instead of "specific individual").
- This revision does not further change current District law. The revision improves the clarity of the revised offense.

(9) *OAG, App. C at 197, recommends clarifying the government's evidentiary obligations in the statutory definition of "significant emotional distress" by codifying, "The government is not required to prove that the victim sought or needed professional treatment or counseling."*

- The RCC does not incorporate this recommendation because it creates inconsistency in the RCC drafting and may cause confusion. While it is certainly true that the government is not required to prove that the victim sought or needed professional treatment or counseling, this meaning is adequately conveyed by the RCC definition stating "significant emotional distress" means "substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling." The word "may" is frequently used throughout the RCC and D.C. Code more broadly to communicate that a fact need not be proven, without additional statements that, correspondingly the government need not prove such facts. To add the recommended clarificatory statement only here might raise questions as to the absence of such statements elsewhere.

(10) *OAG, App. C at 197, recommends amending the exclusion from liability to clarify that "official duties" means the "professional obligations" of a journalist or attorney and the court obligations of a* pro se *litigant. OAG provides specific draft language that it recommends, stating that a journalist, attorney, or pro se litigant "is acting within the reasonable scope of that role."*

- The RCC incorporates this recommendation by specifying the person must be "acting within the reasonable scope of that role." The RCC applies this "reasonable scope of that role" to all persons listed in the exception.
- This revision does not further change current District law. The revision improves the clarity of the revised offense.

(11) *OAG, App. C at 197-198, recommends amending the parental discipline defense to exclude stalking conduct by parents whose rights to contact a child are limited or nonexistent.*

- The RCC incorporates this recommendation by limiting the parental discipline defense, now located in RCC § 22E- 22-40[X], to a parent "who is responsible for the care and supervision of the complainant."
- This revision does not further change current District law. The revision improves the clarity of the revised offense.

(12) *The CCRC recommends amending the definition of the term "financial injury" to a universal definition to apply across all offenses. The revised definition includes costs* reasonably *incurred by any person, not only the stalking victim, a household member, a person threatened by the conduct, and a person financially responsible for the stalking victim. It also includes more examples of financial injuries, such as the cost of clearing a debt and lost compensation.*

- This revision changes current District law as described in the commentary. This change eliminates an unnecessary gap in liability and improves the clarity and consistency of the revised code.

(13) *The CCRC recommends striking the word "combination" from the paragraph (a)(1), to clarify that the pattern of conduct need not include instances of conduct from multiple subparagraphs.*

- This revision does not further change current District law. This change improves the clarity of the revised offense.

(14) *The CCRC recommends making all prosecutions of this offense jury-demandable, in light of the potential First Amendment considerations. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.*[71] *Citing the "subjective nature" of stalking, the Council's Committee on Public Safety and the Judiciary deemed it an offense for which "the community, not a single judge, should sit in judgment" and found it "highly appropriate that a jury of [the defendant's] peers ... judge whether the behavior is acceptable or outside the norm and indicative of escalating problems."*[72]

- This revision may change current District law as described in the commentary. This change improves the consistency and proportionality of the revised code.

(15) *The CCRC recommends updating the commentary to include a references to two recent District of Columbia Court of Appeals decisions interpreting the current stalking statute (*Beachum v. United States, *189 A.3d 715 (D.C. 2018);* Coleman v. United States, *16-CM-345, 2019 WL 1066002, at *1 (D.C. Mar. 7, 2019)*) and a *recent Court of Appeals of North Carolina decision interpreting language similar to the District's current stalking statute.* State v. Shackelford, *COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).*

- This revision to commentary does not further change current District law. This change improves the clarity of the revised offense.

(16) *The CCRC recommends, in light of a March 2019 DCCA* Coleman *opinion clarifying that each of the two or more occasions must satisfy all the other stated elements of the offense,*[73] *that the revised statute no longer refer to*

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

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

[73] *Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *10 (D.C. Mar. 7, 2019).

the defined term "pattern of conduct." While there is no additional "continuity of purpose" requirement as discussed in the prior draft's definition of "pattern of conduct," the other parts of the former "pattern of conduct" definition are preserved. The revised statute refers in the offense itself to a requirement that the defendant "on two or more occasions, engages in a course of conduct…" and in paragraph (d) provides that, "when conduct is of a continuing nature, each 24-hour period constitutes one occasion." This drafting generally follows the Coleman *decision's discussion of the meaning of a "course of conduct" in the current statute.*

- This revision does not substantively change current District law. This change improves the clarity of the revised offense.

(17) *The CCRC recommends replacing cross-references to specific criminal statutes that were in the prior draft of criminal threats with the broader phrase "committing a criminal involving a trespass, threat, loss of property, or damage to property." This change may make it easier for factfinders by eliminating consideration of extraneous elements to focus on the main aspect of the conduct—trespass, threats, loss of property, or damage to property—that is clearly criminal in nature. This change provides liability for conduct that is very close to the relevant descriptions of conduct in the current D.C. Code stalking statute.*[74] *However, consistent with the prior draft, the threatened harm must be "criminal" and the actor must have the purpose that the conduct would be criminal. The current D.C. Code statute does not describe whether the conduct it references must be criminal in nature.*

- This revision may substantively change current District law, as described in commentary. This change improves the clarity of the revised offense.

(18) *The CCRC recommends adding to the exclusions from liability, alongside the reference to the U.S. Constitution, or the First Amendment Assemblies Act of 2004 codified at § 5-331.01 et al., a reference to the Open Meetings Act codified at D.C. Code § 2-575.*

- This revision does not substantively change current District law. This change improves the clarity and consistency of the revised offense.

(19) *Comments concerning typographical errors are incorporated.*

[74] D.C. Code § 22-3132(8) ("…threaten… "Interfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so…").

RCC § 22E-1301. Sexual Assault.

(1) *PDS, App. C at 176, recommends adding "to participate in the sexual act" to subsection (a)(D)(i) of first degree sexual assault.*

- The RCC incorporates PDS's suggestion by adding the phrase "to engage in the sexual act." The RCC uses "engage" instead of "participate" because the revised first degree sexual assault statute requires, in part, that the complainant "engage" in a sexual act (subsection (a)(1)). The RCC also made this revision to third degree sexual assault (subsection (c)(2)(D)(i)).
- This revision may change current District law, as described in the updated commentary. This revision improves the clarity and completeness of the revised statute.

(2) *PDS, App. C at 176, recommends deleting the sentencing enhancements in subsection (g) of the revised sexual assault statute and instead relying on the Sentencing Guidelines. PDS says that, "[g]iven the high statutory maxima and the wide ranges available under the Sentencing Guidelines, sentencing enhancements are not necessary to guide judicial discretion" because "[j]udges will examine the facts of each case and sentence appropriately."*

- The RCC does not incorporate PDS's recommendation because it may lead to inconsistent and disproportionate penalties amongst similarly-situated defendants. Statutory sentencing enhancements increase the severity of possible sentences in a consistent manner and provide legislative guidance as to factors relevant to sentencing.

(3) *PDS, App. C at 176, recommends that, assuming sentencing enhancements are retained, the required age of the complainant should be increased to 75 years in the sexual assault penalty enhancement for elderly complainants (subsection (g)(4)(E)) "[i]f the intent is to focus on the unique vulnerabilities of the complainant." Alternatively, PDS recommends requiring at least a ten year age gap between the actor and a complainant that is 65 years of age or older and deleting the requirement that the complainant be under 65 years "[i]f the intent of the RCC is to punish young defendants who may take advantage of an individual who is over age 65."*

- The RCC incorporates PDS's recommendation by amending the penalty enhancement for sexual assault against elderly persons to require that the actor recklessly disregarded that the complainant was 65 years of age or older and the actor was, in fact, at least 10 years younger than the complainant. This change appropriately focuses the penalty enhancement on predatory behavior by younger defendants on elderly complainants. Sexual assaults committed by an elderly person against another elderly person[75] are no longer subject to an age-based penalty enhancement.

[75] For example, in a nursing home.

- This revision changes current District law, as described in the updated commentary. This change improves the consistency and proportionality of the revised statute.

(4) *PDS, App. C at 177, recommends, in particular, elimination of the penalty enhancement in subsection (g)(4)(D) because the required two year age difference between an actor that is 18 years of age or older and a complainant that is under 18 years of age "does not address a particular harm and draws lines that may be entirely arbitrary." PDS says that, "[a] sexual assault of a 17 year old by a 19 year old may be no different than a sexual assault of an 18 year old by a 21 year old" and that "[t]he age distinction drawn in the RCC in many instances will have no correlation to the particular harm of this conduct as opposed to other similar conduct."*

- The RCC does not incorporate PDS' recommendation because it would be inconsistent with penalty enhancements in other offenses that provide for increased punishment when an adult with a sufficient age gap harms a minor. However, as discussed below, the RCC increases the required age difference for a penalty enhancement for sexual assault to four years to match the required age gap in the current child sexual abuse statutes,[76] the RCC sexual abuse of a minor offense, and several other RCC sex offenses.
- This revision changes current District law. The change improves the consistency and proportionality of the revised statute.

(5) *OAG, App. C at 188, recommends that, if the RCC continues to require a culpable mental state of knowledge for first and third degree sexual assault and other sexual offenses that are not subject to a voluntary intoxication defense under current District law, then an exception should be made to allow liability in certain situations. Specifically, OAG states that "a person should not be able to decide to rape, or otherwise sexually abuse, someone; consume massive amounts of alcohol to get up the nerve to do it; consummate the rape; and then be able to argue, whether true or not, that at the time of the rape he lacked the mental state necessary to be convicted of the offense." OAG says that "[t]his exception would be similar to what the Commission is already proposing in § 22E-208 (c) concerning willful blindness."*

- The RCC incorporates OAG's recommendation by incorporating a footnote into the Explanatory Notes accompanying RCC § 22E-209, which addresses situations involving self-induced intoxication intended to create the conditions for one's own absent-element defense across revised offenses.[77] This footnote explains that: "If, under these circumstances, the actor possesses the statutorily-required purpose, knowledge, or intent at the point in which he or she begins consuming intoxicating substances,

[76] D.C. Code §§ 22-3008; 22-3009.

[77] *See generally* Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 31 (1985) ("Where the actor is not only culpable as to causing the defense conditions, but also has a culpable state of mind *as to causing himself to engage in the conduct constituting the offense*, the state should be punish him for causing the ultimate justified or excused conduct.").

then the fact that the person subsequently lacks the requisite desire or state of awareness at the precise moment the conduct constituting the offense is completed should not preclude a finding that the person satisfied the offense's culpable mental state requirement."[78] The footnote also offers a detailed illustration of this generally applicable intoxication principle using a hypothetical similar to that discussed by OAG in its comment.[79]

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(6) *OAG, App. C at 189, recommends revising first degree sexual assault so that it is clear that the requirement "overcomes, restrains, or causes bodily injury to the complainant" applies only to the use of "physical force" and not to the use of a "weapon."*

- The RCC incorporates this recommendation by codifying the use of physical force and the use of a weapon in separate subsections (subsection (a)(2)(A)) and subsection (a)(2)(B)). The RCC also makes this revision to third degree sexual assault.
- This revision does not change current District law. This change improves the clarity of the revised statute.

(7) *OAG, App. C at 189, recommends removing "physically" from subsection (a)(2)(D)(ii)(II) of first degree sexual assault because it is unclear what "physically" adds. OAG explains that its question is that, "after a person has*

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[78] *Id.* at 35 (Observing that, in this situation, "[t]he actor's liability for the offense may be based on his conduct at the time he becomes voluntary intoxicated and his accompanying state of mind as to the elements of the subsequent offense.").

[79] Specifically, the relevant hypothetical reads:

> X desires to have sex with V, who is happily married and has previously expressed V's firm lack of romantic interest in X on multiple occasions. Soon after the last rejection, X realizes that the only way he'll ever have sex with Y is by force; however, X also realizes that he lacks the temperament necessary to follow through on this criminal intent. To address the perceived deficiency (and strengthen his resolve), X purchases a large amount of Phencyclidine (PCP) and cocaine, which X subsequently consumes a few hours before a party that he knows V will be attending by herself. Later on that evening, while at the party, X asks Y to step into an empty bedroom for a brief discussion, at which point X proceeds to pin Y's hands behind her back and engage in non-consensual, forceful intercourse. However, due to his extreme state of intoxication, at the time of intercourse X honestly perceives the sexual interaction with Y to be a consensual, passionate expression of long-suppressed mutual affection. X is subsequently prosecuted for first-degree sexual assault on a theory of liability requiring knowledge. *See* RCC § 22E-1303(a) ("An actor commits the offense of first degree sexual assault when that actor . . . Knowingly causes the complainant to engage in or submit to a sexual act . . . By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant.").

On these facts, X's lack of awareness concerning the non-consensual, forceful nature of the intercourse at the moment it occurred should *not* preclude a finding of guilt, provided the prosecution can establish that X was practically certain that—at the moment he became intoxicated—the forceful sexual act he intended to facilitate would be non-consensual. *See* Robinson, *supra* note 3, at 51 ("If an actor's intoxication negates a required culpability element at the time of the offense, such element is nonetheless established if the actor satisfied such element immediately preceding or during the time that he was becoming intoxicated or at any time thereafter until commission of the offense, and the harm or evil he intended, contemplated, or risked is brought about by the actor's subsequent conduct during intoxication.").

been drugged, what is the difference between a person being substantially incapable "mentally" of appraising the nature of the sexual act and a person being substantially incapable "physically" of appraising the nature of the sexual act?"

- The RCC does not incorporate OAG's recommendation because it may lead to a gap in liability and decrease the clarity of the statute. Removal of the term "physically" would leave the provision referring in relevant part to drugging a complainant when the substance in fact renders the complainant, "(II) Substantially incapable, mentally ~~or physically~~, of appraising the nature of the sexual act; or (III) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual act." The inclusion of both "physically" and "mentally" is intended to ensure coverage for both situations where a person is rendered physiologically incapable of appraising or communicating unwillingness (e.g., unable to perceive what is happening or form speech), and situations where a person is rendered psychologically incapable of appraising or communicating unwillingness (e.g., emotionally indifferent to any acts). While distinguishing mental and physical effects is difficult, the point of the RCC language is to render such distinctions moot—both are covered. The commentary has been revised to include this explanation.

(8) *OAG, App. C at 189, recommends revising the intoxication provision in first degree sexual assault to include a situation where the complainant can think and speak, but is physically unable to move anything other than his or her mouth.*

- The RCC incorporates OAG's recommendation by revising subsection (a)(2)(D)(ii)(I) to include "substantially paralyzes." The RCC also makes this revision to subsection (c)(2)(D)(ii)(I) in third degree sexual assault.
- This revision does not change current District law. The change improves the clarity of the revised offense and may reduce an unnecessary gap in liability.

(9) *The CCRC recommends revising subsection (a)(2)(B) of first degree sexual assault and subsection (c)(2)(B) of third degree sexual assault to prohibit using a weapon against "the complainant," as opposed to merely using a weapon. This revision makes sexual assault liability predicated on a weapon consistent with liability predicated on physical force basis.*

- This revision does not change current District law. This revision improves the clarity and consistency of the revised offense.

(10) *The CCRC recommends revising subsection (b)(2)(B)(i) of second degree sexual assault and subsection (d)(2)(B)(i) of fourth degree sexual assault to include "paralyzed." This revision makes the type of impairment in these gradations consistent with the type of impairment in the revised intoxication provisions in first degree sexual assault (subsection (a)(2)(D)(ii)(I)) and third degree sexual assault (subsection (c)(2)(D)(ii)(I)).*

- This revision does not change current District law. This revision improves the clarity, consistency, and completeness of the revised offense.

(11) *The CCRC recommends replacing "or" with "and" between subsection (e)(1)(A) and subsection (e)(1)(B) of the effective consent defense for sexual*

assault. The requirements in subsection (e)(1)(B) are intended to be in addition to the requirements in subsection (e)(1)(A). The infliction of apparently consensual bodily injury in the context of the relationships described in subsection (e)(1)(B) prevents a claim of effective consent.

- This revision may change current District law, as described in the updated commentary. This revision improves the completeness of the sexual assault effective consent defense.

(12) *The CCRC recommends requiring in subsection (e)(1)(B)(i) of the effective consent defense for sexual assault that the actor is "at least" four years older than the complainant instead of "more than" four years older. This provision is intended to require the same age gap as is required in subsection (e)(1)(B)(ii) of the defense, the RCC sexual abuse of a minor offense, and other RCC sex offenses.*

- This revision may change current District law, as described in the updated commentary. This revision improves the completeness of the sexual assault effective consent defense.

(13) *The CCRC recommends specifying if "any" evidence is present at trial in the burden of proof for the effective consent defense. This revision clarifies the burden of proof without changing current District.*

- This revision does not change current District law. This revision improves the clarity and completeness of the defense.

(14) *The CCRC recommends revising the penalty enhancement in subsection (g)(4)(D) to require at least a four year age difference instead of a two year age difference between an actor that is 18 years of age or older and a complainant that is under 18 years of age. A four year age gap is consistent with the four year age gap required in the current child sexual abuse statutes,*[80] *the RCC sexual abuse of a minor offense, and several other RCC sex offenses.*

- This revision changes current District law, as described in the updated commentary. This revision improves the consistency and proportionality of the revised penalty enhancement.

(15) *The CCRC recommends deleting the requirements that "The complainant is legally incompetent" and "The complainant is substantially incapable, mentally or physically, of appraising the nature of the proposed sexual act or sexual contact" from the effective consent defense. By requiring "effective consent," the defense incorporates the definitions of both "consent" and "effective consent" in RCC § 22E-701, which have substantially similar requirements.*[81]

[80] D.C. Code §§ 22-3008; 22-3009.

[81] RCC § 22E-701 defines "effective consent," in part, as "consent other than consent induced by physical force, a 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."

- This revision may change current District law, as described in the updated commentary. This revision improves the clarity of the revised statute.

(16) *The CCRC recommends adding to the revised statute's penalty enhancement language the phrase: "In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608…." This revision clarifies the way in which penalty enhancements applicable to the revised sexual assault offense interacts with other RCC general penalty enhancements.*

- This revision may change current District law, as described in the updated commentary. This revision improves the clarity of the revised statute.

(17) *PDS and OAG made several comments on the definition of "coercion" that was specific to the first draft of RCC sex offenses. The RCC definition of "coercive threat" now applies to all RCC offenses. The PDS and OAG comments are discussed in the Appendix to RCC § 22E-701.*

RCC § 22E-1302. Sexual Abuse of a Minor.

(1) *The CCRC recommends limiting the reasonable mistake of age defense in subsection (g)(2) in two ways. First, the defense is limited to situations where the actor's reasonable belief as to the complainant's age was supported by an oral statement by the complainant about his or her age. Second, the actual age of the complainant must be at least 14 for the defense to subsections (b) and (e) (abuse of a complainant that is, in fact, under 16 years of age) or at least 16 for the defense to subsections (c) and (f) (abuse of a complainant that is, in fact, under 18 years of age when the actor is in a position of trust with or authority over the complainant). These limitations ensure that judgments as to age are based, at least in part, on a statement by the complainant about his or her age, and not merely by the complainant's appearance. The limitation permits two years error in the actor's judgment as to age, below what is legally allowed (16 or 18). There is no reasonable mistake of age defense for second or fifth degree sexual abuse of a minor when the complainant is under 14 years of age, nor is there a reasonable mistake of age defense for third or sixth degree sexual abuse of a minor when the complainant is under 16 years of age.*

- This revision changes current District law, as described in the commentary. This revision improves the proportionality of the revised offense.

(2) *The CCRC recommends replacing "engages in sexual contact with the complainant, or causes the complainant to engage in or submit to sexual contact" with "causes the complainant to engage in or submit to sexual contact" in fourth degree sexual abuse of a minor, fifth degree sexual abuse of a minor, and sixth degree sexual abuse of a minor. The revised language is consistent with the "sexual contact" gradations of the other RCC sex offenses.*

- This revision may change current District law, as described in the commentary. This revision improves the consistency and completeness of the revised offense.

RCC § 22E-1303. Sexual Exploitation of an Adult.

(1) *PDS, App. C at 171-172, recommends that the RCC definition of "person of authority in a secondary school" be amended to pertain only to certain persons "in a secondary school attended by the complainant or where the complainant receives services or attends regular programming."*

- The RCC partially incorporates this recommendation by revising subsections (a)(2)(A) and (b)(2)(A) of the revised sexual exploitation of an adult statute to refer to certain persons "in a secondary school" where the complainant "is an enrolled student in the same secondary school; or receives services or attends programming at the same secondary school….", as opposed to "in the same school system" that was in the prior draft. The revised statute directly incorporates in the statute language similar to that recommended by PDS. "Person of authority in a secondary school" is no longer a separate defined term as it was in the prior draft revision. 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 incorporates language substantially similar to that proposed by PDS, but omits the qualifier "regular" in reference to programming. 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, per RCC § 22E-1302, there may be liability under third degree and sixth degree sexual abuse of a minor for any sexual conduct in the absence of force with students under 18 years of age, regardless of which school they may attend if the actor is in a "position of trust with or authority over" the complainant.
- This revision changes current District law, as described in the commentary. This revision improves the clarity, completeness and proportionality of the revised offense.

(2) *PDS, App. C at 171-172, recommends that the definition of "person of authority in a secondary school" be amended to be an exclusive definition that applies only to "any teacher, counselor, principal, or coach."*

- The RCC partially incorporates this recommendation by revising the definition to refer to "a teacher, counselor, principal, administrator, nurse, coach, or security officer in a secondary school" and codifying the definition directly into subsection (a)(2)(A) and subsection (b)(2)(A) of the revised statute. "Person of authority in a secondary school" is no longer a separate defined term as it was in the prior draft revision. This revision limits the offense to specified persons of authority in a secondary school, whereas the prior draft defined "person of authority in a secondary school" as "include[ing] any teacher, counselor, principal, or coach in a secondary school." 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-1302) if the actor is still in a "position of trust with or authority over" the complainant.

- This revision changes current District law, as described in the commentary. This revision improves the clarity and completeness of the revised offense.

(3) *PDS, App. C at 172-173, recommends lowering the age of consent for sexual conduct with persons of authority in a secondary school from 20 years to 18 years. Subsection (a)(2)(A)(ii) and subsection (b)(2)(A)(ii) would require that the complainant be under the age of 18 years instead of under the age of 20 years.*

- The RCC does not incorporate this recommendation because it may create a gap in liability for sexual conduct that is inherently coercive due to the complainant's status as a secondary education student. The revised offense preserves the distinction between sexual exploitation of an adult and third degree and sixth degree sexual abuse of a minor, which require, in part, that the complainant be under the age of 18 years and that the actor is in a "position of trust with or authority over" the complainant.

(4) *OAG, App. C at 189, recommends statutorily defining the phrase "member of the clergy" and suggests basing the definition on the list of clergy in D.C. Code § 22-3020.52.*[82]

- The RCC partially incorporates this recommendation by revising the commentary to note that the term "clergy" is intended to be interpreted broadly to include Christian and non-Christian religious officials. The ordinary meaning of the word "clergy" is sufficiently clear and broadly refers to Christian and non-Christian religious officials.[83] The list of clergy in D.C. Code § 22-3020.52 unnecessarily restricts the scope of the offense.

(5) *The CCRC recommends defining the terms "healthcare provider" and "health professional" and adding these defined terms to subsections (a)(2)(C) and (b)(2)(C) of the revised statute to clarify the scope of covered persons. The current first and second degree sexual abuse of a patient or client statutes and the prior revised draft applied 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. In the revised statute, "healthcare provider" and "health professional" are defined terms that refer to current D.C.*

[82] D.C. Code § 22-3020.52(c)(2)(A) ("The [child sexual abuse] notification requirements of subsection (a) of this subsection do not apply 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 . . .").

[83] *See, e.g.,* Merriam-Webster's Collegiate Dictionary Eleventh Edition (2014) ("clergy 1 : a group ordained to perform pastoral or sacerdotal functions in a Christian church 2 : the official or sacerdotal class of a non-Christian religion.").

Code civil provisions.[84] *The definitions refer to a wide array of medical and cognate professions, including massage therapists and addiction counselors, and are consistent with the scope of the current D.C. Code statute.*

- This revision may change current District law, as described in the commentary. This revision improves the clarity of the revised offense.

[84] D.C. Code §§ 3–1205.01; 16–2801.

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

(1) *PDS, App. C at 177, recommends revising subsection (a)(2)(D) of the sexually suggestive conduct with a minor statute to require the action to be "with the intent to gratify the actor's sexual desire with respect to [the complainant] or to humiliate or degrade [the complainant.]" PDS states that, as written, subsection (a)(2)(D) criminalizes a minor's "incidental viewing of sexual activity as a result of sharing a room or a home with others."*

- The RCC partially incorporates PDS's recommendation by revising subsection (a)(2)(D) to require the conduct be done "with intent that the complainant's presence cause the sexual arousal or sexual gratification of any person."[85] The revised statute requires a nexus between the sexual conduct and the viewing by the minor, so as to exclude criminal liability where the minor's viewing is incidental.[86] The RCC codifies "the sexual arousal or sexual gratification of any person" instead of "the actor's sexual desire" to include a situation where the actor touches the genitalia of a third person with intent to gratify the third person's sexual desire with respect to the complainant's presence, and to include a situation where the actor's touching is done with intent to gratify the complainant.
- This revision changes District law as described in the commentary. The change improves the proportionality of the revised statute.

[85] PDS's proposed revised wording, App. C at 177, refers to "minor child." The RCC consistently uses "complainant" instead of using the terms "child" or "minor."

[86] For example, as cited by PDS such conduct may include: "a sibling masturbating or parents engaging in consensual sex in a room shared with a minor." The critical question, however, is whether the conduct was intentionally done in sight of the minor to sexually arouse or gratify anyone.

RCC § 22E-1305. Enticing a Minor into Sexual Conduct.

(1) *OAG, App. C at 190, recommends revising commentary to subsection (a)(1)(B) of the revised enticing a minor statute to clarify whether "'in order to' refers to the actor's motivations or is part of what the actor must communicate to the complainant." OAG recommends a clarification as to the former.*

- The RCC incorporates OAG's recommendation by statutorily specifying that the actor must persuade or entice, or attempt to persuade or entice, the complainant to go to another location "and plans to cause the complainant to engage in or submit to a sexual act or sexual contact at that location." The language clarifies that the requirement is for the actor's motivation. The revised commentary has been amended accordingly.
- This revision does not change current District law. This revision improves the clarity of the revised statute.

(2) *OAG, App. C at 190, recommends revising the enticing statute to clarify that the requirement that the actor is at least 4 years older than the complainant does not apply to the actual age of a law enforcement officer purporting to be a person under the age of 16 years. OAG recommends specific language to restructure the statute "[i]f the intent is to include any situation where an actor tries to entice a law enforcement officer who purports to under 16" years of age.*

- The RCC incorporates OAG's recommendation by restructuring the statute. The revised enticing statute has been re-drafted to clarify that the required four year age difference is, in the case of a law enforcement officer, only between the actor and the purported age of the law enforcement officer-complainant, not the actual age of the law enforcement officer-complainant.
- The revision does not change current District law. The RCC draft improves the clarity of the revised statute.

(3) *The CCRC recommends revising subsection (a)(1)(B) of the revised enticing statute to require that the actor "cause the complainant to engage in or submit to a sexual act or sexual contact" instead of "engage in or submit to a sexual act or sexual contact." This revision makes this element of the revised offense consistent with other RCC sex offenses, such as sexual assault, which require the actor to "cause the complainant to engage in or submit to" a sexual act or sexual contact.*

- This revision may change current District law, as described in the commentary. This revision improves the consistency and proportionality of the revised statutes.

(4) *The CCRC recommends applying a knowledge mental state to the element that the actor is in a "position of trust with or authority over the complainant," as opposed to a recklessly culpable mental state. This revision makes this element of the revised enticing statute consistent with the revised sexual abuse of a minor statute and the revised sexually suggestive conduct with a minor statute.*

- This revision may change current District law, as described in the updated commentary. This revision improves the consistency and proportionality of the revised statutes.

(5) *The CCRC recommends renaming the offense "enticing a minor into sexual conduct" to clarify the nature of the enticement. The prior draft named the offense simply "enticing a minor," and the current D.C. Code § 22–3010 offense is named "enticing a child or minor."*

- The revision does not change current District law. The RCC draft improves the clarity of the revised statute.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.

(1) *OAG, App. C at 190-191, recommends clarifying whether the requirement that the actor is at least 4 years older than the complainant applies to a law enforcement officer purporting to be a person under the age of 16 years.*

- The RCC incorporates OAG's recommendation by re-drafting the offense to clarify that the required four year age difference in the case of a law enforcement officer is between the actor and the purported age of the complainant.
- This revision does not change current District law. This change improves the clarity of the revised statute.

(2) *The CCRC recommends applying a knowledge mental state to the element that the actor is in a "position of trust with or authority over the complainant," as opposed to a recklessly culpable mental state. This revision makes this element of the revised arranging statute consistent with the revised sexual abuse of a minor statute and the revised sexually suggestive conduct with a minor statute.*

- This revision changes current District law, as described in the commentary. This change improves the consistency and proportionality of the revised statutes.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

[No Advisory Group comments received.]

RCC § 22E-1308. Limitations on Liability for RCC Chapter 13 Offenses.

(1) *The CCRC recommends deleting subsection (b) of the limitations on liability for RCC Chapter 13 offenses statute. Merger of related sex offenses is addressed through the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses, including sex offenses, may be released at a later date.*

- This revision does not change current District law for sex offenses. The revision improves the clarity of the revised sex offenses.

RCC § 22E-1401. Kidnapping

(1) *PDS, App. C at 139-41 says that its recommendations regarding criminal restraint also apply to the revised kidnapping offense, except regarding the categorical, statutory exception to liability for parents, guardians, and relatives. PDS says that the additional intent requirement in kidnapping correctly provides liability for all persons (including parents, guardians, and relatives) except with respect to liability for restraint-type conduct with intent to inflict bodily injury where such injury is in the exercise of parental discipline. PDS recommends that the revised kidnapping statute specifically except liability for such intent to inflict bodily injury in the exercise of parental discipline. PDS recommends specific statutory language to this effect.*

- The RCC incorporates or does not incorporate the various PDS recommendations that are relevant to *both* kidnapping and criminal restraint identically—see disposition of comments on criminal restraint for more information.
- The RCC partially incorporates PDS' distinct recommendation for a parental discipline exception to kidnapping by providing a general defense for reasonable parental discipline that otherwise would constitute kidnapping. Under subsection (a)(1) of RCC § 22E-405, the special responsibility for care, discipline, or safety defense, a responsible parent, person acting in the place of a parent per civil law, or person acting with the effective consent of such a parent, is not liable for conduct that is reasonable in manner and degree, does not create a risk of death or serious bodily injury (or is a permitted medical procedure).
- This revision may change current District law, as described in the commentary. The revision improves the clarity, consistency, and proportionality of the revised statute.

(2) *OAG, App. C at 145-47 says that its recommendations and comments regarding criminal restraint also apply to the revised kidnapping offense.*

- The RCC incorporates the various OAG recommendations and comments that are relevant to *both* kidnapping and criminal restraint identically—see disposition of comments on criminal restraint for more information.

(3) *OAG, App. C at 147-48, recommends that the commentary's discussion of holding a person for ransom should be amended to omit the word "pecuniary." OAG notes that holding a person and demanding an item of sentimental value as a condition of release should still constitute holding a person for ransom. OAG recommends that the commentary, in relevant part, state: "Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant."*

- The RCC incorporates this recommendation omitting the word "pecuniary" in the revised commentary.
- This revision does not appear to further change current District law. The revision improves the clarity of the revised statute.

(4) *The CCRC recommends including both aggravated kidnapping and kidnapping in a single statute.*

- This change is organizational, and itself does not substantively alter either offense.

(5) *The CCRC recommends amending the kidnapping statute to require that the actor "confines or moves the complainant," instead of "interfering" with the complainant's freedom of movement.*

- This change is not intended to change the scope of the revised kidnapping offense. Using the words "confines or moves" is intended to clarify the elements of the revised kidnapping offense.

(6) *The CCRC recommends amending the kidnapping statute to include all of the elements of aggravated kidnapping. The prior version of the statute defined aggravated kidnapping as "commit[ting] kidnapping" plus proof of at least one additional aggravating factor. Under the revised statute, aggravated kidnapping does not use a nested definition of kidnapping, and instead explicitly includes all required elements.*

- This change itself does not further change current District law, and improves the clarity of the revised criminal code.

(7) *The CCRC recommends amending the aggravated kidnapping offense to require either: 1) the actor was 18 years or older, and the complainant was under 12 years of age, and reckless as to the fact that a person with legal authority over the complainant would not effectively consent to the confinement or movement; or 2) the complainant did not effectively consent to the confinement or movement, plus proof at least one additional element listed in (a)(2)(B)(i)-(iii). Under this revision, aggravated kidnapping excludes acting with the effective consent of the complainant but without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated person, or 12 years of age or older. Such conduct remains criminalized as kidnapping, however. This revision recognizes that although confining or moving an incapacitated person or person under the age of 16 without effective consent of the person with authority over the complainant warrants criminalization, it is not as harmful as acting without the complainant's effective consent, or when the complainant is under 12 years of age.*

- This change improves the proportionality of the revised criminal code.

(8) *The CCRC recommends removing any requirement that, for kidnapping predicated on a deception, it be proven that, if the deception had failed, the actor immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury. Because of the additional intent requirement in kidnapping (as compared to criminal restraint), this requirement regarding the use of deception is not necessary to prevent overcriminalizing ordinary, innocent behavior.*

- This revision does not appear to further change current District law. The revision improves the clarity of the revised statute.

(9) *The CCRC recommends amending the kidnapping statute to require recklessness as to the fact that the complainant is an incapacitated person, or under the age of 16. The prior RCC draft of the kidnapping statute covered knowingly interfering with the freedom of movement of a person under 16 or a person assigned a legal guardian by any means, if the actor did not have effective consent of the parent or*

legal guardian. The RCC now specifies a reckless culpable mental state for this element. Such a mental state is also consistent with other victim-status enhancements in other RCC and current D.C. Code offenses, and balances the need for some subjective awareness of the complainant's characteristics with the recognition that judgments of age are probabilistic. To be practically certain requires familiarity with the complainant (a non-stranger case) or a clear departure of many years from a given age.

- This change improves the consistency and proportionality of the revised criminal code.

(10) *The CCRC recommends amending kidnapping to require recklessness as to the fact that a person with legal authority over the complainant would not have effectively consented to the confinement or movement when the complainant is incapacitated, or when the actor is 18 years or older and the complainant is under the age of 16. The prior RCC draft of the kidnapping statute required knowledge as to this element. The second draft applies a recklessness mental state, in accord with the mental state required as to whether the complainant is under the age of 16, or is an incapacitated person. The standard as to the effective consent of the person with legal authority over the complainant should not be higher than that of the circumstance (the complainant's age or incapacity) which would alert the actor to inquire whether there is effective consent from someone other than the complainant.*

- This change improves the consistency and proportionality of the revised criminal code.

(11) *The CCRC recommends amending the kidnapping statute to require that the actor be 18 year or older, and at least 4 years older than the complainant, in cases premised on lack of effective consent of a person with authority over the complainant who is under the age of 16. The prior RCC draft of the kidnapping statute did not specify any age requirement as to the actor when liability was based on failure to have the effective consent of that person's parent or guardian. Consequently, an actor under the age of 18 would commit kidnapping by interfering with another child's freedom of movement against the orders of the complainant's parent—even if such interference was with the full effective consent of the minor complainant. For example, a child who convinces his friend they should run away from home together, even if he or she knows that the friend's parents do not approve could be convicted of kidnapping under the prior version of the statute. Such conduct does not warrant criminalization. Where a minor actor knowingly moves or confines a complainant minor* without *that complainant's effective consent, liability exists under subparagraph (b)(2)(A) of the revised statute.*

- This change improves the proportionality of the revised criminal code.

(12) *The CCRC recommends amending the kidnapping statute to criminalize conduct with intent to permanently deprive a person with legal authority over the complainant of custody of the complainant, regardless of the complainant's age and including incapacitated persons.*

- The prior RCC draft kidnapping statute had a similar intent requirement: "Permanently deprive a parent, legal guardian, or other lawful custodian of

custody of a minor." However, by reference to a person with legal authority over the complainant and removing an age requirement, incapacitated persons are also covered by this aspect of the updated kidnapping statute.

- This revision does not appear to further change current District law. This change improves the clarity, consistency, and proportionality of the revised statute.

(13) *The CCRC recommends re-drafting the relative defense as an exception to liability. The prior RCC draft kidnapping statute included a defense in cases where the defendant is a relative of the complainant, acted with intent to assume personal custody of the complainant, and did not cause bodily injury or threaten to cause bodily injury to the complainant. The RCC now incorporates this language as an exception, but only in cases predicated on intent to permanently deprive a parent who is responsible for the general care and supervision of the complainant, or court-appointed guardian of lawful custodian of custody of a minor. The exception also refers to "close relatives" instead of "relatives" to more closely match intuitions about the scope of covered persons, which remains the same except for the omission of "cousin."*

- This revision does not further change current District law. This change improves the clarity and proportionality of the revised statute.

(14) *The CCRC recommends deleting from the prior RCC draft kidnapping statute the subsection that criminalized acting with intent to hold the complainant in a condition of involuntary servitude. This provision is unnecessary and redundant with the RCC human trafficking and forced labor offenses. Interfering with a person's freedom of movement with intent to hold that person in a condition of involuntary servitude would constitute trafficking in labor or services as defined under RCC § 22E-1605, or attempted forced labor under RCC § 22E-1603.*

- This revision does not further change current District law. The revision improves the consistency of the revised statutes and limits unnecessary overlap between offenses.

(15) *The CCRC recommends changing the revised kidnapping statutory language and commentary to reference the merger procedures in the general merger provision in RCC § 22E-214. The revised offense still bars convictions for kidnapping and other offenses when the movement or confinement was incidental to commission of another offense, but clarifies procedural rules. The revised statute clarifies that multiple convictions are barred in accordance with RCC § 22E-214, and that multiple convictions are only barred after the time for appeal has expired, or after judgment appealed from has been affirmed.*

- This revision does not appear to further change current District law. The revision improves the clarity of the revised statute.

RCC § 22E-1402. Criminal Restraint.

(1) *PDS, App. C at 136 recommends revising the criminal restraint offense so that for complainants under the age of 16, the only means of committing the offense is if the actor knows that he or she lacks the effective consent of the parent, guardian, or person who has assumed the obligations of a parent. PDS recommends specific statutory language to this effect.*

- The RCC does not incorporate this recommendation because limiting liability for criminal restraint to actors who *know* the complainant is under 16 and *know* that they lack the lack the effective consent of a parent or similar person may create some gaps in liability and, simultaneously criminalize some conduct commonly considered innocent, such as otherwise consensual interactions between minors. Instead, the RCC provides multiple ways of committing the offense against a complainant under 16, in circumstances where: 1) the complainant's age is unknown but effective consent was clearly lacking; and 2) an adult actor is reckless as to the complainant's age and as to the fact that a person with legal authority over the complainant would not effectively consent to the confinement or movement. Conversely, where the complainant and actor are both minors and the complainant gives effective consent, the RCC absolves of liability notwithstanding the lack of effective consent by a person with legal authority over the complainant.[87]

(2) *PDS, App. C at 136 recommends a categorical, statutory exception to liability for criminal restraint for parents and guardians with respect to their minor children, including 16 and 17 year olds, and wards, rather than a defense. PDS states that this accounts for the fact that such children "must follow the instructions of their parent(s) or they may be found to be a 'child in need of supervision'" per D.C. Code § 16-2301(8). PDS recommends specific statutory language to this effect.*

[87] Consider, first, a person who, as a prank, knowingly jams a door shut from the outside a room in a recreation center, confining the people inside for hours without their effective consent, but not having any idea who is inside. Under the PDS proposal, there would be no liability if the boys inside were all under 16 years of age, because the actor didn't have any evidence (and so didn't *know*) that the people inside were under 16 years of age. Second, consider a 15 year old visiting another 15 year old's home where a departing parent tells the girls they are not allowed to leave the house, but after the parent's departure the visiting teen persuades her friend to go watch a basketball game across town with her. Under the PDS proposal, there would be liability for the visiting friend who knew that the parent did not give effective consent to leaving the house, despite such behavior being common among young teenagers and apparently consensual. Third, consider a 22 year old at a high school graduation party for seniors who persuades a 14 year old girl there to immediately leave on an out-of-town roadtrip, thinking she might be as young as 15, but probably was 18 years old. Under the PDS proposal, there would not be liability because the actor may have been reckless as to the girl's age, but he didn't know her age. In contrast, the RCC proposal instead provides liability in the first situation by specifying as an *alternative* basis for liability the actor knowingly lacks the effective consent of the complainant (regardless of whether the age or incapacity of the complainant is known). In the second situation, the RCC absolves a minor actor of liability for moving or confining a minor complainant when the minor complainant gives his or her effective consent—notwithstanding parental instructions to the contrary. In the third situation, the RCC would provide liability for an adult who is at least reckless as to the complainant's age or incapacity, and the lack of effective consent by a person with legal authority over such a complainant.

- The RCC incorporates this recommendation, although using different statutory language, by providing a statutory, categorical exception to liability for criminal restraint in subparagraph (c)(2)(A) for a person with legal authority over the complainant. Note, however, that such individuals may be liable under the RCC criminal abuse of a minor or criminal neglect of a minor statutes for conduct not in accord with their duty of care to the complainant.
- This revision does not further change current District law. The revision improves the proportionality of the revised statute.

(3) *PDS, App. C at 136-38 recommends clarifying in the revised statute that guardians with authority to take physical custody of a person should be excepted from liability for criminal restraint with respect to those persons, and that moving or confining an adult ward without the effective consent of his or her that guardian with authority to take physical custody of the complainant commits criminal restraint—even if the adult ward themselves consents to the movement or confinement. PDS says that, while there are many types of guardianship, the revised criminal code should seek to maximize the self-reliance and independence of wards by recognizing their right to give effective consent to movement or confinement. PDS says guardians with authority to take physical custody of the complainant should be the only exception. PDS recommends specific statutory language to this effect.*

- The RCC partially incorporates this recommendation, although using different statutory language, by providing a statutory, categorical exception to liability for criminal restraint in subparagraph (c)(2)(A) for a person with legal authority over the complainant. However, the RCC does not incorporate the PDS recommendation that liability for criminal restraint of a person over 18 with a guardian with the legal authority to take physical custody of that person hinge solely on whether the actor knows the complainant's status and the lack of effective consent of such a guardian. The RCC does not incorporate this latter recommendation because, similar to the PDS recommendation with respect to age, limiting liability for criminal restraint to actors who *know* the complainant has such a guardian and *know* that they lack the lack the effective consent of such a guardian may create some gaps in liability and, simultaneously criminalize some conduct commonly considered innocent, such as otherwise consensual interactions between incapacitated persons.
- This revision does not further change current District law. The revision improves the proportionality of the revised statute.

(4) *PDS, App. C at 138 recommends that a categorical, statutory exception to liability for criminal restraint be expanded to include all relatives when the complainant is under the age of 16. PDS recommends specific statutory language to this effect.*

- The RCC partially incorporates this recommendation by excepting in paragraph (c)(2) close relatives and former legal guardians with authority to control the complainant's freedom of movement persons who: 1) Act with intent to assume full responsibility for the care and supervision of the

complainant; and 2) Do not cause bodily injury, or use a coercive threat. This narrow exception to liability applies only close relatives and former legal guardians who act without the effective consent of a person with legal authority over the complainant, but do so with intent to take care of the complainant and without violence. The exception also refers to "close relatives" instead of "relatives" in the prior draft RCC statute to more closely match intuitions about the scope of covered persons, which remains the same except for the omission of "cousin." The covered actors in the revised criminal restraint offense are those whose conduct is subject to the District's parental kidnapping statute (D.C. Code § 16–1021). However, extending a blanket exception to liability would create a gap in liability for instances where a relative who may have no duty of care to the complainant uses violent means to move or confine the complainant. Although there may be cases in which a relative restraining a minor by violence is justified, in that case the relative would need to raise a general justification defense. The prior RCC draft had made it a defense to criminal restraint of a minor or person assigned a legal guardian that the actor was a relative.

- This revision changes current District law. The revision improves the consistency and proportionality of the revised statute.

(5) *PDS, App. C at 139 recommends that the criminal restraint offense include a "Good Samaritan defense" which would apply if a person acted based on a reasonable belief that interference with another person's freedom of movement was necessary to protect that person from imminent physical harm. PDS recommends specific statutory language to this effect.*

- The RCC partially incorporates this recommendation by codifying a forthcoming general justification defense for conduct that is criminal but seeks to avoid a greater harm, commonly known as a "lesser evil" or "necessity" defense.[88] The issue raised by PDS is not specific to criminal restraint liability and merits a more general treatment.
- This revision may change current District law. The revision improves the proportionality of the revised statute.

(6) *PDS, App. C at 141 objects to including as an element of aggravated criminal restraint that the defendant acted "with the purpose of harming the complainant because of the complainant's status." Specifically, PDS objects to increased penalty gradations for a complainant's status as a District official or employee or family member of a District official or employee.*

[88] *See, e.g.,* Model Penal Code § 3.02 ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear."). *See also 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.").

- The RCC partially incorporates this recommendation by eliminating as an aggravating factor the complainant's status as a District employee or family member of a District employee. However, higher gradations for criminal restraint still includes acting with the purpose to harm the complainant due to his or her status as a "District official," and the fact that the complainant is a "protected person" which includes District officials. The revised offense also eliminates as an aggravating circumstance that the complainant is a participant in a citizen patrol or a was harmed because of the complainant's status as a participant in a citizen patrol. These changes are consistent with the treatment of aggravating factors affecting penalty gradations for other RCC offenses against persons.
- This revision changes current District law, as described in the commentary. The revision improves the consistency and proportionality of the revised statute.

(7) *OAG, App. C at 145-46 recommends that the word "harm" as used in the aggravating factors for the revised criminal restraint offense either be defined, or commentary should clarify the difference between "harm" and "bodily injury."*

- The RCC incorporates this recommendation by clarifying in commentary that the term "harm" is meant to be construed broadly, and includes not only bodily injury but mental anguish and emotional distress.
- This revision does not change current District law.[89] The revision improves the clarity of the revised statute.

(8) *OAG, App. C at 146, OAG recommends that the commentary should provide examples of cases when a criminal restraint is clearly incidental to the commission of another crime, and when it is not.*

- The RCC incorporates this recommendation through its clarifying examples in a footnote[90] to the Commentary of when a criminal restraint is clearly incidental to the commission of another crime. Generally, as the commentary notes, the limitation on multiple convictions provision is intended to re-instate the D.C. Court of Appeals' fact-based analysis, which is applied prior to its decision in *Parker v. United States*, 692 A.2d 913 (D.C. 1997).
- This revision of the commentary does not further change current District law. The revision improves the clarity of the revised statute.

(9) *OAG, App. C at 146-47 comments that it is unclear how the government would prove one of the means of committing criminal restraint, to interfere with a*

[89] The analogous statutes do not use the term "harm" but generally just allow enhancements when enumerated offenses are committed against particular victims. However, never specifies any kind of harm/injury that has to result.

[90] *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.).

person's freedom of movement with consent obtained by deception, provided that if the deception failed, the defendant would have immediately obtained or attempted to obtain consent by causing bodily injury or threatening to cause bodily injury. OAG did not recommend any particular change regarding this point.

- The RCC addresses this comment by clarifying the commentary regarding evidence that may constitute intent to resort to force in a criminal restraint by deception. In the prior draft of the commentary a footnote provided some examples of factors that may be relevant in proving the defendant's intent to resort to force or threats: "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." These examples of facts that could be used as evidence of the defendant's intent to resort to force or threats should the deception fail are expanded in the kidnapping and criminal restraint commentary. More generally, although it may be difficult in some cases to prove the defendant's intent to resort to force, this is an inherent challenge in proving many inchoate or semi-inchoate offenses. For example, attempt liability requires proof of the defendant's intent to commit acts that he or she never actually performed.

(10) *OAG, App. C at 147 comments that it is not possible to interfere with a person's freedom of movement by deception so long as the deception is successful, since the complainant chose to be in the location where he or she was. Similarly, OAG comments that enticing a person under the age of 16 with the promise of candy cannot constitute interference with the child's freedom of movement, because the child is happily enticed by candy, there has been no interference with the child's freedom of movement.*

- The RCC addresses this comment by: 1) replacing "Knowingly interferes to a substantial degree with another person's freedom of movement;" with the phrase "Knowingly and substantially confines or moves the complainant"; and 2) separately addressing the use of deception without intent to resort to force as an unusual exception to liability rather than in the elements of the offense. These changes avoid the connotation that "interfere" includes an action against a person's will, and more plainly concretely describes the actor's conduct as moving or confining. The RCC correspondingly clarifies in the commentary when a person causes another to move or be confined for purposes of the statute, he use of force, threats, or other coercive behaviors is not needed. Innocent persuasion, like inviting a person to dinner (as well as less innocent interventions like a stranger asking a small child to get in a car to get ice cream), if successful, may satisfy the requirement of "confines or moves" if it causes that person to move to, or remain in, a location that he or she would not have absent the invitation. The vast scope of everyday conduct that constitutes "confines or moves," however, is limited by the requirement that the interference be substantial.

- Criminalizing deceptions still has the potential to cover many common, ordinary activities typically considered innocent (e.g. a person pretextually inviting another person to go to a movie in order to take them to a surprise party). The RCC requirement of an intent to resort to some kind of force if the deception fails eliminates liability for such deceptions. Such an intent requirement exists in federal case law in some circuits.[91]

(11) *The CCRC recommends including both aggravated criminal restraint and criminal restraint in a single statute.*

- This change is organizational, and itself does not substantively alter either offense.

(12) *CCRC recommends amending the criminal restraint statute to include all of the elements of aggravated criminal restraint. The prior version of the statute defined aggravated criminal restraint as "commit[ting] criminal restraint" plus proof of at least one additional aggravating factor. Under the revised statute, aggravated criminal restraint does not use a nested definition of criminal restraint, and instead explicitly includes all required elements.*

- This change itself does not further change current District law, and improves the clarity of the revised criminal code.

(13) *The CCRC recommends amending the criminal restraint statute to require that the actor "confines or moves the complainant," instead of "interfering" with the complainant's freedom of movement.*

- This change is not intended to change the scope of the revised kidnapping offense. Using the words "confines or moves" is intended to clarify the elements of the revised kidnapping offense.

(14) *The CCRC recommends amending criminal restraint to require confining or moving the complainant without the complainant's effective consent. The use of the standard definition of "effective consent" broadens somewhat the scope of the offense as compared to the first draft, which required that the interference be without consent or with consent obtained by causing bodily injury, threat to cause bodily injury, or deception—but did not include consent obtained by coercive threats*[92] *generally. Such coercive threats may be as powerful in subverting a*

[91] *E.g., United States v. Corbett*, 750 F.3d 245, 251 (2d Cir. 2014) ("The Fourth and Eleventh Circuits interpret § 1201(a)'s "hold" requirement to be satisfied when a defendant maintains control of his victim by continuing to employ a ruse, as long as the evidence shows that the defendant was willing and intended to use force to back up his deceit."); *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]").

[92] RCC § 22E-701 ("'Coercive threat coercion' means a threatening, explicitly or implicitly, that any person will do any one of, or a combination of, the following:

(A) Engage in conduct that, in fact, constitutes:

(i) An offense against persons as defined in subtitle II of Title 22E; or

(ii) A property offense as defined in subtitle III of Title 22E;

(B) Take or withhold action as a government official, or cause a government official to take or withhold action;

(C) Accuse another person of a crime;

person's freedom of choice as the application of force, and merit inclusion as a way of defeating effective consent in the criminal restraint statute.

- This revision may further change current District law, as described in the commentary. The revision improves the consistency and proportionality of the revised statute.

(15) *The CCRC recommends amending criminal restraint to require a reckless mental state as to whether the complainant is an incapacitated individual, or under the age of 16. The prior RCC draft of the criminal restraint statute covered knowingly interfering with the freedom of movement of a person under 16 or a person assigned a legal guardian by any means, if the actor did not have effective consent of the parent or legal guardian. The RCC now specifies a reckless culpable mental state for this element. Such a mental state is also consistent with other victim-status enhancements in other RCC and current D.C. Code offenses, and balances the need for some subjective awareness of the complainant's characteristics with the recognition that judgments of age are probabilistic. To be practically certain requires familiarity with the complainant (a non-stranger case) or a clear departure of many years from a given age.*

- This change improves the consistency and proportionality of the revised criminal code.

(16) *The CCRC recommends amending criminal restraint to require recklessness as to the fact that a person with legal authority over the complainant would not have effectively consented to the confinement or movement when the complainant is incapacitated, or when the actor is 18 years or older and the complainant is under the age of 16. The prior RCC draft of the criminal restraint statute required knowledge as to this element. The second draft applies a recklessness mental state, in accord with the mental state required as to whether the complainant is under the age of 16, or is incapacitated. The standard as to the effective consent of the person with legal authority over the complainant should not be higher than that of the circumstance (the complainant's age or incapacity) which would alert the actor to inquire whether there is effective consent from someone other than the complainant.*

- This change improves the consistency and proportionality of the revised criminal code.

(17) *The CCRC recommends amending criminal restraint to require that the actor be 18 years or older, and at least 4 years older than the complainant, in*

(D) 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:

(i) Hatred, contempt, ridicule, or other significant injury to personal reputation;

(ii) Significant injury to credit or business reputation;

(E) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;

(F) 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; or

(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply.").

cases premised on lack of effective consent of a person with authority over the complainant who is under the age of 16. The prior RCC draft of the criminal restraint statute did not specify any age requirement as to the actor, or age gap between the actor and complainant, when liability was based on failure to have the effective consent of that person's parent or guardian. This created the possibility of unwarranted criminal liability for confining or moving a child's against the orders of the complainant's parent. For example, a child who invites his friend to his house to watch a violent movie, knowing that the friend's parents do not approve; or an 18 year old taking a 16 year old on a date, knowing that the 16 year old's parents do not approve, should not be guilty of criminal restraint. Such conduct does not warrant criminalization. Where a minor actor knowingly moves or confines a complainant minor without *that complainant's effective consent, liability exists under subparagraphs (a)(2)(B) and (b)(2)(A) of the revised statute.*

- This change improves the proportionality of the revised criminal code.

(18) *The CCRC recommends amending the aggravated criminal restraint offense to require either: 1) the actor was 18 years or older, and the complainant was under* 12 *years of age, and reckless as to the fact that a person with legal authority over the complainant would not effectively consent to the confinement or movement; or 2) the complainant did not effectively consent to the confinement or movement, plus proof at least one additional element listed in (a)(2)(B)(i)-(iii). Under this revision, aggravated criminal restraint excludes acting with the effective consent of the complainant but without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated person, or 12 years of age or older. Such conduct remains criminalized as criminal restraint. This revision recognizes that although confining or moving an incapacitated person or person under the age of 16 without effective consent of the person with authority over the complainant warrants criminalization, it is not as harmful as acting without the complainant's effective consent, or when the complainant is under 12 years of age.*

- This change improves the proportionality of the revised criminal code.

(19) *The CCRC recommends changing the revised criminal restraint statutory language and commentary to reference the merger procedures in the general merger provision in RCC § 22E-214. The revised offense still bars convictions for criminal restraint and other offenses when the movement or confinement was incidental to commission of another offense, but clarifies procedural rules. The revised statute clarifies that multiple convictions are barred in accordance with RCC § 22E-214, and that multiple convictions are only barred after the time for appeal has expired, or after judgment appealed from has been affirmed.*

- This revision does not appear to further change current District law. The revision improves the clarity of the revised statute.

RCC § 22E-1501. Criminal Abuse of a Minor.

(1) *OAG, App. C at 121, recommends renaming the offense "criminal cruelty to a child" or another name that avoids potential confusion with the District's civil child welfare system.*

- The RCC incorporates OAG's recommendation by renaming the offense "criminal abuse of a minor."
- This revision does not appear to change current District law. This revision improves the clarity and organization of the revised statute.

(2) *OAG, App. C at 122, recommends either expanding the statutory definitions of "serious bodily injury" and "significant bodily injury" as they are applied to a "baby or small child," or creating additional gradations of the criminal abuse of a minor offense. OAG lists various injuries which it says do not appear to qualify as first or second degree criminal abuse of a minor, but would be graded as third degree or do not constitute RCC criminal abuse of a minor at all. OAG also states that it is unclear "what offense a parent would be committing" if the parent "intentionally blew PCP smoke into a baby's face or fed the baby food containing drugs, which did not cause a substantial risk of death or a bodily injury."*

- The RCC does not incorporate OAG's recommendation because it creates inconsistent liability and penalties in the RCC criminal abuse of a minor statute and other revised offenses against persons, and may reduce penalty proportionality. The CCRC recommendation distinguishes harms using the main distinctions in bodily injury used in the RCC and current District's assault statutes. Comparatively less serious harms to minors are covered by third degree criminal abuse of a minor, while higher gradations concern harms that involve "significant bodily injury," "serious bodily injury," or "serious mental injury."[93] The RCC definition of "significant bodily injury" lists specific harms (e.g. a temporary loss of consciousness) that constitute at least "significant bodily injury," without more, but the RCC also provides functional definitions of what constitutes a "significant bodily injury" or "serious bodily injury" (e.g. requiring immediate medical treatment beyond what a layperson can personally administer for "significant bodily injury."). Consequently, most or all the examples OAG cites may constitute any degree of the revised criminal abuse of a

[93] *See* RCC § 22E-701 ("'Serious bodily injury' means bodily injury or significant bodily injury that involves: A) A substantial risk of death; B) Protracted and obvious disfigurement; or C) Protracted loss or impairment of the function of a bodily member or organ."); ("'Serious mental injury' means 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."); ("'Significant bodily injury' means 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. The following injuries constitute at least a significant bodily injury: 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.").

minor, depending on the facts of the case.[94] The commentary, however, has been revised to address a hypothetical similar[95] to that raised by OAG regarding drugging a child.

(3) *OAG, App. C at 122, recommends adding "interfering with the child's blood flow to the brain or extremities" to the excluded conduct in the parental discipline defense.*

- The RCC does not incorporate OAG's recommendation because, as discussed below, the revised parental defense in RCC § 22E-40X no longer includes *per se* unreasonable types of conduct.

(4) *PDS, App. C at 132, recommends requiring a four year age difference between the adult and the complainant, as opposed to two years.*

- The RCC does not incorporate PDS's recommendation because, as discussed below, the RCC criminal abuse of a minor statute no longer includes an age-based provision for liability.

(5) *PDS, App. C at 133, recommends deleting from revised offense using "physical force that overpowers" the complainant.*

- The RCC incorporates this recommendation and eliminates the phrase "physical force that overpowers" from the criminal abuse of a minor statute. This revision makes the revised statute consistent with the revised assault statute. In addition, this revision does not appear to change the scope of the revised statute because "physical force that overpowers" a person, but does not cause "bodily injury," is criminal restraint (RCC § 22E-1402) and is specifically included as a predicate offense for third degree criminal abuse of a minor. Notably, overpowering a person without causing "bodily injury" also may be criminalized by second degree offensive physical contact (RCC § 22E-1205(b)) or, in severe instances, kidnapping (RCC § 22E-1401).
- This revision changes current District law, as described in the updated

[94] The examples that OAG states appear to constitute only a third degree offense or do not constitute criminal abuse of a minor at all in the RCC (e.g. "a laceration that is .74 inches in length and less than a quarter of an inch deep;") appear to be harms that fall just short of the harms listed as constituting "at least" per se "significant bodily injury" in the RCC definition. However, the RCC per se definitions of harms constituting "significant bodily injury," which are based on current District case law, do not preclude slightly lesser injuries from constituting "significant bodily injury" or even "serious bodily injury" under the flexible standards described in the RCC definitions. For example, "a laceration that is .74 inches in length and less than a quarter of an inch deep" would still constitute "significant bodily injury" if "to prevent long-term physical damage or to abate severe pain, [the laceration] requires hospitalization or immediate medical treatment beyond what a layperson can personally administer" or would even constitute serious bodily injury if causes "protracted and obvious disfigurement."

[95] The OAG hypothetical referred to a parent who "intentionally blew PCP smoke into a baby's face or fed the baby food containing drugs, which did not cause a substantial risk of death or a bodily injury." However, in the RCC the question raised by the more basic fact pattern of mild drugging is whether there was an actual "bodily injury" as opposed to a mere risk of a bodily injury—an issue excluded by the OAG hypothetical. Does blowing PCP smoke into a baby's face or feeding them food containing illicit drugs constitute "physical pain, illness, or *any impairment of physical condition*" (emphasis added) per the RCC definition of "bodily injury" in RCC § 22E-701? If so, such conduct constitutes at least third degree criminal abuse of a minor. The RCC criminal neglect of a minor offense does not criminalize risk of mere "bodily injury."

commentary. This revision improves the clarity, consistency, and proportionality of the revised statute, and reduces unnecessary overlap with other offenses.

(6) *PDS, App. C at 133-134, recommends revising the burden of proof for the parental discipline defense to refer to "the defendant's purpose of exercising discipline" as opposed to "the defendant's purpose of exercising reasonable discipline." PDS says that "whether any exercise of parental discipline is reasonable is uniquely within the province of the jury." PDS says that, "Any judicial finding on whether the issue of reasonable parental discipline has been raised should focus on whether there has been any evidence, however weak, that the defendant's purpose was parental discipline, not on the reasonableness of that discipline."*

- The RCC incorporates PDS's recommendation. The parental defense in RCC § 22E-40X simply requires "any" evidence of the complainant's age, the actor's relationship to the complainant, and that the actor had the intent of safeguarding or promoting the welfare of the complainant before the government has the burden of disproving the defense. While reasonableness remains a part of the parental defense, proof of reasonableness is not necessary to the actor's burden of production.
- This revision does not appear to change current District law. This revision improves the clarity and completeness of the revised parental defense.

(7) *PDS, App. C at 134, requests that the burden of proof for the parental discipline defense be amended to include "if some evidence, however weak, is present at trial." PDS says that, because "exercise of parental discipline is reasonable is uniquely within the province of the jury…[a]ny judicial finding on whether the issue of reasonable parental discipline has been raised should focus on whether there has been any evidence, however weak, that the defendant's purpose was parental discipline, not on the reasonableness of that discipline."*

- The RCC partially incorporates this recommendation by stating as the burden of proof for the general justification defense regarding parental discipline in RCC § 22E-40X: "The government must prove the absence of a defense in this section beyond a reasonable doubt if *any* evidence is present at trial of: (1) Sub-paragraphs (a)(1)(A)- (a)(1)(C) of the parental defense;…" (emphasis added). The RCC does not incorporate the language "however weak" recommended by PDS.
- This revision does not appear to change current District law. This revision improves the clarity and consistency of the revised parental defense.

(8) *PDS, App. C at 134 recommends adding a provision to merge convictions for the abuse and neglect of vulnerable persons offenses and assault offense.*

- The CCRC partially incorporates this recommendation. In the RCC, merger of assault and the abuse and neglect of vulnerable persons offenses is governed by the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.
- This revision does not further change current District law, as described in the commentary. This revision improves the clarity of the revised statutes.

(9) *The CCRC recommends requiring that the actor "recklessly" cause serious bodily injury in first degree criminal abuse of a minor instead of "recklessly, under circumstances manifesting extreme indifference to human life." This revision reserves the "recklessly, under circumstances manifesting extreme indifference to human life" culpable mental state for the revised assault statute and certain revised homicide statutes. A lower culpable mental state better reflects the higher expectation that a person who has a responsibility under civil law for the health, welfare, or supervision of the complainant should take care not to cause serious bodily injury to the complainant.*

- This revision does not change current District law.[96] This revision improves the proportionality of the revised statute and its consistency with other RCC offenses against persons.

(10) *The CCRC recommends requiring that the actor be reckless 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." This replaces the alternative requirements in the prior RCC draft that, with respect to the actor ""In fact: that person is an adult at least two years older than the child; or that person is a parent, legal guardian, or other person who has assumed the obligations of a parent," and the separate requirement of recklessness as to the age of the complainant. Generally, this change narrows the scope of liability for the offense from all adults at least two years of age older than the minor, to those persons (regardless of age) 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 abuse of a minor offense thus provides a distinct charge for individuals who are at least reckless of having 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 minor they harm. To some degree this change also widens liability, compared to the prior RCC statute, for persons that are not an adult at least two years older than the complainant—previously liability for such younger persons was limited to parents, legal guardians, and persons acting* in loco parentis. *Recklessness as to age is typically applied in the RCC, and logically the mental state should match the mental state as to the duty of care since the former gives rise to the latter.*

- This revision appears to change current District law, as described in the updated commentary. This revision improves the clarity and consistency of the revised offense, and reduces unnecessary overlap with other RCC offenses against persons, such as assault.

(11) *The CCRC recommends replacing committing "harassment" with "stalking, per RCC § 22E-1206" as a possible basis for liability for third degree criminal abuse of a vulnerable adult or elderly person. The RCC does not have a*

[96] The current child cruelty statute requires a "recklessly" culpable mental state. D.C. Code § 22-1101(a), (b).

separate harassment offense, but the revised stalking offense includes harassment-type conduct.

- This revision does not appear to change current District law. This change improves the clarity and organization of the revised statute.

(12) *The CCRC recommends replacing the parental discipline defense that was previously codified in the revised statute and instead making the revised criminal abuse of a minor statute subject to the special defenses in RCC § 22E-40X, including a revised parental discipline defense.*

- This revision may change current District law, as is described in the updated commentary. This revision improves the clarity, consistency, completeness and organization of the RCC.

(13) *The CCRC recommends using the term "minor" in the offense name and referring to a "complainant" "under 18 years of age" in the offense. This revision creates uniformity with other RCC offenses against persons and offenses under current District law that consider a complainant under the age of 18 years to be a "minor."*[97]

- This revision does not appear to change current District law. This revision improves the clarity and organization of the RCC offenses against persons.

(14) *The CCRC recommends including as a basis for third degree criminal abuse of a minor purposely causing significant emotional distress by confining the complainant. This provision is narrower than the RCC criminal restraint offense in RCC § 22E-1402, which is separately listed as a basis for third degree criminal abuse of a minor, and establishes liability for persons with legal authority over the complainant, close relatives or former legal guardians who are wholly or partially excepted from liability under the RCC criminal restraint. Confinement by such actors of a minor complainant to whom they have a duty of care otherwise is not subject to liability absent this provision or an alternative basis of liability arising from the confinement (e.g., threats, causing bodily injury or a serious mental injury, or creating a substantial risk of a significant bodily injury). Such a purposeful, harmful use of confinement is likely already within the scope of the current D.C. Code's child cruelty statute, and would have been within the scope of the criminal restraint statute referred to in the prior RCC draft child abuse statute. The need for this change arises solely from the RCC criminal restraint offense in RCC § 22E-1402 now wholly or partially exempting liability under that statute for some persons.*

- This revision may change current District law, as discussed in the revised commentary. This revision improves the consistency and proportionality of the RCC offenses against persons and avoids a potential gap in liability.

[97] *See, e.g.*, D.C. Code §§ 22-811 (contributing to the delinquency of a minor statute); 22-3009.01, 22-3009.02, 22-3001(5A) (sexual abuse of a minor statute and definition of "minor").

RCC § 22E-1502. Criminal Neglect of a Minor.

(1) *OAG, App. C at 121, recommends renaming the offense "criminal harm to a child" or another name that avoids potential confusion with the District's civil child welfare system.*

- The RCC incorporates OAG's recommendation, renaming the offense "criminal neglect of a minor."
- This revision does not appear to change current District law. This revision improves the clarity and organization of the revised statute.

(2) *PDS, App. C at 134, recommends adding a provision to merge convictions for the abuse and neglect of vulnerable persons offenses and assault offense.*

- The RCC partially incorporates this recommendation. In the RCC, merger of assault and the abuse and neglect of vulnerable persons offenses is governed by the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.
- This revision does not further change current District law, as described in the commentary. This revision improves the clarity of the revised statutes.

(3) *The CCRC recommends using the term "minor" in the offense name and referring to a "complainant" "under 18 years of age" in the offense. This revision creates uniformity with other RCC offenses against persons and offenses under current District law that consider a complainant under the age of 18 years to be a "minor."*[98]

- This revision does not appear to change current District law. This revision improves the clarity and organization of the RCC offenses against persons.

(4) *The CCRC recommends requiring that the complainant be reckless 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" instead of the prior RCC draft language "knows that he or she has a duty of care" to the complainant. This change provides greater specificity as to the meaning of "duty of care," consistent with other the RCC general justification defenses for parents, guardians, and others per RCC § 22E-40X. The change also makes a reckless culpable mental state required as to the age of the complainant, which was unclear in the prior draft. Recklessness as to age is typically applied in the RCC, and 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 revision changes current District law, as described in the updated commentary. This revision improves the clarity and consistency of the revised statute.

(5) *The CCRC recommends eliminating the requirements that the actor "in fact" "violated his or her duty of care" to the complainant and that the actor was "reckless" as to the risk of harm being "unjustified," requirements that were*

[98] *See, e.g.*, D.C. Code § 22-811 (contributing to the delinquency of a minor statute); 22-3009.01, 22-3009.02, 22-3001(5A) (sexual abuse of a minor statute and definition of "minor").

recommended in the prior RCC draft. These requirements are not necessary as essential elements of the offense. If an actor raises a defense that the conduct in question was committed in accordance with his or her duty of care under the RCC general justification defenses for parents, guardians, and others per RCC § 22E-40X [forthcoming], or otherwise justified under a justification defense described in RCC § 22E-40X [forthcoming], the burden of proof shifts to the government to prove a violation of the duty of care. However, if the actor is pursuing an alternative defense, proof of the actor's physical or mental harm is sufficient proof of the violation of the duty of care.

- This revision does not appear to change current District law. This revision improves the clarity of the revised statute and its consistency with the revised general defenses.

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

(1) *PDS, App. C at 134 recommends adding a provision to merge convictions for the abuse and neglect of vulnerable persons offenses and assault offense.*

- The CCRC partially incorporates this recommendation. In the RCC, merger of assault and the abuse and neglect of vulnerable persons offenses is governed by the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.
- This revision does not further change current District law, as described in the commentary. This revision improves the clarity of the revised statutes.

(2) *The CCRC recommends naming the offense "criminal abuse of a vulnerable adult or elderly person" instead of "abuse of a vulnerable adult or elderly person" as in the prior RCC draft. This revision reflects the name of the offense under current District law and creates uniformity between the names of the revised criminal abuse of a minor and revised criminal neglect of a minor offenses.*

- This revision does not change current District law. This revision improves the clarity and organization of the revised statute.

(3) *The CCRC recommends requiring that the actor "recklessly" cause serious bodily injury in first degree criminal abuse of a vulnerable adult or elderly person instead of "recklessly, under circumstances manifesting extreme indifference to human life." This revision reserves the "recklessly, under circumstances manifesting extreme indifference to human life" culpable mental state for the revised assault statute and certain revised homicide statutes. A lower culpable mental state better reflects the higher expectation that a person who has a responsibility under civil law for the health, welfare, or supervision of the complainant should take care not to cause serious bodily injury to the complainant.*

- This revision appears to change current District law, as described in the updated commentary. This revision improves the proportionality of the revised statute and its consistency with other RCC offenses against persons.

(4) *The CCRC recommends requiring that the actor be reckless 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." This change narrows the scope of liability to those persons with a duty of care to the vulnerable adult or elderly person (e.g., a teacher, doctor, or caretaker may be liable for the offense). The revised criminal abuse of a minor offense thus provides a distinct charge for individuals who are at least reckless that they have responsibilities under civil law for vulnerable adult and elderly complainants 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 vulnerable adult or elderly person, but only for persons with a duty of care to the complainant. This revision promotes uniformity with the current neglect of a vulnerable adult or elderly person statute and is consistent with the revised criminal abuse of a minor and revised criminal neglect of a*

minor statutes. The RCC applies recklessness as to whether a complainant is a vulnerable adult or elderly, and logically the mental state should match the mental state as to the duty of care since the former gives rise to the latter.

- This revision appears to change current District law, as described in the updated commentary. This revision improves the consistency and proportionality of the revised statute, and reduces overlap between revised offenses.

(5) *The CCRC recommends deleting "uses physical force that overpowers" from the criminal abuse of a vulnerable adult or elderly person statute. This revision makes the revised statute consistent with the revised assault statute. In addition, this revision does not appear to change the scope of the revised statute because "physical force that overpowers" a person, but does not cause "bodily injury," may constitute criminal restraint (RCC § 22E-1402) and is specifically included as a predicate offense for third degree criminal abuse of a vulnerable adult or elderly person. Notably, overpowering a person without causing "bodily injury" also may be criminalized by second degree offensive physical contact (RCC § 22E-1205(b)) or, in severe instances, kidnapping (RCC § 22E-1401).*

- This revision may change current District law, as described in the updated commentary. This revision improves the clarity, consistency, and proportionality of the revised statute, and reduces unnecessary overlap with other offenses.

(6) *The CCRC recommends replacing committing "harassment" with "stalking, per RCC § 22E-1206" as a possible basis for liability for third degree criminal abuse of a vulnerable adult or elderly person. The RCC does not have a separate harassment offense.*

- This revision does not appear to change current District law. This change improves the clarity and organization of the revised statute.

(7) *The CCRC recommends replacing the effective consent defense that was previously codified in the prior RCC draft criminal abuse of a vulnerable adult or elderly person statute with the general effective consent defense in RCC § 22E-40X and an offense-specific consent defense for religious prayer in lieu of medical treatment.*

- This revision may change current District law, as is described in the updated commentary. This revision improves the completeness and organization of the RCC.

(8) *The CCRC recommends including as a basis for third degree criminal abuse of a vulnerable adult or elderly person purposely causing significant emotional distress by confining the complainant. This provision is narrower than the RCC criminal restraint offense in RCC § 22E-1402, which is separately listed as a basis for third degree criminal abuse of a minor, and establishes liability for persons with legal authority over the complainant, close relatives or former legal guardians who are wholly or partially excepted from liability under the RCC criminal restraint. Confinement by such actors of a complainant who is a vulnerable adult or elderly person to whom they have a duty of care otherwise is not subject to liability absent this provision or an alternative basis of liability arising from the confinement (e.g., threats, causing bodily injury or a serious*

mental injury, or creating a substantial risk of a significant bodily injury). Such a purposeful, harmful use of confinement is likely already within the scope of the current D.C. Code's criminal abuse of a vulnerable adult or elderly person statute, and would have been within the scope of the criminal restraint statute referred to in the prior RCC draft abuse of a vulnerable adult or elderly person statute. The need for this change arises solely from the RCC criminal restraint offense in RCC § 22E-1402 now wholly or partially exempting liability under that statute for some persons.

- This revision may change current District law, as discussed in the revised commentary. This revision improves the consistency and proportionality of the RCC offenses against persons and avoids a potential gap in liability.

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

(1) *PDS, App. C at 134, recommends codifying a provision to merge convictions for the abuse and neglect of vulnerable persons offenses and assault offense.*

- The CCRC partially incorporates this recommendation. In the RCC, merger of assault and the abuse and neglect of vulnerable persons offenses is governed by the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.
- This revision does not further change current District law, as described in the commentary. This revision improves the clarity of the revised statutes.

(2) *The CCRC recommends naming the offense "criminal neglect of a vulnerable adult or elderly person" instead of "neglect of a vulnerable adult or elderly person." This revision reflects the name of the offense under current District law and creates uniformity with the names of the revised criminal abuse of a minor and revised criminal neglect of a minor offenses.*

- This revision does not change current District law. This revision improves the clarity and organization of the revised statute.

(3) *The CCRC recommends requiring that the complainant be reckless 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" instead of the prior RCC draft language "knows that he or she has a duty of care" to the complainant. This change provides greater specificity as to the meaning of "duty of care," consistent with other the RCC general justification defenses for parents, guardians, and others per RCC § 22E-40X. The reckless culpable mental state as to the duty logically should match the mental state as to the attribute that gives rise to the duty.*

- This revision may change current District law, as described in the updated commentary. This revision improves the completeness of the revised statute.

(4) *The CCRC recommends eliminating the requirement that the actor "in fact" "violated his or her duty of care" to the complainant and that the actor was "reckless" as to the risk of harm being "unjustified," requirements that were recommended in the prior RCC draft. These requirements are not necessary as essential elements of the offense. If an actor raises a defense that the conduct in question was committed in accordance with his or her duty of care under the RCC general justification defenses for parents, guardians, and others per RCC § 22E-40X [forthcoming], or otherwise justified under a justification defense described in RCC § 22E-40X [forthcoming], the burden of proof shifts to the government to prove a violation of the duty of care. However, if the actor is pursuing an alternative defense, proof of the actor's physical or mental harm is sufficient proof of the violation of the duty of care.*

- This revision does not appear to change current District law. This revision improves the clarity of the revised statute and its consistency with the revised general defenses.

(5) *The CCRC recommends replacing the effective consent defense that was previously codified in the prior RCC draft criminal neglect of a vulnerable adult or elderly person statute with the general effective consent defense in RCC § 22E-40X and an offense-specific consent defense for religious prayer in lieu of medical treatment.*

- This revision may change current District law, as is described in the updated commentary. This revision improves the completeness and organization of the RCC.

RCC § 22E-1601. Forced Labor or Services.

(1) *PDS, App. C at 178, recommends the same changes to "coercion" as the term is used in the human trafficking chapter, as had been recommended for "coercion" as the term is used in the sexual assault chapter.*

- Specific comments from PDS, the Office of the Attorney General (OAG), and any other CCRC recommended revisions relating to the definition of "coercion" are addressed in the disposition of comments section relating to the definition of "coercive threat," accompanying commentary to RCC § 22E-701.

(2) *PDS, App. C at 179, recommends changing the titles of revised human trafficking offenses. Specifically, PDS recommends relabeling "forced labor or services" as "labor or services trafficking;" "forced commercial sex" as "commercial sex trafficking;" "trafficking in labor or services" as "assisting labor or services trafficking;" "trafficking in commercial sex" as "assisting commercial sex trafficking;" and "sex trafficking of minors" as "assisting sex trafficking of minors." PDS suggests that "the public perception if 'trafficking' is that it is particularly serious, a form of modern-day slavery." Accordingly, it says that the "trafficking" label should be reserved for forced labor or services and forced commercial sex offenses.*

- The RCC does not incorporate this recommendation because the label does not affect the offenses' penalty proportionality and changing names as recommended may be confusing. The labels in the revised statutes generally track those in the current D.C. Code. In addition, the term "human trafficking" is often used in other jurisdictions to refer to conduct beyond coercing a person into performing labor or commercial sex acts, and can include transporting, recruiting, recruiting, enticing, housing, or maintaining a person who will be coerced into providing labor or services, or engaging in commercial sex acts.[99] Even if coercing a person to perform labor or commercial sex acts are the most serious offenses in this chapter, it does not follow that the "trafficking" label should be reserved for those offenses.

(3) *OAG, App. C at 193, states that since businesses cannot be incarcerated, they should be subject to "a separate fine penalty structure for businesses that is substantial enough to act as a deterrent."*

[99] Of the twenty nine states with nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code and have a general part, twenty four have "trafficking" statutes that include transporting, housing, etc. a person who will be caused to engage in labor, services, or commercial sex acts by means of coercion or debt bondage. Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781, Haw. Rev. Stat. Ann. § 707-782; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.206; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; N.J. Stat. Ann. § 2C:13-8; N.Y. Penal Law § 135.35; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3011; S.D. Codified Laws § 22-49-1; Tenn. Code Ann. § 39-13-308; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

- The RCC addresses this recommendation through the general provision in § 22E-604 which authorizes heightened financial penalties for corporate defendants.
- This revision does not change current law. The change improves the proportionality of the revised statutes.

(4) *OAG, App. C at 193, recommends amending the penalty enhancement, which authorizes heightened penalties for forced labor, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors if the "complainant was held or provides services [or commercial sex acts] for more than 180 days." OAG recommends redrafting the enhancement to clarify that it applies when the combined time that a person is held and forced to provide services for a total of more than 180 days.*

- The RCC incorporates this recommendation by specifying in the revised forced labor or services, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors statutes that the penalty enhancement applies if the actor "held the complainant or caused the complainant to provide services [or commercial sex acts] *for a total* of more than 180 days."
- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(5) *OAG, App. C at 194, asks how the offense penalty enhancements under the sex trafficking f minors statute, RCC § 22A-1607(b), interacts with general penalty enhancements. The question appears to apply equally to other revised human trafficking offenses that include penalty enhancements.*

- The RCC addresses this question by statutorily specifying that the specific penalty enhancements for trafficking offense apply in addition to any general penalty enhancements.
- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(6) *The CCRC recommends re-drafting all trafficking offenses to state that an "actor" commits the offense, as opposed to a "person or business." This revision is not intended to change current law. The term "actor" is defined as "a person accused of any offense[.]"*[100] *The term "person" is defined as an "individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity."*[101] *Therefore, the term "actor" includes businesses.*

- This revision does not change current law. The change clarifies and may improve the proportionality of the revised statute.

[100] RCC § 22E-701.
[101] RCC § 22E-701.

RCC § 22E-1602 Forced Commercial Sex.

(1) *PDS, App. C at 178, recommends the same changes to "coercion" as the term is used in the human trafficking chapter, as had been recommended for "coercion" as the term is used in the sexual assault chapter.*

- Specific comments from PDS, the Office of the Attorney General (OAG), and any other CCRC recommended revisions relating to the definition of "coercion" are addressed in the disposition of comments section relating to the definition of "coercive threat," accompanying commentary to RCC § 22E-701.

(2) *PDS, App. C at 179, recommends changing the titles of revised human trafficking offenses. Specifically, PDS recommends relabeling "forced labor or services" as "labor or services trafficking;" "forced commercial sex" as "commercial sex trafficking;" "trafficking in labor or services" as "assisting labor or services trafficking;" "trafficking in commercial sex" as "assisting commercial sex trafficking;" and "sex trafficking of minors" as "assisting sex trafficking of minors." PDS suggests that "the public perception if 'trafficking' is that it is particularly serious, a form of modern-day slavery." Accordingly, it says that the "trafficking" label should be reserved for forced labor or services and forced commercial sex offenses.*

- The RCC does not incorporate this recommendation because the label does not affect the offenses' penalty proportionality and changing names as recommended may be confusing. The labels in the revised statutes generally track those in the current D.C. Code. In addition, the term "human trafficking" is often used in other jurisdictions to refer to conduct beyond coercing a person into performing labor or commercial sex acts, and can include transporting, recruiting, recruiting, enticing, housing, or maintaining a person who will be coerced into providing labor or services, or engaging in commercial sex acts.[102] Even if coercing a person to perform labor or commercial sex acts are the most serious offenses in this chapter, it does not follow that the "trafficking" label should be reserved for those offenses.

(3) *PDS, App. C at 180-81, recommends re-drafting the forced commercial sex, trafficking in commercial sex, and sex trafficking of minors offenses to require that the actor have intent that the complainant will engage in a commercial sex*

[102] Of the twenty nine states with nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code and have a general part, twenty four have "trafficking" statutes that include transporting, housing, etc. a person who will be caused to engage in labor, services, or commercial sex acts by means of coercion or debt bondage. Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781, Haw. Rev. Stat. Ann. § 707-782; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.206; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; N.J. Stat. Ann. § 2C:13-8; N.Y. Penal Law § 135.35; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3011; S.D. Codified Laws § 22-49-1; Tenn. Code Ann. § 39-13-308; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

act with another person. *PDS says this revision will limit overlap with sexual assault offenses.*

- The RCC incorporates this recommendation by statutorily requiring in the forced commercial sex offense that the actor caused *the complainant* to engage in a commercial sex act with a person other than the actor ("another person"). The trafficking in commercial sex, and sex trafficking of minors offenses likewise are amended to require that the actor had intent to cause the complainant to engage in a commercial sex act with a person other than the actor.
- This revision may change current District law. This change improves the clarity and proportionality of the revised statute and limits unnecessary overlap with sexual assault offenses.

(4) *OAG, App. C at 193, states that since businesses cannot be incarcerated, they should be subject to "a separate fine penalty structure for businesses that is substantial enough to act as a deterrent."*

- The RCC addresses this recommendation through the general provision in § 22E-604 which authorizes heightened financial penalties for corporate defendants.
- This revision does not change current law. The change improves the proportionality of the revised statutes.

(5) *OAG, App. C at 193, recommends amending the penalty enhancement, which authorizes heightened penalties for forced labor, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors if the "complainant was held or provides services [or commercial sex acts] for more than 180 days." OAG recommends redrafting the enhancement to clarify that it applies when the combined time that a person is held and forced to provide services for a total of more than 180 days.*

- The RCC incorporates this recommendation by specifying in the revised forced labor or services, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors statutes that the penalty enhancement applies if the actor "held the complainant or caused the complainant to provide services [or commercial sex acts] *for a total* of more than 180 days."
- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(6) *OAG, App. C at 194, asks how the offense penalty enhancements under the sex trafficking of minors statute, RCC § 22A-1607(b), interacts with general penalty enhancements. The question appears to apply equally to other revised human trafficking offenses that include penalty enhancements.*

- The RCC addresses this question by statutorily specifying that the specific penalty enhancements for trafficking offense apply in addition to applying any general penalty enhancements.
- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(7) *The CCRC recommends re-drafting all trafficking offenses to state that an "actor" commits the offense, as opposed to a "person or business." This revision*

is not intended to change current law. The term "actor" is defined as "a person accused of any offense[.]"[103] *The term "person" is defined as an "individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity."*[104] *Therefore, the term "actor" includes businesses.*

- This revision does not change current law. The change clarifies and may improve the proportionality of the revised statute.

(8) *The CCRC recommends amending the penalty enhancement provisions under the forced commercial sex trafficking in commercial sex, and commercial sex with a trafficked person statutes to include committing the offense when, in fact, the complainant was under 12 years of age. The penalty enhancements in the prior draft revisions to human trafficking statutes applied if the actor was reckless as to the fact that the complainant was under the age of 18. This revision adds an alternative basis for enhancement, for which the actor is strictly liable, when the complainant is under the age of 12. This change makes the age-based human trafficking enhancement more consistent with the penalty enhancements applicable to sexual assault, defined under RCC § 22E-1301. The penalty classification for each grade of sexual assault may be increased in severity by one class when the complainant was, in fact, under 12 years of age at the time of the offense.*

- This revision changes District law. The change improves the proportionality and consistency of the revised statutes.

[103] RCC § 22E-701.
[104] RCC § 22E-701.

RCC § 22E-1603 Trafficking in Labor or Services.

(1) *PDS, App. C at 178, recommends the same changes to "coercion" as the term is used in the human trafficking chapter, as had been recommended for "coercion" as the term is used in the sexual assault chapter.*

- Specific comments from PDS, the Office of the Attorney General (OAG), and any other CCRC recommended revisions relating to the definition of "coercion" are addressed in the disposition of comments section relating to the definition of "coercive threat," accompanying commentary to RCC § 22E-701.

(2) *PDS, App. C at 179, recommends changing the titles of revised human trafficking offenses. Specifically, PDS recommends relabeling "forced labor or services" as "labor or services trafficking;" "forced commercial sex" as "commercial sex trafficking;" "trafficking in labor or services" as "assisting labor or services trafficking;" "trafficking in commercial sex" as "assisting commercial sex trafficking;" and "sex trafficking of minors" as "assisting sex trafficking of minors." PDS suggests that "the public perception if 'trafficking' is that it is particularly serious, a form of modern-day slavery." Accordingly, it says that the "trafficking" label should be reserved for forced labor or services and forced commercial sex offenses.*

- The RCC does not incorporate this recommendation because the label does not affect the offenses' penalty proportionality and changing names as recommended may be confusing. The labels in the revised statutes generally track those in the current D.C. Code. In addition, the term "human trafficking" is often used in other jurisdictions to refer to conduct beyond coercing a person into performing labor or commercial sex acts, and can include transporting, recruiting, recruiting, enticing, housing, or maintaining a person who will be coerced into providing labor or services, or engaging in commercial sex acts.[105] Even if coercing a person to perform labor or commercial sex acts are the most serious offenses in this chapter, it does not follow that the "trafficking" label should be reserved for those offenses.

(3) *PDS, App. C at 178, objects to the use of the word "harbor" in the trafficking in labor or services, trafficking in commercial sex, sex trafficking of minors, and the commercial sex with trafficked person statutes. PDS suggests replacing the word*

[105] Of the twenty nine states with nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code and have a general part, twenty four have "trafficking" statutes that include transporting, housing, etc. a person who will be caused to engage in labor, services, or commercial sex acts by means of coercion or debt bondage. Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781, Haw. Rev. Stat. Ann. § 707-782; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.206; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; N.J. Stat. Ann. § 2C:13-8; N.Y. Penal Law § 135.35; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3011; S.D. Codified Laws § 22-49-1; Tenn. Code Ann. § 39-13-308; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

"harbor" with the words "houses" and "hotels." PDS says that the normal meaning of the verb "to harbor" is to provide shelter or sanctuary, and the statute is not intended to cover "persons and organizations that provide places of refuge to victims of trafficking."

- The RCC partially incorporates this recommendation by replacing the word "harbor" with "housing." However, the revised statutes do not include the word "hotels." The word "housing" is broad enough to cover any conduct that would constitute "hoteling."[106] However, any acts that constitute "harboring" that are not covered by the words housing, recruiting, enticing, transporting, providing, obtaining, or maintaining would be insufficient for liability under these revised statutes.
- This revision may change District law. The change improves the clarity and proportionality of the revised statute.

(4) *PDS, App. C at 179-80, recommends that trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors be re-drafted to require a "with intent" mental state as to whether the complainant will be caused to provide labor, services, or a commercial sex act by means of coercion or debt bondage. PDS says that, "there is a great danger that the offense will be written too broadly and criminalize persons who contribute minimally to the crime and have no vested interest in the success or outcome of the crime." PDS specifically notes that only requiring a reckless mental state as to these elements risks penalties that are disproportionately severe compared to the culpability of the actor.*

- The RCC incorporates this recommendation, and the trafficking in labor or services statute is amended to require that the defendant acted "with intent" that the complainant will be caused to provide labor or services by means of coercive threat or debt bondage.
- This revision changes District law. The change improves the proportionality of the revised statute.

(5) *OAG, App. C at 193, states that since businesses cannot be incarcerated, they should be subject to "a separate fine penalty structure for businesses that is substantial enough to act as a deterrent."*

- The RCC addresses this recommendation through the general provision in § 22E-604 which authorizes heightened financial penalties for corporate defendants.
- This revision does not change current law. The change improves the proportionality of the revised statutes.

(6) *OAG, App. C at 193, recommends amending the penalty enhancement, which authorizes heightened penalties for forced labor, forced commercial sex,*

[106] PDS's written comments note that the Oxford-English Dictionary confirms that "hotel" can be used as a verb, but did not quote any definition. To the extent that "hoteling" means to provide *temporary* shelter, the word "housing" is broad enough to encompass that conduct. Meriam-Webster does not provide for a definition of "hotel" as a verb. However, the Cambridge English dictionary defines "hoteling" as "an arrangement in which workers who do not have permanent desks in an office must ask to use a desk when they come into work."

trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors if the "complainant was held or provides services [or commercial sex acts] for more than 180 days." OAG recommends redrafting the enhancement to clarify that it applies when the combined time that a person is held and forced to provide services for a total of more than 180 days.

- The RCC incorporates this recommendation by specifying in the revised forced labor or services, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors statutes that the penalty enhancement applies if the actor "held the complainant or caused the complainant to provide services [or commercial sex acts] *for a total* of more than 180 days."
- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(7) *OAG, App. C at 194, asks how the offense penalty enhancements under the sex trafficking of minors statute, RCC § 22A-1607(b), interacts with general penalty enhancements. The question appears to apply equally to other revised human trafficking offenses that include penalty enhancements.*

- The RCC addresses this question by statutorily specifying that the specific penalty enhancements for trafficking offense apply in addition to applying any general penalty enhancements.
- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(8) *The CCRC recommends re-drafting all trafficking offenses to state that an "actor" commits the offense, as opposed to a "person or business." This revision is not intended to change current law. The term "actor" is defined as "a person accused of any offense[.]"*[107] *The term "person" is defined as an "individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity."*[108] *Therefore, the term "actor" includes businesses.*

- This revision does not change current law. The change clarifies and may improve the proportionality of the revised statute.

(9) *The CCRC recommends amending the trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors offenses to require that the accused recruits, entices, transports, etc. a person, with intent that* as a result the person will be *caused to provide labor, services, or a commercial sex act by means of a coercive threat or debt bondage. This provision was discussed at the December 19, 2018 Advisory Group meeting. Under this revision, there must be a relationship between the recruiting, enticing, transporting etc., and whether that person will be caused to perform labor or services, or engage in a commercial sex act by means of coercive threat or debt bondage. The provision of housing, etc. to a complainant is not subject to liability unless it is causally linked to the*

[107] RCC § 22E-701.
[108] RCC § 22E-701.

complainant's future labor, services or commercial sex act. The revised statute's use of "will be" refers to any future time, either imminent or in the distant future.

- This revision changes District law. The change improves the proportionality of the revised statute.

RCC § 22E-1604 Trafficking in Commercial Sex.

(1) *PDS, App. C at 178, recommends the same changes to "coercion" as the term is used in the human trafficking chapter, as had been recommended for "coercion" as the term is used in the sexual assault chapter.*

- Specific comments from PDS, the Office of the Attorney General (OAG), and any other CCRC recommended revisions relating to the definition of "coercion" are addressed in the disposition of comments section relating to the definition of "coercive threat," accompanying commentary to RCC § 22E-701.

(2) *PDS, App. C at 179, recommends changing the titles of revised human trafficking offenses. Specifically, PDS recommends relabeling "forced labor or services" as "labor or services trafficking;" "forced commercial sex" as "commercial sex trafficking;" "trafficking in labor or services" as "assisting labor or services trafficking;" "trafficking in commercial sex" as "assisting commercial sex trafficking;" and "sex trafficking of minors" as "assisting sex trafficking of minors." PDS suggests that "the public perception if 'trafficking' is that it is particularly serious, a form of modern-day slavery." Accordingly, it says that the "trafficking" label should be reserved for forced labor or services and forced commercial sex offenses.*

- The RCC does not incorporate this recommendation because the label does not affect the offenses' penalty proportionality and changing names as recommended may be confusing. The labels in the revised statutes generally track those in the current D.C. Code. In addition, the term "human trafficking" is often used in other jurisdictions to refer to conduct beyond coercing a person into performing labor or commercial sex acts, and can include transporting, recruiting, recruiting, enticing, housing, or maintaining a person who will be coerced into providing labor or services, or engaging in commercial sex acts.[1] Even if coercing a person to perform labor or commercial sex acts are the most serious offenses in this chapter, it does not follow that the "trafficking" label should be reserved for those offenses.

(3) *PDS, App. C at 178, objects to the use of the word "harbor" in the trafficking in labor or services, trafficking in commercial sex, sex trafficking of minors, and the commercial sex with trafficked person statutes. PDS suggests replacing the word*

[1] Of the twenty nine states with nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code and have a general part, twenty four have "trafficking" statutes that include transporting, housing, etc. a person who will be caused to engage in labor, services, or commercial sex acts by means of coercion or debt bondage. Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781, Haw. Rev. Stat. Ann. § 707-782; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.206; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; N.J. Stat. Ann. § 2C:13-8; N.Y. Penal Law § 135.35; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3011; S.D. Codified Laws § 22-49-1; Tenn. Code Ann. § 39-13-308; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

"harbor" with the words "houses" and "hotels." PDS says that the normal meaning of the verb "to harbor" is to provide shelter or sanctuary, and the statute is not intended to cover "persons and organizations that provide places of refuge to victims of trafficking."

- The RCC partially incorporates this recommendation by replacing the word "harbor" with "housing." However, the revised statutes do not include the word "hotels." The word "housing" is broad enough to cover any conduct that would constitute "hoteling."[2] However, any acts that constitute "harboring" that are not covered by the words housing, recruiting, enticing, transporting, providing, obtaining, or maintaining would be insufficient for liability under these revised statutes.

(4) *PDS, App. C at 179-80, recommends that trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors be re-drafted to require a "with intent" mental state as to whether the complainant will be caused to provide labor, services, or a commercial sex act by means of coercion or debt bondage. PDS says that, "there is a great danger that the offense will be written too broadly and criminalize persons who contribute minimally to the crime and have no vested interest in the success or outcome of the crime." PDS specifically notes that only requiring a reckless mental state as to these elements risks penalties that are disproportionately severe compared to the culpability of the actor.*

- The RCC incorporates this recommendation, and the trafficking in commercial sex statute is amended to require that the defendant acted "with intent" that the complainant will be caused to engage in a commercial sex act by means of coercive threat or debt bondage.
- This revision changes District law. The change improves the proportionality of the revised statute.

(5) *PDS, App. C at 180-81, recommends re-drafting the forced commercial sex, trafficking in commercial sex, and sex trafficking of minors offenses to require that the actor have intent that the complainant will engage in a commercial sex act with* another person. *PDS says this revision will limit overlap with sexual assault offenses.*

- The RCC incorporates this recommendation by statutorily requiring in the trafficking in commercial sex offense that the actor acted with intent that *the complainant* will engage in a commercial sex act with a person other than the actor ("another person"). The forced commercial sex, and sex trafficking of minors offenses likewise are amended to require that the actor had intent to cause the complainant to engage in a commercial sex act with a person other than the actor.

[2] PDS's written comments note that the Oxford-English Dictionary confirms that "hotel" can be used as a verb, but did not quote any definition. To the extent that "hoteling" means to provide *temporary* shelter, the word "housing" is broad enough to encompass that conduct. Meriam-Webster does not provide for a definition of "hotel" as a verb. However, the Cambridge English dictionary defines "hoteling" as "an arrangement in which workers who do not have permanent desks in an office must ask to use a desk when they come into work."

- This revision may change current District law. This change improves the clarity and proportionality of the revised statute and limits unnecessary overlap with sexual assault offenses.

(6) *OAG, App. C at 193, states that since businesses cannot be incarcerated, they should be subject to "a separate fine penalty structure for businesses that is substantial enough to act as a deterrent."*

- The RCC addresses this recommendation through the general provision in § 22E-604 which authorizes heightened financial penalties for corporate defendants.
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(7) *OAG, App. C at 193, recommends amending the penalty enhancement, which authorizes heightened penalties for forced labor, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors if the "complainant was held or provides services [or commercial sex acts] for more than 180 days." OAG recommends redrafting the enhancement to clarify that it applies when the combined time that a person is held and forced to provide services for a total of more than 180 days.*

- The RCC incorporates this recommendation by specifying in the revised forced labor or services, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors statutes that the penalty enhancement applies if the actor "held the complainant or caused the complainant to provide services [or commercial sex acts] *for a total* of more than 180 days."
- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(8) *OAG, App. C at 194, asks how the offense penalty enhancements under the sex trafficking of minors statute, RCC § 22E-1607(b), interacts with general penalty enhancements. The question appears to apply equally to other revised human trafficking offenses that include penalty enhancements.*

- The RCC addresses this question by statutorily specifying that the specific penalty enhancements for trafficking offense apply in addition to applying any general penalty enhancements.
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(9) *The CCRC recommends re-drafting all trafficking offenses to state that an "actor" commits the offense, as opposed to a "person or business." This revision is not intended to change current law. The term "actor" is defined as "a person accused of any offense[.]"*[3] *The term "person" is defined as an "individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government,*

[3] RCC § 22E-701.

governmental instrumentality, or any other legal entity."[4] *Therefore, the term "actor" includes businesses.*

- This revision does not change current law. The change clarifies and may improve the proportionality of the revised statute.

(10) *The CCRC recommends amending the trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors offenses to require that the accused recruits, entices, transports, etc. a person, with intent that* as a result the person will be *caused to provide labor, services, or a commercial sex act by means of a coercive threat or debt bondage. This provision was discussed at the December 19, 2018 Advisory Group meeting. Under this revision, there must be a relationship between the recruiting, enticing, transporting etc., and whether that person will be caused to perform labor or services, or engage in a commercial sex act by means of coercive threat or debt bondage. The provision of housing, etc. to a complainant is not subject to liability unless it is causally linked to the complainant's future labor, services or commercial sex act. The revised statute's use of "will be" refers to any future time, either imminent or in the distant future.*

- This revision changes District law as described in the commentary. The change improves the proportionality of the revised statute.

(11) *The CCRC recommends amending the penalty enhancement provisions under the forced commercial sex, trafficking in commercial sex, and commercial sex with a trafficked person statutes to include committing the offense when, in fact, the complainant was under 12 years of age. The penalty enhancements in the prior draft revisions to human trafficking statutes applied if the actor was reckless as to the fact that the complainant was under the age of 18. This revision adds an alternative basis for enhancement, for which the actor is strictly liable, when the complainant is under the age of 12. This change makes the age-based human trafficking enhancement more consistent with the penalty enhancements applicable to sexual assault, defined under RCC § 22E-1301. The penalty classification for each grade of sexual assault may be increased in severity by one class when the complainant was, in fact, under 12 years of age at the time of the offense.*

- This revision changes District law. The change improves the proportionality and consistency of the revised statutes.

[4] RCC § 22E-701.

RCC § 22E-1605 Sex Trafficking of Minors.

(1) *PDS, App. C at 179, recommends changing the titles of revised human trafficking offenses. Specifically, PDS recommends relabeling "forced labor or services" as "labor or services trafficking;" "forced commercial sex" as "commercial sex trafficking;" "trafficking in labor or services" as "assisting labor or services trafficking;" "trafficking in commercial sex" as "assisting commercial sex trafficking;" and "sex trafficking of minors" as "assisting sex trafficking of minors." PDS suggests that "the public perception if 'trafficking' is that it is particularly serious, a form of modern-day slavery." Accordingly, it says that the "trafficking" label should be reserved for forced labor or services and forced commercial sex offenses.*

- The RCC does not incorporate this recommendation because the label does not affect the offenses' penalty proportionality and changing names as recommended may be confusing. The labels in the revised statutes generally track those in the current D.C. Code. In addition, the term "human trafficking" is often used in other jurisdictions to refer to conduct beyond coercing a person into performing labor or commercial sex acts, and can include transporting, recruiting, recruiting, enticing, housing, or maintaining a person who will be coerced into providing labor or services, or engaging in commercial sex acts.[1] Even if coercing a person to perform labor or commercial sex acts are the most serious offenses in this chapter, it does not follow that the "trafficking" label should be reserved for those offenses.

(2) *PDS, App. C at 178, objects to the use of the word "harbor" in the trafficking in labor or services, trafficking in commercial sex, sex trafficking of minors, and the commercial sex with trafficked person statutes. PDS suggests replacing the word "harbor" with the words "houses" and "hotels." PDS says that the normal meaning of the verb "to harbor" is to provide shelter or sanctuary, and the statute is not intended to cover "persons and organizations that provide places of refuge to victims of trafficking."*

- The RCC partially incorporates this recommendation by replacing the word "harbor" with "housing." However, the revised statutes do not include the word "hotels." The word "housing" is broad enough to cover any conduct that would constitute "hoteling." However, any acts that

[1] Of the twenty nine states with nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code and have a general part, twenty four have "trafficking" statutes that include transporting, housing, etc. a person who will be caused to engage in labor, services, or commercial sex acts by means of coercion or debt bondage. Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781, Haw. Rev. Stat. Ann. § 707-782; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.206; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; N.J. Stat. Ann. § 2C:13-8; N.Y. Penal Law § 135.35; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3011; S.D. Codified Laws § 22-49-1; Tenn. Code Ann. § 39-13-308; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

constitute "harboring" that are not covered by the words housing, recruiting, enticing, transporting, providing, obtaining, or maintaining would be insufficient for liability under these revised statutes.

(3) *OAG, App. C at 193, recommends amending the penalty enhancement, which authorizes heightened penalties for forced labor, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors if the "complainant was held or provides services [or commercial sex acts] for more than 180 days." OAG recommends redrafting the enhancement to clarify that it applies when the combined time that a person is held and forced to provide services for a total of more than 180 days.*

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- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(4) *PDS, App. C at 179-80, recommends that trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors be re-drafted to require a "with intent" mental state as to whether the complainant will be caused to provide labor, services, or a commercial sex act by means of coercion or debt bondage. PDS says that, "there is a great danger that the offense will be written too broadly and criminalize persons who contribute minimally to the crime and have no vested interest in the success or outcome of the crime." PDS specifically notes that only requiring a reckless mental state as to these elements risks penalties that are disproportionately severe compared to the culpability of the actor.*

- This revision changes District law. The change improves the proportionality of the revised statute.

(5) *PDS, App. C at 180-81, recommends re-drafting the forced commercial sex, trafficking in commercial sex, and sex trafficking of minors offenses to require that the actor have intent that the complainant will engage in a commercial sex act with* another person. *PDS says this revision will limit overlap with sexual assault offenses.*

- The RCC incorporates this recommendation by statutorily requiring in the sex trafficking of minors offense that the actor engages in conduct with intent that *the complainant* will engage in a commercial sex act with a person other than the actor ("another person"). (The forced commercial sex and trafficking in commercial sex offenses likewise are amended to require that the actor had intent to cause the complainant to engage in a commercial sex act with a person other than the actor.)
- This revision may change current District law. This change improves the clarity and proportionality of the revised statute and limits unnecessary overlap with sexual assault offenses.

(6) *OAG, App. C at 193, states that since businesses cannot be incarcerated, they should be subject to "a separate fine penalty structure for businesses that is substantial enough to act as a deterrent."*

- The RCC addresses this recommendation through the general provision in § 22E-604 which authorizes heightened financial penalties for corporate defendants.
- This revision does not change current law. The change improves the proportionality of the revised statutes.

(7) *OAG, App. C at 193, recommends amending the penalty enhancement, which authorizes heightened penalties for forced labor, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors if the "complainant was held or provides services [or commercial sex acts] for more than 180 days." OAG recommends redrafting the enhancement to clarify that it applies when the combined time that a person is held and forced to provide services for a total of more than 180 days.*

- The RCC incorporates this recommendation by specifying in the revised forced labor or services, forced commercial sex, trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors statutes that the penalty enhancement applies if the actor "held the complainant or caused the complainant to provide services [or commercial sex acts] *for a total* of more than 180 days."
- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(8) *OAG, App. C at 194, asks how the offense penalty enhancements under the sex trafficking of minors statute, RCC § 22A-1607(b), interacts with general penalty enhancements. The question appears to apply equally to other revised human trafficking offenses that include penalty enhancements.*

- The RCC addresses this question by statutorily specifying that the specific penalty enhancements for trafficking offense apply in addition to applying any general penalty enhancements.
- This revision may change current District law. The change clarifies and may improve the proportionality of the revised statute.

(9) *The CCRC recommends re-drafting all trafficking offenses to state that an "actor" commits the offense, as opposed to a "person or business." This revision is not intended to change current law. The term "actor" is defined as "a person accused of any offense[.]"*[2] *The term "person" is defined as an "individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity."*[3] *Therefore, the term "actor" includes businesses.*

- This revision does not change current law. The change clarifies and may improve the proportionality of the revised statute.

[2] RCC § 22E-701.
[3] RCC § 22E-701.

(10) *The CCRC recommends amending the trafficking in labor or services, trafficking in commercial sex, and sex trafficking of minors offenses to require that the accused recruits, entices, transports, etc. a person, with intent that* as a result the person will be *caused to provide labor, services, or a commercial sex act by means of a coercive threat or debt bondage. This provision was discussed at the December 19, 2018 Advisory Group meeting. Under this revision, there must be a relationship between the recruiting, enticing, transporting etc., and whether that person will be caused to perform labor or services, or engage in a commercial sex act by means of coercive threat or debt bondage. The provision of housing, etc. to a complainant is not subject to liability unless it is causally linked to the complainant's future labor, services or commercial sex act. The revised statute's use of "will be" refers to any future time, either imminent or in the distant future.*

- This revision changes District law. The change improves the proportionality of the revised statute.

(11) *The CCRC recommends amending the commentary to recharacterize the requirement of "recklessness" as to the complainant being under 18 years of age as a change in District law. In the prior draft commentary, alternative, conflicting interpretations of the statute's culpable mental state were described. However, on further examination of the legislative history and statutory text, it appears that the current statute requires knowledge as to the complainant's age in all circumstances except where the actor has a reasonable opportunity to view the complainant, in which case recklessness is required. The revised statute continues to recommend a "recklessness" requirement in the revised sex trafficking of a minor statute, consistent with the treatment of age in other RCC and current D.C. Code statute.*

- This change to the commentary does not change District law, but concerns an underlying change to District law. The change improves the clarity and consistency of the revised statute.

RCC § 22E-1606. Benefiting from Human Trafficking.

(1) *PDS, App. C at 181, recommends clarifying whether and how the actor must have been participating in an association with two or more persons "other than through the use of physical force, coercion or deception," as stated in the commentary.*

- The RCC incorporates this recommendation by deleting the commentary language referred to. This language was included in error in the first draft of the commentary.
- This revision does not change current law. The change clarifies the revised commentary.

(2) *PDS, App. C at 181-82, recommends re-drafting the benefiting from human trafficking offense to require knowledge as to whether the group has engaged in conduct constituting forced commercial sex or forced labor or services. PDS also recommends adding a third penalty gradation of the offense that requires recklessness as to whether the group has engaged in forced commercial sex or forced labor or services. PDS says that this will allow for greater differentiation between offenders' culpability, for example, differentiating a group's "kingpin" who acts purposely from a marginal participant who acts recklessly.*

- The RCC does not incorporate this recommendation because it is not necessary to ensure penalty proportionality. While a "kingpin" of a group engaged in a trafficking offense may have greater culpability than a marginal participant who disregards a substantial risk that the group is engaging in a trafficking offense, a "kingpin" who purposely directs a group that is engaged in such trafficking is likely liable for a more serious trafficking or other offense, either as a principal or accomplice. The revised benefitting from human trafficking offense has already added a penalty gradation to the current statute.

(3) *OAG, App. C at 193, states that since businesses cannot be incarcerated, they should be subject to "a separate fine penalty structure for businesses that is substantial enough to act as a deterrent."*

- The RCC addresses this recommendation through the general provision in § 22E-604 which authorizes heightened financial penalties for corporate defendants.
- This revision does not change current law. The change improves the proportionality of the revised statutes.

(4) *The CCRC recommends re-drafting all trafficking offenses to state that an "actor" commits the offense, as opposed to a "person or business." This revision is not intended to change current law. The term "actor" is defined as "a person accused of any offense[.]"*[1] *The term "person" is defined as an "individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government,*

[1] RCC § 22E-701.

governmental instrumentality, or any other legal entity."[2] *Therefore, the term "actor" includes businesses.*

- This revision does not change current law. The change clarifies and may improve the proportionality of the revised statute.

(5) *The CCRC recommends that first degree benefitting from human trafficking offense be amended to include participation in a group that has engaged in conduct constituting sex trafficking of minors as defined under RCC § 22E-1605. Under the prior version of this statute, first degree benefitting from human trafficking included participating in a group that has engaged in conduct constituting forced commercial sex or trafficking in commercial sex. Neither first degree or second degree forms of the offense included participation in a group that has engaged in conduct constituting sex trafficking of minors.*

- This change improves the consistency and proportionality of the revised statute.

[2] RCC § 22E-701.

RCC § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking.

(1) *OAG, App. C at 194, recommends deleting the words "without lawful authority" from the misuse of documents in furtherance of human trafficking statute. OAG states that it is never lawful to destroy, conceal, remove, confiscate, or possess a government identification document with intent to restrict a person's liberty or freedom of movement with intent to maintain the person's labor, services, or performance of a commercial sec act.*

- The RCC incorporates this recommendation by omitting the words "without lawful authority." There is no indication in legislative history why this language is included in D.C. Code § 22-1835. In the RCC, law enforcement or court-ordered seizure of passports or other documents would be subject to a justification defense, consistent with any other conduct that would appear to be a crime if not government-authorized.
- This revision does not change current law. The change improves the clarity of the revised statute.

(2) *The CCRC recommends re-drafting all trafficking offenses to state that an "actor" commits the offense, as opposed to a "person or business." This revision is not intended to change current law. The term "actor" is defined as "a person accused of any offense[.]"*[1] *The term "person" is defined as an "individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity."*[2] *Therefore, the term "actor" includes businesses.*

- This revision does not change current law. The change clarifies and may improve the proportionality of the revised statute.

(3) *The CCRC recommends deleting the term "prevent" and the phrase "or attempt to prevent or restrict," from the revised statute as duplicative. The term "prevent" appears to be a subsumed in the term "restrict" that is retained in the revised statute. The phrase "or attempt to prevent or restrict," present in current D.C. Code is unnecessary because the phrase "with intent" indicates that the person's liberty need not actually be proven to be restricted. In the RCC the object of the phrase "with intent" is not an element that must be separately proven to be true.*[3] *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 revision does not change current law. The change clarifies and may improve the proportionality of the revised statute.

[1] RCC § 22E-701.
[2] RCC § 22E-701.
[3] RCC § 22E-205.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

(1) *PDS, App. C at 178, recommends the same changes to "coercion" as the term is used in the human trafficking chapter, as had been recommended for "coercion" as the term is used in the sexual assault chapter.*

- Specific comments from PDS, the Office of the Attorney General (OAG), and any other CCRC recommended revisions relating to the definition of "coercion" are addressed in the disposition of comments section relating to the definition of "coercive threat," accompanying commentary to RCC § 22E-701.

(2) *PDS, App. C at 178, objects to the use of the word "harbor" in the trafficking in labor or services, trafficking in commercial sex, sex trafficking of minors, and the commercial sex with trafficked person statutes. PDS suggests replacing the word "harbor" with the words "houses" and "hotels." PDS says that the normal meaning of the verb "to harbor" is to provide shelter or sanctuary, and the statute is not intended to cover "persons and organizations that provide places of refuge to victims of trafficking."*

- The RCC partially incorporates this recommendation by replacing the word "harbor" with "housing." However, the revised statutes do not include the word "hotels." The word "housing" is broad enough to cover any conduct that would constitute "hoteling."[1] However, any acts that constitute "harboring" that are not covered by the words housing, recruiting, enticing, transporting, providing, obtaining, or maintaining would be insufficient for liability under these revised statutes.

(3) *The CCRC recommends relabeling the sex trafficking patronage offense as "commercial sex with a trafficked person." This change is non-substantive, and itself does not change any elements of the offense. The new name more clearly and plainly states the conduct involved.*

- This revision does not change current law. The change improves the clarity of the revised statute.

(4) *The CCRC recommends re-drafting all trafficking offenses to state that an "actor" commits the offense, as opposed to a "person or business." This revision is not intended to change current law. The term "actor" is defined as "a person accused of any offense[.]"*[2] *The term "person" is defined as an "individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity."*[3] *Therefore, the term "actor" includes businesses.*

[1] PDS's written comments note that the Oxford-English Dictionary confirms that "hotel" can be used as a verb, but did not quote any definition. To the extent that "hoteling" means to provide *temporary* shelter, the word "housing" is broad enough to encompass that conduct. Meriam-Webster does not provide for a definition of "hotel" as a verb. However, the Cambridge English dictionary defines "hoteling" as "an arrangement in which workers who do not have permanent desks in an office must ask to use a desk when they come into work."

[2] RCC § 22E-701.

[3] RCC § 22E-701.

- This revision does not change current law. The change clarifies and may improve the proportionality of the revised statute.

(5) *The CCRC recommends that the revised commercial sex with a trafficked person offense include two penalty grades instead of three. Under the prior version of the statute, third degree sex trafficking patronage required engaging in a commercial sex act with a person who had been trafficked, with recklessness that the person is under the age of 18. However, it is not clear that there is a clear difference in seriousness between the prior drafts' second and third degrees. Under the revised statute, the conduct previously described as third degree will be grouped with the second degree conduct. Under this revision, engaging in a commercial sex act with a person who was trafficked with recklessness that the person is under the age of 18 is subject to the same penalty as doing so with a person who was compelled to perform the acts by means of coercive threat or debt bondage.*

- This revision changes current law as described in the commentary. The change improves the proportionality of the revised statute.

(6) *The CCRC recommends amending the penalty enhancement provisions under the forced commercial sex trafficking in commercial sex, and commercial sex with a trafficked person statutes to include committing the offense when, in fact, the complainant was under 12 years of age. The penalty enhancements in the prior draft revisions to human trafficking statutes applied if the actor was reckless as to the fact that the complainant was under the age of 18. This revision adds an alternative basis for enhancement, for which the actor is strictly liable, when the complainant is under the age of 12. This change makes the age-based human trafficking enhancement more consistent with the penalty enhancements applicable to sexual assault, defined under RCC § 22E-1301. The penalty classification for each grade of sexual assault may be increased in severity by one class when the complainant was, in fact, under 12 years of age at the time of the offense.*

- This revision changes District law. The change improves the proportionality and consistency of the revised statutes.

RCC § 22E-1609. Forfeiture.

(1) *OAG, App. C at 195, says that it is unclear whether the forfeiture provision under RCC § 22A-1609 follows the holding from One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558 (D.C. 1998).*

- The RCC addresses this comment by amending the statute to state that forfeiture is a matter of judicial discretion by substituting "may" for "shall," and clarifying in commentary that any forfeiture under this provision is subject to Constitutional proportionality.
- This revision changes District law as described in the commentary. The change improves the proportionality, and perhaps the constitutionality, of the revised statute.

(2) *The CCRC recommends amending the reputation or opinion evidence statute to omit the word "business." This is not intended to change current law. The word "person" is defined under the RCC to include businesses.*

- This change improves the clarity and consistency of the revised criminal code.

RCC § 22E-1610. Reputation or opinion evidence.

(1) *The CCRC recommends amending the reputation or opinion evidence statute to apply to prosecutions for forced commercial sex, as prohibited by RCC § 22E-1602, and commercial sex with a trafficked person, as prohibited by RCC § 22E-1608. The current human trafficking chapter does not include analogous forced commercial sex or commercial sex with a trafficked person offenses, and accordingly the current reputation or opinion evidence statute does not refer to those offenses. However, given the bar on admission of evidence of an alleged victim's past sexual behavior in prosecutions for other trafficking offenses, it would be inconsistent to omit reference to forced commercial sex and commercial sex with a trafficked person.*

- This revision changes District law as described in the commentary. The change reduces a possible gap in the revised statute.

(2) *The CCRC recommends amending the reputation or opinion evidence statute to omit the word "business." This is not intended to change current law. The word "person" is defined under the RCC to include businesses.*

- This change improves the clarity and consistency of the revised criminal code.

RCC § 22E-1611. Civil action.

(1) *OAG, App. C at 195, recommends amending the civil action statute to specify that when the complainant was under the age of 35 at the time of the offense, he or she may bring a civil action until the date the victim attains the age of 40, or 5 years from when the victim knew, or reasonably should have known, of any act constituting an offense in this chapter, whichever is later.*

- The RCC incorporates this change. This provision makes the statute of limitations rules for civil actions based on violations of human trafficking statutes consistent with those for violations on sexual assault statutes.
- This revision changes District law. The change improves the consistency and proportionality of the revised statute.

RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.

(1) *OAG, App. C at 193, states that there are problems with the exception to liability provision pertaining to use of parental discipline in the prior draft. OAG does not specify what changes it recommends to remedy these problems.*

- The RCC does not address the problems identified by OAG because the provision at issue has been deleted from this section. Instead, the RCC's general justification defense pertaining to special responsibility for care, discipline, or safety will apply in RCC § 22E-4XX will apply to parental discipline.
- This revision may change current District law as described in the commentary to RCC § 22E-4XX. The change improves the clarity and consistency of the revised statute.

(2) *The CCRC recommends deleting subsection (a) of the limitations on liabilities and sentencing for RCC Chapter 16 offenses statute. Merger of related human trafficking offenses is addressed through the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses, including human trafficking offenses, may be released at a later date.*

- This revision does not change current District law. The change improves the clarity of the revised statute.

(3) *The CCRC recommends amending the limitation on liabilities and sentencing statute to limit accomplice and conspiracy liability for victims of human trafficking. Under this revision, a person may not be charged as an accomplice to a trafficking offense if, prior to the commission of the offense, the principal had committed a Chapter 16 offense against that person. A person may also not be charged with conspiracy to commit a trafficking offense if, prior to the commission of the offense, any party to that conspiracy had committed a Chapter 16 offense against that person. However, a victim of a trafficking offense may still be charged as a principal. In some instances, perpetrators of human trafficking offenses may compel vulnerable victims to assist in further trafficking offenses. In these cases, it is disproportionately severe to hold these persons liable as accomplices or co-conspirators.*

- This change improves the proportionality of the revised statute.

RCC § 22E-2001. Aggregation to Determine Property Offense Grades.

[No Advisory Group comments received.]

RCC § 22E-2101. Theft.

(1) *PDS, App. C at 74-75, recommends grading theft of labor based on the number of hours of labor, rather than the monetary value of that labor. PDS states that "stealing 8 hours from the professional should not be punished as if his crime was categorically worse than had he or she stolen from a low-wage worker." PDS provides specific language that it recommends for the revision and says the same penalty structure should be used for the revised fraud and extortion statutes.*

- The RCC does not incorporate this recommendation in the revised theft offense because, while labor is a type of property and potentially subject to theft, theft of labor or other property requires lack of consent. The fact patterns that appear to be of concern to PDS are instances of fraud, as defined in the RCC, which requires consent of the laborer obtained by deception (e.g., a false promise to pay the laborer). The revised fraud statute incorporates the PDS recommendation.

(2) *OAG, App. C at 223, recommends that the theft commentary be amended to more clearly state the RCC's elimination of certain while-armed penalty enhancements for non-violent pickpocketing or taking property from the immediate actual possession of another person. The current use of the term "non-violent" along with reference to "use" of a dangerous weapon is confusing. OAG provides specific language that it recommends for the commentary.*

- The RCC commentary incorporates OAG's recommendation, but with different drafting.[1] The revised commentary states: "First, non-violent takings of property, including motor vehicles, 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 or to penalty enhancements for the status of the complainant as they are under current law. These enhanced penalties are unnecessary for non-violent conduct that constitutes second degree or third degree theft, although there may be liability under other provisions in the RCC" (footnotes omitted).
- This revision to the commentary is based on a change in current District law, as described in the updated commentary. This revision improves the clarity of the commentary and revised statute.

(3) *The CCRC recommends specifying in all gradations of theft that the defendant must act without the consent of "an owner" and intend to deprive "that owner" of the property. The prior RCC draft recommendation referred to action without the consent of "the owner" and with intent to deprive "that person" of property. This revision clarifies that theft liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC that means*

[1] OAG, App. C at 223-224, recommends combining two sentences in the commentary so that it reads "non-violent pickpocketing or taking property from the immediate actual possession of another person is no longer subject to a penalty enhancement for the presence or use of a dangerous weapon, as the use or display of the weapon during the taking would constitute robbery under the RCC."

"a person holding an interest in property with which the actor is not privileged to interfere without consent."[2] *Any actor commits theft if he or she takes "property of another" (i.e. property that the actor lacks a privilege to interfere with without consent) without the consent of an owner (i.e. a person, possibly even a co-owner, who has an interest in the property that the actor lacks the privilege to interfere with without consent) and with intent to deprive that owner of the property.*

- This revision does not change current District law. This revision improves the clarity of the revised theft statute.

(4) *The CCRC recommends excluding from theft conduct that violates D.C. Code § 35-252 (fare evasion). The recently passed Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592) contains such an exclusion for the current theft statute.*

- This revision does not change current District law.[3] This revision improves the completeness of the revised theft statute.

(5) *The CCRC, in subsection (c)(4)(C), recommends incorporating the revised definition of "possession" into the theft statute provision rather than relying on the separate defined term in RCC § 22E-701. The prior RCC draft recommendation referred to property "taken from the immediate actual possession of another person." The revised statute requires the property is taken from a complainant who "holds or carries the property on his or her person" or from a complainant who "has the ability and desire to exercise control over the property and it is within his or her immediate physical control." The language incorporates the revised definition of "possesses" in RCC § 22E-701 in a more direct, clearer manner.*

- This revision changes current District law, as described in the updated commentary. This revision improves the clarity of the revised theft statute.

(6) *The CCRC recommends reorganizing the revised statute to include the relevant value thresholds in each gradation of the offense, instead of including the value thresholds in the penalty provision.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

(7) *The CCRC recommends relabeling the revised statute's gradations to make "first degree" rather than "aggravated" the most serious gradation and labeling the remaining gradations accordingly, so the least serious gradation is "fifth degree."*

- This revision does not further change District law. This change improves the clarity of the revised statute.

[2] RCC § 22E-701.

[3] This presupposes the Fare Evasion Decriminalization Amendment Act of 2018 will become law. The current projected law date is June 6, 2019. If the law is not enacted, the proposed exclusion would amount to a change in law.

RCC § 22E-2102. Unauthorized Use of Property.

(1) *PDS, App. C at 73-74, recommends revising RCC § 22E-2003, Limitation on convictions for multiple related property offenses, so that trespass of a motor vehicle and unauthorized use of property (UUP) merge.*

- The RCC partially incorporates PDS's recommendation. The RCC no longer codifies the language in the prior draft RCC § 22E-2003. However, merger of trespass of a motor vehicle and UUP is governed by the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.
- This revision does not further change current District law, as described in the commentary. This revision improves the clarity of the revised statutes.

(2) *The CCRC recommends excluding from the unauthorized use of property (UUP) statute conduct that violates D.C. Code § 35-252 (fare evasion). The recently passed Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592) contains such an exclusion for the current theft statute,*[1] *but fare evasion could also fall within the current taking property without right statute.*

- This revision appears to change current District law, as described in the updated commentary. This revision improves the completeness of the revised UUP statute.

(3) *The CCRC recommends requiring that the defendant must act without the effective consent of "an owner" instead of "the owner," as was required in the prior RCC draft. This revision clarifies that UUP liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC that means "a person holding an interest in property with which the actor is not privileged to interfere without consent."*[2] *Any actor commits UUP if he or she takes "property of another" (i.e. property that the actor lacks a privilege to interfere with without consent) without the effective consent of an owner (i.e. a person, possibly even a co-owner, who has an interest in the property that the actor lacks the privilege to interfere with without consent).*

- This revision does not change current District law. This revision improves the clarity of the revised theft statute.

[1] This presupposes the Fare Evasion Decriminalization Amendment Act of 2018 will become law. The current projected law date is June 6, 2019. If the law is not enacted, the proposed exclusion would amount to a change in law.

[2] RCC § 22E-701.

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

(1) *OAG, App. C at 57, recommends retaining the penalty structure in the current UUV statute so that a passenger receives the same penalty as the driver. OAG states that "a person who can be charged as a passenger in a UUV [case] is necessarily an aider and abettor to its illegal operation and, therefore, faces the same penalty as the operator." OAG also states that stolen cars are frequently passed from driver to driver and that the penalty in a UUV passenger case should not depend on who happens to be the driver or the passenger when the police stop the car.*

- The RCC incorporates OAG's recommendation by deleting the second degree gradation of the revised offense. The revised UUV statute is limited to knowingly operating a motor vehicle without the effective consent of an owner. A passenger that satisfies accomplice liability (RCC § 22E-210) requirements will receive the same penalty as the driver. The commentary to the revised UUV offense makes clear that *merely* riding as a passenger in a motor vehicle with knowledge of the unlawful operation is not sufficient for UUV liability—all the accomplice liability requirements in RCC § 22E-210 must also be met by the passenger, including a purpose to assist in planning or commission, or encouragement, of UUV by the vehicle operator.
- This revision changes current District law, as described in the updated commentary.[1] The RCC draft improves the clarity, consistency, and proportionality of the revised offense.

(2) *PDS, App. C at 73-74, recommends revising RCC § 22E-2003, Limitation on convictions for multiple related property offenses, so that trespass of a motor vehicle and unauthorized use of property (UUP) merge.*

- The RCC partially incorporates PDS's recommendation. The RCC no longer codifies the language in the prior draft RCC § 22E-2003. However, merger of trespass of a motor vehicle and UUP is governed by the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.
- This revision does not further change current District law, as described in the commentary. This revision improves the clarity of the revised statutes.

(3) *PDS, App. C at 75, recommends eliminating second degree of the revised UUV statute because "[b]eing a passenger in a car, even without the effective consent of the owner, should not be a crime." PDS states that, "[w]here a passenger is aiding and abetting the driver, the passenger can be held liable," and where the passenger and driver switch roles, there can be liability if the government can prove that the passenger has also been a driver.*

- The RCC incorporates PDS's suggestion, as described above in Item #1 above.

[1] While the revised statute follows the current District statute in its structure, the revised statute changes current District case law by limiting of UUV liability for a passenger to situations where the requirements of accomplice liability in RCC § 22E-210 are met.

- This revision changes current District law, as described in the updated commentary. The RCC draft improves the clarity, consistency, and proportionality of the revised offense.

(4) *The CCRC recommends requiring that the defendant must act without the effective consent of "an owner" instead of "the owner," as was required in the prior RCC draft. This revision clarifies that UUV liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC that means "a person holding an interest in property with which the actor is not privileged to interfere without consent."*[2] *Any actor commits UUV if he or she operates a motor vehicle without the effective consent of an owner (i.e. a person, possibly even a co-owner, who has an interest in the motor vehicle that the actor lacks the privilege to interfere with without consent).*

- This revision does not change current District law. This revision improves the clarity of the revised theft statute.

(5) *The CCRC recommends deleting the prior RCC draft provision prohibiting multiple convictions for UUV, unauthorized use of a rented or leased motor vehicle in D.C. Code § 22-3215, and carjacking. Merger of UUV and other offenses is addressed through the general merger provision in RCC § 22E-214. Further recommendations regarding merger of specific RCC offenses may be released at a later date.*

- This revision does not change current District law. This revision improves the clarity of the revised theft statute.

[2] RCC § 22E-701.

RCC § 22E-2104. Shoplifting.

(1) *PDS, App. C at 76, recommends revising subsection (a)(2) to include personal property of another that is "or was" displayed, held, stored, or offered for sale. PDS states that this revision would clarify that the revised offense includes property that is in "reasonable close proximity to the customer area, but is not presently for sale."*

- The RCC incorporates PDS's recommendation, but uses different drafting. Subsection (a)(2) of the revised shoplifting statute now has two subparagraphs that require that the property be "displayed or offered for sale" (subparagraph (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)).
- This revision does not change current District law. This revision improves the clarity of the revised statute.

(2) *PDS, App. C at 76, recommends replacing the requirement "within a reasonable time" in subsection (e)(3) and subsection (e)(4) of the qualified immunity provision with "as soon as practicable" because an individual who "lock[s] an alleged shoplifter in a room and take[s] their time to contact law enforcement" should not be shielded from liability.*

- This revision may change current District law, as described in the updated commentary. This revision improves the clarity of the revised statute.

(3) *OAG, App. C at 57-58, recommends either removing the requirement that the offense was "committed in that person's presence" from subsection (c)(1) of the qualified immunity provision or, in the alternative, revising the requirement to include the use of technology that identifies the alleged shoplifter. OAG says that, "The gravamen for having qualified immunity should not be whether the offense occurred in the store employee's presence, but whether the store employee's stop was reasonable."*

- The RCC incorporates OAG's recommendation by deleting the requirement "committed in the person's presence." The probable cause requirement in the qualified immunity provision ensures that the detention or ensuing arrest is reasonable.
- This revision may change current District law, as described in the updated commentary. This revision removes a possible gap in current District law.

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

(1) *The CCRC recommends revising subsection (a)(2) to refer to conduct without effective consent of "an owner" instead of "the owner." The current D.C. Code commercial privacy statute*[1] *and the prior RCC draft recommendation referred to action without the consent of "the owner." This revision clarifies that liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC and means "a person holding an interest in property with which the actor is not privileged to interfere.*[2] *Any actor commits unlawful creation or possession of a recording if he or she makes, obtains, or possesses a specified sound recording without the consent of an owner (i.e. a person, possibly even a co-owner, who has an interest in the property with which the actor lacks the privilege to interfere without consent) and with intent to sell, rent, or otherwise use the recording for commercial gain or advantage.*

- This revision does not change current District law. This revision improves the clarity of the revised theft statute.

(2) *The CCRC recommends elimination of the permissive inference described in the prior draft RCC text. Current D.C. Code § 22-3214(b) 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." The prior draft RCC text had recommended changing this "presumption" to a "permissive inference" to improve the constitutionality of the statute. However, on further review, the CCRC does not believe that the sole fact of possession of 5 or more unauthorized copies makes more likely than not*[3] *that the copies were made, obtained, or possessed for commercial gain or advantage. 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 changes current District law as described in the commentary. This revision improves the proportionality, and perhaps the constitutionality, of the revised statute.

(3) *The CCRC recommends revising the statute to make optional, rather than mandatory, the forfeiture of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in the crime. Current D.C. Code § 22-3214(b) does not contain a forfeiture provision. However, consistent with the current deceptive labeling statute, D.C. Code § 22–3214.01, and the prior draft of*

[1] D.C. Code § 22-3214(b).

[2] RCC § 22E-701.

[3] 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)).

the revised unlawful labeling of a recording statute, RCC § 22E-2207, the prior draft unlawful creation or possession of a recording statute had included a forfeiture provision. To provide judicial discretion to impose proportionate sentencing and to ensure that the forfeiture provision is constitutional both facially and as applied,[4] *the CCRC recommends making forfeiture optional rather than mandatory. A parallel change is recommended to RCC § 22E-2207, the prior draft unlawful creation or possession of a recording statute had included a forfeiture provision.*

- This revision changes current District law as described in the commentary. This revision improves the proportionality, and perhaps the constitutionality, of the revised statute.

[4] 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).

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater.

[No Advisory Group comments received.]

RCC § 22E-2201. Fraud.

(1) *The Office of the Attorney General (OAG), App. C at 60-61, recommends amending the fraud statute to replace the word "transfer" with the phrase "causes the transfer." OAG states that this change is intended to clarify that the revised fraud statute includes cases in which the accused causes the transfer of property, but the transfer is not directly to the accused.*

- The RCC partially incorporates this recommendation by amending the commentary to clarify that the revised statute includes "causing the transfer" of property. However, the concern raised by OAG is a general concern about how to interpret conduct described in the RCC (or the current D.C. Code), and arises with other conduct in the revised fraud statute (e.g. takes) and other offenses. In the RCC, even where a revised statute does not explicitly describe an action as "causing…," that meaning is implied and indirect means of engaging in the action (e.g. through an innocent person[1]) are included. The revised definition of a "result element"[2] and accompanying commentary discuss this further.
- This revision of the commentary does not change District law. This change improves the clarity of the revised commentary and statute.

(2) *The Public Defender Service (PDS), App. C at 069, recommends that the commentary to the RCC fraud and forgery offenses clarify that the deception required by the offense "must be causally connected" to the consent (in fraud) or the appearance of the document (in forgery). PDS says this clarification is necessary because some means of engaging in "deception" as that term is defined in the RCC (e.g., failure to disclose a known lien disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property) do not include a materiality requirement.*

- The RCC commentary incorporates this recommendation by amending the commentary to clarify that, in fraud, the deception must actually cause the property owner to consent to giving or transferring property.
- This revision of the commentary does not change District law. This change improves the clarity of the revised commentary and statute.

(3) *PDS, App. C at 074-075, recommends re-drafting penalty gradations for theft, fraud, and extortion to be based, when the taking of labor or services are involved, on the number of hours taken rather than the market value of the labor. PDS says that if fair market value is used to determine penalties for theft of services, taking labor from a white collar professional is subject to much more severe penalties than taking labor from a person making minimum wage. PDS proposes specific language regarding the hours of labor that should be included in the revised gradations.*

- The RCC incorporates this recommendation by redrafting the statute with reference to hours of labor or services in the same amounts as PDS

[1] See RCC § 22E-211 Liability for Causing Crime By an Innocent or Irresponsible Person.

[2] RCC § 22E-211(c)(2) ("'Result element' means any consequence caused by a person's act or omission that is required to establish liability for an offense.").

proposed. The taking of labor or services from an individual typically is criminalized as a fraud offense where the labor or services are not coerced, but due to a deception by the purchaser as to payment.[3] Grading offenses using only the market value of labor may lead to disproportionate penalties because the harm experienced by a complainant varies more closely with the number of hours of labor or services the actor is not compensated for than the market value of those hours.

- This revision changes District law as described in the commentary. This change improves the proportionality of the revised statute.

(4) *The CCRC recommends specifying in all gradations of fraud that the defendant must act without the effective consent of "an owner." The prior RCC draft recommendation referred to action without the consent of "the owner." This revision clarifies that liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC and means "a person holding an interest in property with which the actor is not privileged to interfere without consent.*[4] *Any actor commits fraud who takes by deception the property of another (i.e. property that the actor lacks a privilege to interfere with without consent) with the consent of an owner (i.e. a person, possibly even a co-owner, who has an interest in the property that the actor lacks the privilege to interfere with without consent) and meets the other statutory elements of the offense.*

- This revision does not change current District law. This revision improves the clarity of the revised statute.

(5) *The CCRC recommends reorganizing the revised statute to include the relevant value thresholds and all elements in each gradation of the offense, instead of including the value thresholds in the penalty provision and referring to the elements in the lowest gradation.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

(6) *The CCRC recommends relabeling the revised statute's gradations to make the most serious gradation "first degree" rather than "aggravated", and adding an additional "fifth" degree as the least serious gradation.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

[3] When labor or services are coerced, the conduct may constitute a human trafficking offense. See RCC § 22E-1601.
[4] RCC § 22E-701.

RCC § 22E-2202. Payment Card Fraud.

(1) *The CCRC recommends reorganizing the revised statute to include the relevant value thresholds and all elements in each gradation of the offense, instead of including the value thresholds in the penalty provision.*
   a. This revision does not further change District law. This change improves the clarity of the revised statute.

(2) *The CCRC recommends relabeling the revised statute's gradations to make "first degree" rather than "aggravated" the most serious gradation, and adding an additional "fifth" degree as the least serious gradation.*
   a. This revision does not further change District law. This change improves the clarity of the revised statute.

(3) *The CCRC recommends further review of the payment card fraud jurisdiction provision in conjunction with a possible RCC general provision addressing jurisdiction for all revised offenses. The current D.C. Code fraud chapter, which includes both payment card fraud and the general fraud offense, includes a jurisdictional statute in D.C. Code §22-3224.01. This current statute specifies that an offense under the fraud chapter is "deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if: 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; or 4) Any part of the offense takes place in the District of Columbia." It is unclear, without further research, whether these jurisdiction provisions are necessary or proper. Of particular concern, there is no clear precedent, and it may be unconstitutional, to claim criminal jurisdiction based solely on the residency of the victim—i.e., where there is no other claim that the conduct or a result of the conduct occurred in the District.*[1] *The jurisdiction provision has been bracketed for future review.*

[1] *See* § 4.4(b) Statutory extensions of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(b) (3d ed.) ("Without departing from the territorial principle of jurisdiction—some conduct or result of conduct must still occur within the state—a number of states have by statute enlarged their criminal jurisdiction by making other local conduct or results (other than the one particular act or omission or result which the common law considered vital for the determination of the situs of the crime) the basis for jurisdiction.") (internal citations omitted); § 4.4(c)(2)Based on citizenship, 1 Subst. Crim. L. § 4.4(c)(2) (3d ed.). ("We have already seen that a nation may by statute give itself jurisdiction over crimes committed by its nationals abroad. The Supreme Court has held that a similar non-territorial principle of jurisdiction can be exercised by the states. Although on its facts the case is limited to jurisdiction over a state's citizens for conduct on the high seas, the same principle should be applicable to acts done on land outside the state, either abroad or in another state of the United States.") (internal citations omitted).

RCC § 22E-2203. Check Fraud.

(1) *PDS, App. C at 79, recommends amending the draft revised statute to clarify that "gaining knowledge after using the check that the check will not be honored is not check fraud." PDS recommends adding the phrase "using the check that the check will not be honored is not check fraud."*

- The RCC incorporates this change by redrafting the statute to require that the actor use the check "with intent that the check not be honored in full…". The culpable mental state of "with intent" requires that the actor believe, to a practical certainty, at the time of the transaction, that the check will not be honored in full. The language "with intent" also clarifies that the offense is semi-inchoate—i.e. it need not be proven that a bank or depository institution did not honor the check.[1]
- This revision may change current District law. The change improves the clarity of the revised statute.

(2) *PDS, App. C at 79-80, recommends deleting the permissive inference, which allows a fact finder to infer that the accused knew the check will be honored if the accused fails to pay the check holder the amount not honored within 10 days of being notified that the check was not honored.*

- The RCC incorporates this recommendation by removing the permissive inference. The current D.C. Code statutory language about "prima facie evidence" and the permissive inference in the prior draft RCC statute both may run afoul of the constitutional standard for such an inference.[2] It cannot be said with substantial assurance that, given that a person does not repay a bank for an overdrawn check within 5 days (per D.C. Code § 22–1510) or 10 days (per the prior draft revision) of notice from the bank, it was more likely than not that at the time the check was used to obtain or pay for property the actor intended that the check would not be honored.
- This revision changes District law as described in the commentary. The change improves the proportionality and may improve the constitutionality of the revised offense.

(3) *The CCRC recommends re-drafting the check fraud statute to include the requisite amount of loss to the check holder in each grade of the offense, instead of including the amount in the penalty provision.*

- This change does not alter the scope of the offense, but improves the clarity and consistency of the revised criminal code.

[1] E.g., it is irrelevant if, at its discretion, the institution did honor the check despite there being insufficient funds, or because sufficient funds were added by a third party.

[2] *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)) ("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.").

(4) *The CCRC recommends reorganizing the revised statute to include the relevant value thresholds and all elements in each gradation of the offense, instead of including the value thresholds in the penalty provision.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

RCC § 22E-2204. Forgery.

(1) *The CCRC recommends reorganizing the revised statute to include the relevant value thresholds and all elements in each gradation of the offense, instead of including the value thresholds in the penalty provision.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

(2) *The CCRC recommends re-drafting third degree forgery to require that the accused "knowingly do any of the follow" acts listed under subparagraphs (c)(1)(A)-(C). This change is organizational, and clarifies that forgery requires that the accused knowingly commit any of the acts listed under subparagraphs (c)(1)(A)-(C), and act with intent to obtain property of another by deception, or harm another person. This change does not alter the scope of the offense, but clarifies that forgery requires that the accused commit any of the acts listed under (c)(1)(A)-(C), and has intent to obtain property by deception, or harm another.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

RCC § 22E-2205. Identity Theft.

(1) *The Office of the Attorney General (OAG), App. C at 062, recommends amending the identity theft statute to specifically add as an alternative basis of liability the use of a person's personal identifying information to "harm the person whose identifying information was used." OAG says that "All the conditions outlined in RCC § 22A-2205 (a)(4) have to do with using somebody's identity to enrich the person committing identity theft or some third party" but that "people also use identity theft to embarrass someone or to get even with them for a perceived slight." OAG cites as an example of the behavior it wishes to cover by its recommended language, setting up a social media account using the identity of a person they would like to hurt, linking the account to friends of the target, then posting "false or embarrassing posts and pictures."*

- The RCC does not incorporate this recommendation because such an expansion of criminal liability would be disproportionate and, as the recommendation is drafted, unconstitutional. As noted by OAG, stalking statutes, in the District (both in current law[1] and the RCC[2]) and other jurisdictions, already provide criminal liability for engaging in a pattern of behavior that causes a person significant emotional distress. Depending on the facts of the case, particularly the repetition of such conduct on two or more occasions, the example cited by OAG regarding use of social media to harm another person may constitute stalking. Generally, causing even serious harm to a person's reputation, without more, is subject to only civil, not criminal, liability. However, the OAG recommendation as drafted contains no minimum threshold as to the amount of reputational or other harm that must be intended. In addition, the OAG recommendation as currently drafted does not require the intent to harm another person be by deception, unlike other bases of liability in the revised identity theft statute, and so would appear to criminalize writing an unwanted news article about a person (using a person's name or other personal identifying information without their effective consent) when done with intent to harm the person named. Stalking statute provisions that have sought to criminalize communications *about* a person (in contrast to communications to a person, directly or indirectly) have been struck as violating First Amendment protections,[3] and a similar analysis would

[1] D.C. Code §§ 22-3131 – 3135.

[2] RCC § 22E-1206.

[3] *See, e.g., People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) where the Supreme Court of Illinois held that a stalking statute provision prohibiting communications about a person is unconstitutional:

> [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

seem to apply to the language recommended by OAG. The RCC criminalizes some behavior of the type described by OAG, to the extent it constitutes stalking, but maintains the focus of identity theft, a property crime, on deceptive uses of personal identifying information to obtain property or avoid payment.

(2) *OAG, App. C at 62-63, recommends either adding to the revised statute language in the current identity theft statute regarding use of another person's name or other personal identifying information to avoid detection, apprehension, or prosecution for a crime, or to create a separate but similar statute in the RCC that, in addition, expands criminal liability to cover efforts to avoid civil tickets and notices of infraction.*[4] *OAG states that such a provision is necessary because "giving out false identifying information belonging to or pertaining to another person to identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime is not criminalized elsewhere in the Code."*

- At this time the RCC does not incorporate the recommendation into the revised identity theft statute because it may create unnecessary overlap with other crimes such as obstructing justice,[5] false or fictitious reports to Metropolitan Police,[6] and false statements.[7] However, the CCRC will review this matter further when revising obstruction of justice, false statements, and related offenses to ensure that the relevant conduct in the current identity theft statute remains unlawful.

(3) *The CCRC recommends further review of the identity theft jurisdiction provision in conjunction with a possible RCC general provision addressing jurisdiction for*

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opinion) (holding that the 'disparagement clause,' which prohibits federal registration of a trademark based on its offensive content, violates the first amendment).

[4] The language proposed by OAG would cover "using personal identifying information belonging to or pertaining to another person, without that person's consent, to identify himself or herself at the time of he or she is given a ticket, a notice of infraction, is arrested; or to facilitate or conceal his or her commission of a crime; or to avoid detection, apprehension, or prosecution for a crime."

[5] D.C. Code § 22-722(a)(6) ("A person commits the offense of obstruction of justice if that person…corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.").

[6] D.C. Code § 5-117.05. ("Except as provided in § 22-1319, whoever shall make or cause to be made to the Metropolitan Police force of the District of Columbia, or to any officer or member thereof, a false or fictitious report of the commission of any criminal offense within the District of Columbia, or a false or fictitious report of any other matter or occurrence of which such Metropolitan Police force is required to receive reports, or in connection with which such Metropolitan Police force is required to conduct an investigation, knowing such report to be false or fictitious; or who shall communicate or cause to be communicated to such Metropolitan Police force, or any officer or member thereof, any false information concerning the commission of any criminal offense within the District of Columbia or concerning any other matter or occurrence of which such Metropolitan Police force is required to receive reports, or in connection with which such Metropolitan Police force is required to conduct an investigation, knowing such information to be false, shall be punished by a fine of not exceeding $300 or by imprisonment not exceeding 30 days.").

[7] D.C. Code § 22-2405 ("A person commits the offense of making false statements if that person wilfully makes a false statement that is in fact material, in writing, directly or indirectly, to any instrumentality of the District of Columbia government, under circumstances in which the statement could reasonably be expected to be relied upon as true").

all revised offenses. The current D.C. Code identity theft sub-chapter includes a jurisdictional statute in D.C. Code §22–3227.06. This current statute specifies that: "The offense of identity theft shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if: (1) The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia; or (2) Any part of the offense takes place in the District of Columbia.." It is unclear, without further research, whether these jurisdiction provisions are necessary or proper. Of particular concern, there is no clear precedent, and it may be unconstitutional, to claim criminal jurisdiction based solely on the residency of the victim—i.e., where there is no other claim that the conduct or a result of the conduct occurred in the District.[8] *The jurisdiction provision has been bracketed for future review.*

(4) *The CCRC recommends reorganizing the revised statute to include the relevant value thresholds and all elements in each gradation of the offense, instead of including the value thresholds in the penalty provision and referring to the elements in the lowest gradation.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

(5) *The CCRC recommends relabeling the revised statute's gradations to make the most serious gradation "first degree" rather than "aggravated", and adding an additional "fifth" degree as the least serious gradation.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

[8] *See* § 4.4(b)Statutory extensions of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(b) (3d ed.) ("Without departing from the territorial principle of jurisdiction—some conduct or result of conduct must still occur within the state—a number of states have by statute enlarged their criminal jurisdiction by making other local conduct or results (other than the one particular act or omission or result which the common law considered vital for the determination of the situs of the crime) the basis for jurisdiction.") (internal citations omitted); § 4.4(c)(2)Based on citizenship, 1 Subst. Crim. L. § 4.4(c)(2) (3d ed.). ("We have already seen that a nation may by statute give itself jurisdiction over crimes committed by its nationals abroad. The Supreme Court has held that a similar non-territorial principle of jurisdiction can be exercised by the states. Although on its facts the case is limited to jurisdiction over a state's citizens for conduct on the high seas, the same principle should be applicable to acts done on land outside the state, either abroad or in another state of the United States.") (internal citations omitted).

RCC § 22E-2206. Identity Theft Civil Provisions

[No Advisory Group comments received.]

RCC § 22E-2207. Unlawful Labeling of a Recording.

(1) *The Public Defender Service (PDS), App. C at 80, recommends deleting the permissive inference included in the prior draft recommendation, which would allow a fact finder to infer that the accused had an intent to sell, rent or otherwise use the recording commercial advantage if the person possesses 5 or more recordings of the same sound or audiovisual material that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets.*

- The RCC incorporates this recommendation by removing the permissive inference. The prior draft recommendation included a permissive inference to make the revised unlawful labeling of a recording statute consistent with the revised unlawful creation or possession of a recording (UCPR) offense.[1] However, the permissive inference has now been removed from the revised UCPR offense and there is concern that an inference for unlawful labeling of a recording may run afoul of the constitutional standard for such an inference.[2] It cannot be said with substantial assurance that, given that a person possesses 5 or more improperly labeled recordings, it was more likely than not that at the time the person had an intent to sell or rent such recordings.
- This revision does not change District law. The change improves the proportionality, consistency, and may improve the constitutionality of the revised offense.

(2) *The CCRC recommends revising the statute to make optional, rather than mandatory, the forfeiture of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in the crime. Current D.C. Code § 22-3214.01 contains a mandatory forfeiture provision. To provide judicial discretion to impose proportionate sentencing and to ensure that the forfeiture provision is constitutional both facially and as applied,[3] the CCRC recommends making forfeiture optional rather than mandatory. A parallel change is recommended to RCC § 22E-2105, the prior draft Unlawful Creation or Possession of a Recording statute which had included a forfeiture provision.*

- This revision changes current District law as described in the commentary. This revision improves the proportionality, and perhaps the constitutionality, of the revised statute.

(3) *The CCRC recommends reorganizing the revised statute to include the relevant number of recordings in each gradation of the offense, instead of including the number of recordings in the penalty provision.*

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[1] RCC § 22E-2105.

[2] *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)) ("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.").

[3] 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).

- This revision does not change District law. This change improves the clarity of the revised statute.

(4) *The CCRC recommends relabeling the revised statute's gradations to make the most serious gradation "first degree" rather than "aggravated," and adding a "second" degree as the least serious gradation.*

- This revision does not change District law. This change improves the clarity of the revised statute.

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

(1) *OAG, App. C. at 52, comments that attempt penalties for various property offenses, including financial exploitation of a vulnerable adult (FEVA), are insufficient for a sting operation where a person apparently satisfies all of the elements of the offense except the victim turns out to be a law enforcement officer. Taking FEVA as an example, OAG explains that "there is no reason why the perpetrators should not be subject to the same penalty as if they did the exact same things and obtained property from a person who was actually a vulnerable adult." OAG suggests either changing definitions, or drafting a general provision "that states that in sting operations the person has committed the offense if the facts were as they believed it to be."*

- The RCC does not incorporate changes based on the OAG comment because increasing punishment as suggested is inconsistent with the general approach to attempt liability in the current D.C. Code and the RCC, and may result in disproportionate results. OAG correctly states that in FEVA and other offenses, a person will typically be guilty only of an attempted crime when the actor fulfilled every other element of the offense except the property wasn't actually taken from a vulnerable person, but instead a law enforcement officer posing as a vulnerable person as part of a sting operation. Such reduced liability for so-called "completed" attempts (where an actor has done everything in his or her power to complete the crime but nonetheless one of the elements is not fulfilled), however, is a general feature of the current D.C. Code[1] and RCC.[2] OAG does not explain why a completed attempt in the context of a sting is different than other types of completed attempts (e.g., firing a gun at point-blank range that jams or the bullet misses, or, in the context of FEVA, stealing from a person who the actor believes to be an elderly person but isn't). A person who satisfies the elements of FEVA, but is mistaken as to the complainant's status, is not more culpable simply because the mistake was the result of a sting operation. It is true that a few current D.C. Code offenses penalize attempts (whether "completed attempts" or otherwise) the same as meeting all the elements of an offense.[3] However, these offenses are anomalies and appear to reflect a judgment that an attempt satisfies the gravamen or central purpose of the crime. However, in FEVA and other property offenses, the real impact of property loss on the victim appears to be a critical feature of the crime—a loss that does not occur where there is a sting operation (or other attempt, "completed" or otherwise). Notwithstanding the actor's subjective

[1] D.C. Code § 22-1803.
[2] RCC § 22E-301.
[3] See, e.g. enticing a child or minor, § 22–3010(a) ("Whoever, being at least 4 years older than a child or being in a significant relationship with a minor, (1) takes 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, or (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 …").

culpability being the same, the chief justification for penalizing "completed attempts" less than crimes where all elements are satisfied is that there is less objective harm.

(2) *OAG, App. C. at 63-64, OAG recommends that strict liability should apply as to whether the complainant was an elderly person or vulnerable adult, with a defense available if the accused reasonably believed that the complainant was not an elderly person or vulnerable adult, as stated in the current FEVA statute. OAG says that requiring knowledge as to the complainant being an elderly person or vulnerable adult change current District law, and potentially imposes too stringent a requirement on the government.*

- The RCC partially incorporates this recommendation by amending the statute to require recklessness as to the complainant being an elderly person or vulnerable adult. A reckless culpable mental state as to the age of other circumstance concerning the victim is consistent with other revised statutes,[4] and the RCC general provision concerning the relationship between culpable mental states and mistakes.[5] The revised statute, however, continues to place the burden of proof as to an actor's recklessness on the government, rather than make reasonable mistake as to the victim's status a defense. OAG stated concerns[6] about its ability to prove a culpable mental state of the defendant because the defendant could put on proof that he or she thought the victim was not elderly or vulnerable, or because evidence concerning a person's beliefs are peculiarly within the defendant's possession. However, such concerns would arise with virtually every criminal offense which requires the government to prove an actor's culpable mental state based on inferences from the actor's conduct and other circumstances—e.g., in theft, whether the actor had intent to deprive a person of property or merely temporarily borrow the item.
- This revision changes current District law as described in the commentary. This change improves the consistency and proportionality of the revised statute.

(3) *The CCRC recommends specifying in all gradations of FEVA that the defendant must act without the effective consent of "an owner." The prior RCC draft recommendation referred to action without the consent of "the owner." This revision clarifies that liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC and means "a*

[4] See, e.g., RCC § 22E-1202 Assault.

[5] RCC § 22E-208.

[6] OAG at *App. C. at 064. (*"If passed, the government would frequently not be able to meet its burden. How could the government prove the mental state of "knowingly" to the element that the person was 65 years old or that a given individual met the definition of a vulnerable adult when all the defendant would have to do is put on something to show that he or she thought the person was 64 years old or had limitations that impaired the person's ability but that those limitations were not 'substantial'? … All of the evidence concerning the person's belief are peculiarly within that persons' possession.")(internal footnote and text omitted).

person holding an interest in property with which the actor is not privileged to interfere without consent.[7] *Any actor commits FEVA who takes by deception the property of another (i.e. property that the actor lacks a privilege to interfere with without consent) without the consent of an owner (i.e. a person, possibly even a co-owner, who has an interest in the property that the actor lacks the privilege to interfere with without consent) and meets the other statutory elements of the offense.*

- This revision does not change current District law. This revision improves the clarity of the revised statute.

(4) *The CCRC recommends reorganizing the revised statute to include the relevant value of financial injury in each gradation of the offense, instead of including the amount of financial injury in the penalty provision.*

- This revision does not change District law. This change improves the clarity of the revised statute.

(5) *The CCRC recommends relabeling the revised statute's gradations to make the most serious gradation "first degree" rather than "aggravated", and adding a "fifth" degree as the least serious gradation.*

- This revision does not change District law. This change improves the clarity of the revised statute.

[7] RCC § 22E-701.

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions.

[No Advisory Group comments received.]

RCC § 22E-2301. Extortion.

(1) *PDS, App. C at 74-75, recommends re-drafting penalty gradations for theft, fraud, and extortion to be based, when the taking of labor or services are involved, on the number of hours taken rather than the market value of the labor. PDS says that if fair market value is used to determine penalties for theft of services, taking labor from a white collar professional is subject to much more severe penalties than taking labor from a person making minimum wage. PDS proposes specific language regarding the hours of labor that should be included in the revised gradations.*

- The RCC does not incorporate this recommendation in the revised extortion offense because, while labor is a type of property and potentially subject to extortion, extortion of labor would constitute the separate offense of forced labor.[1] The fact patterns that appear to be of concern to PDS are instances of fraud, as defined in the RCC, which requires consent of the laborer obtained by deception (e.g., a false promise to pay the laborer). The revised fraud statute incorporates the PDS recommendation.[2]

(2) *PDS, App. C at 68, recommends re-drafting portions of the commentary to the definition of "coercion" to clarify that threatening a labor strike or boycott does not constitute coercion, unless such threats are made to enrich the person instead of benefitting the group.*

- The RCC does not incorporate this recommendation, as the revised definition of "coercive threats" does not include reference to "wrongful threats of economic injury." However, the revised commentary to the extortion offense clarifies that the offense is not intended to cover obtaining property under threat of labor strikes or consumer boycotts.

(3) *The CCRC recommends reorganizing the revised statute to include the relevant value thresholds and all elements in each gradation of the offense, instead of including the value thresholds in the penalty provision and referring to the elements in the lowest gradation.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

(4) *The CCRC recommends numerous revisions to the definition of "coercion." The term "coercive threat," which is used in the revised extortion statute is defined in RCC § 22E-701. To the extent the definition of "coercive threat" differs from the prior definition of "coercion," the extortion offense has also changed. For more in depth discussion of changes to the "coercive threat" definition, see Commentary to RCC § 22E-701.*

- These revisions change current District law, and improve the clarity of the revised criminal code.

(5) *The CCRC recommends specifying in all gradations of extortion that the defendant must act without the effective consent of "an owner." The prior RCC*

[1] RCC § 22E-1601.
[2] RCC § 22E-2201.

draft recommendation referred to action without the consent of "the owner." This revision clarifies that liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC and means "a person holding an interest in property with which the actor is not privileged to interfere without consent."[3] *Any actor commits extortion who takes the property of another (i.e. property that the actor lacks a privilege to interfere with without consent) with the consent of an owner (i.e. a person, possibly even a co-owner, who has an interest in the property that the actor lacks the privilege to interfere with without consent) obtained by coercive threat, and meets the other statutory elements of the offense.*

- This revision does not change current District law. This revision improves the clarity of the revised statute.

(6) *The CCRC recommends relabeling the revised statute's gradations to make the most serious gradation "first degree" rather than "aggravated", and adding an additional "fifth" degree as the least serious gradation.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

[3] RCC § 22E-701.

RCC § 22E-2401. Possession of Stolen Property.

(1) *The CCRC recommends specifying in all gradations of possession of stolen property that the defendant must act with intent to deprive "an owner" of the property. The prior RCC draft recommendation referred to action with intent to deprive "the owner" of property. This revision clarifies that liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC and means "a person holding an interest in property with which the actor is not privileged to interfere without consent.*[1] *Any actor commits possession of stolen property who takes property with intent to deprive an owner (i.e. a person, possibly even a co-owner, who has an interest in the property that the actor lacks the privilege to interfere with without consent) of the property and meets the other offense requirements.*

- This revision does not change current District law. This revision improves the clarity of the revised theft statute.

(2) *The CCRC recommends reorganizing the revised statute to include the relevant value thresholds in each gradation of the offense, instead of including the value thresholds in the penalty provision.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

(3) *The CCRC recommends relabeling the revised statute's gradations to make "first degree" rather than "aggravated" the most serious gradation, and adding an additional "fifth" degree as the least serious gradation.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

[1] RCC § 22E-701.

RCC § 22E-2402. Trafficking of Stolen Property.

(1) *The CCRC recommends reorganizing the revised statute to include the relevant value thresholds in each gradation of the offense, instead of including the value thresholds in the penalty provision.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

(2) *The CCRC recommends relabeling the revised statute's gradations to make "first degree" rather than "aggravated" the most serious gradation, and adding an additional "fifth" degree as the least serious gradation.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

RCC § 22E-2403. Alteration of a Motor Vehicle Identification Number.

(1) *PDS, App. C at 80, recommends amending the alteration of a motor vehicle identification number (AVIN) offense gradations to clarify that when the accused intends to conceal or misrepresent the identity of a motor vehicle part, only the value of the part should be used to determine grading, not the value of the car as a whole. PDS does not specify any particular statutory language in conjunction with its recommendation.*

- The RCC incorporates this recommendation by using the word "such" in the phrase "the value of such motor vehicle or motor vehicle part" to indicate that the relevant value (whether of the part or vehicle as a whole) depends on the prior subsection (b) reference to whether conduct was with intent to conceal the identity of the part or the vehicle. Also, the commentary has been updated to clarify that for grading purposes, when the accused had intent to conceal or misrepresent the identity of a motor vehicle part, the value of the part shall be used to determine grading. The value relevant to gradation should be based on the unit—whether a part or whole of a motor vehicle—that the altered identification number was intended to conceal.
- This revision may change District law, as described in the commentary. This change clarifies and may improve the proportionality of the revised statute.

(2) *PDS, App. C at 80-81, comments that the value threshold for the prior draft first degree AVIN is too low. PDS notes that with a $1,000 value threshold, "almost all alteration of VINs would be charged as a first degree offense and second degree altering a vehicle identification number would only be available after a plea."*

- The RCC incorporates this recommendation by raising the threshold value for first degree AVIN to $2,500. This valuation aligns the AVIN statute with the revised theft, criminal damage to property, receiving stolen property and other offenses' gradations. Although the vast majority motor vehicles are valued at more than $2,500, many motor vehicle parts have a value of less than $1,000.
- This revision changes District law, as described in the commentary. This change improves the proportionality of the revised statute.

(3) *The CCRC recommends reorganizing the revised statute to include all elements in each gradation of the offense, instead of including elements in the penalty provision.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

RCC § 22E-2404. Alteration of Bicycle Identification Number.

[No Advisory Group comments received.]

RCC § 22E-2501. Arson.

(1) *PDS, App. C 76-77, objects to the "knowingly" culpable mental state and the elimination of mitigation in the RCC arson statute because it says this is a "significant lowering of the mental state for arson." PDS recommends either using the culpable mental state "purposely," or using "knowingly" but requiring the "absence of all elements of justification, excused or recognized mitigation."*

- The RCC does not incorporate PDS's recommendation because it may narrow liability for arson in a manner that is disproportionate. The current arson statute requires a culpable mental state of "malice" which the DCCA has stated "blends the Model Penal Code's 'knowingly' and 'recklessly' states of mind."[1] The RCC accordingly creates a revised arson offense requiring knowledge and a reckless burning statute that requires recklessness. The RCC framework effectively splits the one current arson statute into two offenses, one somewhat narrower, one somewhat broader. Permitting special mitigation defenses for arson or destruction of property would be inconsistent with other RCC (and other current D.C. Code) non-homicide offenses, and national norms.[2]

(2) *PDS, App. C at 77, objects to including a "business yard" in the revised arson statute because "it does not make sense to criminalize causing damage to land that happens to be securely fenced" and "there is no reason to distinguish between starting a fire that damages goods stored in a business yard and goods that happen to be within a fenced area but not for sale, or goods for sale but stored momentarily in an open parking lot."*

- The RCC incorporates PDS's recommendation by eliminating the reference to a business yard[3] from arson. The prior draft revised arson statute included in its lowest gradation a "dwelling, building, business yard, watercraft, or motor vehicle." The current D.C. Code arson statute does not refer to a business yard. A fire or explosion at a business yard does not pose the same risk to human life that a fire or explosion poses at a dwelling or building. Instead of liability for starting a fire in a business yard as arson, the revised criminal damage to property statute criminalizes property damage to a business yard, and, if there is injury to another

[1] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[2] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 10.4 (2d ed.) ("Outside of homicide law, the concept of [mitigation] doesn't [really] exist."); John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 404 n. 573 (1986) (rejecting the argument of R. Perkins & R. Boyce that a mitigated burning should not be arson and stating that "why should the rule of provocation be applied outside the law of homicide? I find neither history nor policy which supports the application of the rule of provocation to arson."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1041, n.52 (2011) (categorically stating that "[p]rovocation is available as a partial defense only to murder" and that it is not "a defense, partial or otherwise" to non-homicide offenses, but noting that a "small number of jurisdictions allow a provocation-style defense for offenses other than murder, but to our knowledge this is not the case in any U.S. jurisdiction with common law provocation.").

[3] In RCC § 22E-701, "business yard" is a defined term which means "securely fenced or walled land where goods are stored or merchandise is traded.").

person, there may be liability under an RCC offense against person such as assault.

- This revision does not change current District law. This revision improves the consistency and proportionality of the revised statute.

(3) *PDS, App. C at 077, states that the term "watercraft" is too broad because it "includes canoes and rubber rafts, particularly a raft fitted for oars." PDS recommends defining "watercraft" so that it is restricted to vessels that are not human-propelled.*

- The RCC does not incorporate PDS's recommendation because, as is discussed below in Item #6, the revised arson statute no longer includes "watercraft." Watercraft are only included in the revised arson statute if they satisfy the definition of "dwelling" in RCC § 22E-701; otherwise, damaging or destroying a watercraft is covered by the revised criminal damage to property offense.

(4) *PDS, App. C at 77, recommends preserving current District law and requiring in the revised arson statute that the building, business yard, etc., be "of another." PDS states that that damaging one's own dwelling, building, etc., should be criminalized as reckless burning and not arson.*

- The RCC does not incorporate PDS's recommendation because it may lead to disproportionate penalties. The revised arson statute requirements ensure that the revised arson offense is focused on the danger to human life, as it is under current District law, instead of property rights. As such, the ownership of the property is irrelevant. A person who knowingly starts a fire in a home they own, reckless that someone else is in the home, is as culpable as a stranger doing so to a home they don't own. The lower penalties for reckless burning may be insufficient for such conduct.

(5) *PDS, App. C at 77, recommends requiring (for what is now third degree arson) that the amount of damage is $2,500 or more and adding a fourth degree misdemeanor gradation for committing arson.*

- The RCC does not incorporate PDS's recommendation because it would cause unnecessary overlap between criminal offenses. The revised arson statute is limited to damaging or destroying a building or dwelling in specified circumstances because of the special nature of these properties, not their monetary value. Damaging these properties outside of the circumstances required in the revised arson statute is criminalized in the RCC criminal damage to property statute.

(6) *The CCRC recommends deleting specific reference to "watercraft" and "motor vehicle" from the revised arson statute. The prior draft revised arson statute included in its lowest gradation a "dwelling, building, business yard, watercraft, or motor vehicle." The current D.C. Code arson statute refers, in relevant part, to "any steamboat, vessel, canal boat, or other watercraft…".*[4] *In the revised arson statute, damaging or destroying watercraft and motor vehicles that satisfy the RCC definition of "dwelling" in RCC § 22E-701 is still included, but other*

[4] D.C. Code § 22-301.

watercraft and motor vehicles do not pose the same risk of harm to human life and so do not merit the same level of criminalization. Damaging or destroying watercraft and motor vehicles that do not satisfy the RCC definition of "dwelling" is criminalized by the RCC criminal damage to property statute.

- This revision changes current District law, as described in the commentary. This revision improves the proportionality of the revised statute.

(7) *The CCRC recommends reorganizing the revised statute to include all elements in each gradation of the offense, instead of including elements in the penalty provision.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

(8) *The CCRC recommends relabeling the revised statute's gradations to make "first degree" rather than "aggravated" the most serious gradation, and labeling the remaining gradations accordingly, so the least serious gradation is "third degree."*

- This revision does not further change District law. This change improves the clarity of the revised statute.

RCC § 22E-2502. Reckless Burning.

(1) *PDS, App. C at 78, objects to including a "business yard" in the revised reckless burning statute because "it does not make sense to criminalize causing damage to land that happens to be securely fenced" and "there is no reason to distinguish between starting a fire that damages goods stored in a business yard and goods that happen to be within a fenced area but not for sale, or goods for sale but stored momentarily in an open parking lot."*

- The RCC incorporates PDS's recommendation by eliminating reference to a business yard[1] from reckless burning. The prior draft revised reckless burning statute included a "dwelling, building, business yard, watercraft, or motor vehicle." The current D.C. Code arson statute does not refer to a business yard. A fire or explosion at a business yard does not pose the same risk to human life that a fire or explosion poses at a dwelling or building. Instead of criminalizing the burning of a business yard as reckless burning, the revised criminal damage to property statute criminalizes property damage to a business yard, and if there is injury to another person, there may be liability under an RCC offense against person such as assault.
- This revision does not change current District law. This revision improves the consistency and proportionality of the revised statute.

(2) *PDS, App. C at 78, states that the term "watercraft" is too broad because it "includes canoes and rubber rafts, particularly a raft fitted for oars." PDS recommends defining "watercraft" so that it is restricted to vessels that are not human-propelled.*

- The RCC does not incorporate PDS's recommendation because, as is discussed below in Item #4 the revised reckless burning statute no longer includes "watercraft." Watercraft are only included in the revised reckless burning statute if they satisfy the definition of "dwelling" in RCC § 22E-701; otherwise, damaging or destroying a watercraft is covered by the revised criminal damage to property offense.

(3) *PDS, App. C at 78, recommends a first degree gradation of the reckless burning statute be added that pertains to the building, business yard, etc., "of another." PDS recommends a second degree gradation of the reckless burning statute address property regardless of ownership (including one's own property).*

- The RCC does not incorporate PDS's recommendation because it may lead to disproportionate penalties. The revised reckless burning statute requirements ensure that the revised offense is focused on the danger to human life instead of property rights, as is the current arson offense. As such, the ownership of the property is irrelevant. A person who recklessly starts a fire in a home they own is as culpable as a stranger doing so to a home they don't own. Lower penalties for reckless burning of one's own property may be insufficient for such conduct.

[1] In RCC § 22E-701, "business yard" is a defined term which means "securely fenced or walled land where goods are stored or merchandise is traded.").

(4) *The CCRC recommends deleting specific reference to "watercraft" and "motor vehicle" from the revised reckless burning statute. The prior draft revised reckless burning statute included a "dwelling, building, business yard, watercraft, or motor vehicle." The current D.C. Code arson statute refers, in relevant part, to "any steamboat, vessel, canal boat, or other watercraft…".*[2] *In the revised reckless burning statute, damaging or destroying watercraft and motor vehicles that satisfy the RCC definition of "dwelling" in RCC § 22E-701 is still included, but other watercraft and motor vehicles do not pose the same risk of harm to human life and so do not merit the same level of criminalization. Damaging or destroying watercraft and motor vehicles that do not satisfy the RCC definition of "dwelling" is criminalized by the RCC criminal damage to property statute.*

- This revision changes current District law, as described in the commentary. This revision improves the proportionality of the revised statute.

[2] D.C. Code § 22-301.

RCC § 22E-2503. Criminal Damage to Property.

(1) *PDS, App. C at 78 recommends the revised statute either use the culpable mental state "purposely," or a "knowingly" culpable mental state plus the absence of all elements of justification, excuse, or recognized mitigation. PDS says that the prior draft recommendation for revision of the offense "significantly and unjustifiably lowers the mental state that currently explicitly applies to the offense, thereby greatly expanding the conduct criminalized by the offense."*

- The RCC does not incorporate PDS's recommendation because it may narrow liability for destruction of property in a manner that is disproportionate. The current malicious destruction of property statute requires a culpable mental state of "malice," which the DCCA has stated "blends the Model Penal Code's 'knowingly' and 'recklessly' states of mind."[1] The RCC accordingly revised the destruction of property offense to require knowledge for higher gradations, with more serious penalties, and recklessness for lower gradations, with less serious penalties. The RCC framework effectively splits the current "malice" requirement among the closest standard culpable mental state requirements. Permitting special mitigation defenses for arson or destruction of property would be inconsistent with other RCC (and other current D.C. Code) non-homicide offenses, and national norms.[2]

(2) *PDS, App. C at 78-79, recommends requiring a reckless culpable mental state instead of strict liability for the fact that the property is a "cemetery, grave, or other place for the internment of human remains" (now third degree criminal damage to property) and for the fact that the property is a "place of worship or a public monument" (now third degree criminal damage to property). PDS states that "[a]n object weathered and worn down over time may not appear to be grave marker" and that "[a] building with a façade of a residence or a business may be used as a place of worship but because of the façade, will not appear to be a place of worship."*

- The RCC does not incorporate PDS's recommendation because it may narrow liability for destruction of property in a manner that is disproportionate. An individual that is subject to these particular penalty gradations has already knowingly committed criminal damage to property,

[1] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[2] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 10.4 (2d ed.) ("Outside of homicide law, the concept of [mitigation] doesn't [really] exist."); John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 404 n. 573 (1986) (rejecting the argument of R. Perkins & R. Boyce that a mitigated burning should not be arson and stating that "why should the rule of provocation be applied outside the law of homicide? I find neither history nor policy which supports the application of the rule of provocation to arson."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1041, n.52 (2011) (categorically stating that "[p]rovocation is available as a partial defense only to murder" and that it is not "a defense, partial or otherwise" to non-homicide offenses, but noting that a "small number of jurisdictions allow a provocation-style defense for offenses other than murder, but to our knowledge this is not the case in any U.S. jurisdiction with common law provocation.").

the gravamen of the offense. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[3] Practically, virtually all places of burial, buildings of worship, and public monuments are readily recognizable.

(3) *The CCRC recommends specifying in all gradations of CDP that the defendant must act without the effective consent of "an owner." The prior RCC draft recommendation referred to action without the consent of "the owner." This revision clarifies that liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC and means "a person holding an interest in property with which the actor is not privileged to interfere without consent."[4] Any actor commits CDP if he or she damages or destroys property of another (i.e. property that the actor lacks a privilege to interfere with without consent) without the consent of an owner (i.e. a person, possibly even a co-owner, who has an interest in the property that the actor lacks the privilege to interfere with without consent) and meets the other statutory elements of the offense.*

- This revision does not change current District law. This revision improves the clarity of the revised statute.

(4) *The CCRC recommends reorganizing the revised statute to include all elements in each gradation of the offense, instead of including elements in the penalty provision.*

- This revision does not further change District law. This change improves the clarity of the revised statute.

(5) *The CCRC recommends relabeling the revised statute's gradations to make "first degree" rather than "aggravated" the most serious gradation, and labeling the remaining gradations accordingly, so the least serious gradation is "fifth degree."*

- This revision does not further change District law. This change improves the clarity of the revised statute.

[3] *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).").

[4] RCC § 22E-701.

RCC § 22E-2504. Criminal Graffiti.

(1) *OAG, App. C at 58-59, comments that there is no need for the element "is visible from a public right-of-way" because graffiti that is not visible from a public right-of-way "has caused just as much damage" as graffiti that is so visible. In addition, OAG states that including this element may affect the availability of graffiti as a plea down offense.*

- The RCC addresses the OAG comment by removing the visibility from a public right-of-way requirement. This requirement, which currently is codified in the definition of "graffiti" in D.C. Code § 22-3312.05(4), appears to be left over from an abatement of graffiti statute which has been repealed.[1]
- This revision changes current District law, as described in the updated commentary. This revision improves the consistency of the revised criminal graffiti statute with the revised criminal damage to property offense, which only requires that the property be "property of another."

(2) *OAG, App. C, at 59, recommends deleting from the revised criminal graffiti statute subsection (e), the parental liability provision. OAG states that the provision is unnecessary and potentially confusing because D.C. Code § 16-2320.01 "authorizes the court to enter a judgment of restitution in any case in which the court finds a child has committed a delinquent act and it also provides*

[1] 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.

that the court may order the parent or guardian of a child, a child, or both to make such restitution." In addition, OAG states that "there are no fine provisions contained in the juvenile disposition (sentencing) statute and, so, the court would never be in a position to require parents and guardians to be responsible for its payment [citing to D.C. Code § 16-2320]."

- The RCC addresses OAG's recommendation by removing subsection (e) from the prior draft.
- This revision changes current District law, as described in the commentary. This revision improves the clarity of the revised statute and removes unnecessary overlap with other penalty provisions in the D.C. Code.

(3) *PDS, App. C at 79 recommends eliminating the mandatory restitution provision (subsection (d)) and the parental liability provision (subsection (e)) from the prior RCC draft recommendation. PDS says that "[r]equiring restitution from individuals and families that cannot afford to pay it is a waste of judicial resources" because "most such orders" would be "unenforceable."*

- The RCC incorporates PDS's recommendation by removing subsections (d) and (e) from the prior draft recommendation. As OAG stated in its written comments, discussed above in Item #2, D.C. Code § 16-2320.01 authorizes the court to enter a judgment of restitution in juvenile cases and authorizes the court to order the parent or guardian of a child, a child, or both, to make restitution. D.C. Code § 16-2320.01 renders both the mandatory restitution provision (subsection (d)) and the parental liability provision (subsection (e)) in the revised criminal graffiti statute unnecessary with respect to juveniles. With respect to adults, D.C. Code § 16-711 provides judicial authority for (but does not require) ordering restitution. The general provision in RCC § 22E-602 also recognizes this general authority to order restitution.
- This revision changes current District law, as described in the commentary. This change improves the clarity of the revised statute and removes unnecessary overlap with other penalty provisions.

(4) *The CCRC recommends specifying in the revised criminal graffiti offense that the defendant must act without the effective consent of "an owner." The prior RCC draft recommendation referred to action without the consent of "the owner." This revision clarifies that liability extends to situations where there are multiple owners of the property, and includes liability for one owner's wrongful action against another owner. "Owner" is a defined term in the RCC and means "a person holding an interest in property with which the actor is not privileged to interfere without consent."[2] Any actor commits graffiti if he or she places an inscription, etc. on property of another (i.e. property that the actor lacks a privilege to interfere with without consent) without the consent of an owner (i.e. a person, possibly even a co-owner, who has an interest in the property that the*

[2] RCC § 22E-701.

actor lacks the privilege to interfere with without consent) and meets the other statutory elements of the offense.

- This revision does not change current District law. This revision improves the clarity of the revised statute.

RCC § 22E-2601. Trespass.

(1) *PDS, App. C at 81, recommends eliminating the permissive inference or, if the permissive inference is retained, requiring that all signage be "visible* prior to *or* outside of *the point of entry."*

- The RCC partially incorporates this recommendation by adding the language "visible prior to or outside the location's points of entry." The permissive inference is retained, however, the revised statute now also specifies that the protected area must be vacant and show signs of forced entry.[176]
- This revision changes District law as described in the commentary. This change clarifies the revised statute and may ensure its constitutionality.

(2) *PDS, App. C at 81, recommends treating partial entry of a location, e.g. trying to squeeze under a chain link fence, as an attempted trespass rather than a completed trespass.*

- The RCC does not incorporate this recommendation because it would create a gap in liability. The commentary to the revised trespass statute states that the statute does not require complete or full entry of the body, and evidence of partial entry of the body or a camera, microphone, or other instrument held by an actor is sufficient proof for a completed trespass. Unlike the RCC burglary statute's more severe penalties and potential for harm to another person or property, the harm of the RCC trespass offense is the bare violation of property rights, and there is no lower crime that would account for the behavior. While attempt liability may capture many intrusions into one's property that don't involve one's full body, such liability would effectively decriminalize many other such intrusions.[177]

(3) *PDS, App. C at 81, recommends adding to the statutory language "A person who has been asked to leave the premises must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass," for the clarity of judges and practitioners.*

- The RCC partially incorporates this recommendation by further clarifying in commentary that the voluntariness provision in the RCC's general part (RCC § 22E-203) requires that a person must have a reasonable opportunity to leave a location after being asked to leave.
- This revision to the commentary does not change District law and clarifies

[176] This narrowing better ensures that it is "more likely than not" that the accused is acting without the effective consent of an occupant or owner. Absent evidence of forced entry, any repair person, real estate agent, or owner in the property would be subject to arrest under the permissive inference, whenever a "no trespassing" sign is displayed. *See Leary v. United States*, 395 U.S. 6 (1969); *Reid v. United States*, 466 A.2d 433, 435–36 (D.C. 1983).

[177] Were a completed trespass to require full bodily entry into a location, proof of an attempted trespass would then require proof that a person acted with intent to enter with their full body. Yet, a minimal intrusion with a body part or device may be committed with no intent to enter with one's full body. Reaching into a motor vehicle or through an open window to touch an object would not constitute an attempted trespass or, without more, any other crime.

the revised commentary.

(4) *PDS, App. C at 81-82, recommends amending the phrase "without the effective consent of* the *occupant, or if there is no occupant,* the *owner," to read "without the effective consent of* an *occupant, or if there is no occupant,* an *owner," to ensure roommates, cohabiting spouses, business co-tenants, and guests of co-tenants are not subject to arrest for trespass.*

- The RCC partially incorporates this change by amending the phrase "without the effective consent of the occupant, or if there is no occupant, the owner," to read "without a privilege or license to do so under civil law." Through the language "privilege or license to do so under civil law," the revised statute relies upon a civil law determination of who has a right to access a location, and with whose permission. In some instances, civil laws may provide that the guest of a co-tenant is a trespasser, whereas in other instances, civil laws may provide that the guest of a co-tenant has a right to remain.[178]
- This revision may change District law as described in the commentary. This change clarifies and improves the consistency of the revised statute.

(5) *PDS, App. C at 82, recommends adding a provision clarifying that the offense excludes liability for First Amendment activity.*

- The RCC incorporates this recommendation by adding an exclusion from liability provision that refers to the U.S. Constitution as well as the District's First Amendment Assemblies Act of 2004 and Open Meetings Act. This language provides notice to the public and criminal justice system actors that a person cannot be barred from a traditional public forum without lawful justification.
- This revision does not change District law. This change clarifies the revised statute and may ensure the constitutionality of the statute as applied.

(6) *The CCRC recommends reclassifying trespass onto land, a watercraft or a motor vehicle as Third Degree Trespass and not separately codifying a revised Trespass of a Motor Vehicle offense.*

- This revision changes current District law as described in the revised commentary. This change improves the proportionality and logically reorganizes revised statutes.

(7) *The CCRC recommends codifying the proof requirements in cases alleging trespass into public housing. Where the government seeks to prove unlawful entry premised on a violation of a DCHA barring notice, it must prove that the barring notice was issued for a reason described in DCHA regulations and must offer evidence that the DCHA official had an objectively reasonable basis for*

[178] Compare, for example, a roommate who bars another roommate's paramour from a shared apartment with a parent who bars a teenage child's paramour from a shared apartment. *See also 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, absent a "private necessity" or other defense).

believing that the criteria identified in the relevant regulation were satisfied.[179]

- This revision better aligns the revised statute with current District law. The change improves the clarity and completeness of the revised statute.

(8) *The CCRC recommends excluding from trespass liability conduct that violates D.C. Code § 35-252. The recently passed Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592) contains such an exclusion for the current unlawful entry statutes.*

- This revision does not change current District law. This change improves the clarity and completeness of the revised statute.

(9) *The CCRC recommends clarifying in commentary that the phrase "or part thereof" is intended to make clear that effective consent to enter one part of a parcel, building, or vehicle may not amount to effective consent to enter another area in the same location. 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.*

- This revision does not further change current District law. This change clarifies the revised statute.

(10) *The CCRC recommends amending the right to a jury trial to include all government buildings and public housing, in light of First Amendment and other constitutional considerations.*[180] *The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.*[181]

- This revision changes District law as described in the commentary. This change improves the consistency of revised statutes.

(11) *Comments concerning typographical errors are incorporated.*

[179] *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).

[180] Buildings that are owned or operated by the government are often the site of protests of government action (or inaction). Barring a person from public housing may implicate that person's right to freedom of movement, freedom of intimate association, and equal protection.

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

RCC § 22E-2701. Burglary.

(1) *PDS, App. C at 82-83, recommends amending the phrase "without the effective consent of* the *occupant, or if there is no occupant,* the *owner," to read "without the effective consent of* an *occupant, or if there is no occupant,* an *owner," and explaining in commentary that an equal occupant of a location cannot be convicted of burglary. PDS says these changes would address the rights of joint occupants.*

- The RCC partially incorporates this recommendation by revising the statute to pertain to entry or remaining in any location "without a privilege or license to do so under civil law." The PDS comment raised a hypothetical of a co-tenant who, after being told to leave an apartment by a roommate (without lawful authority to do so), returns with intent to steal a television in the apartment. PDS states that this conduct should constitute only theft, not burglary, given that the individual had authority to enter the residence. The RCC's use of "without a privilege or license to do so under civil law" would similarly exclude liability for burglary, if (as per the hypothetical) the co-tenant had authority to enter in this instance. However, the particular facts of a case are critical to determining whether a joint occupant has a legal lawful right or privilege to enter, and thus whether the particular location is "without a privilege or license to do so under civil law" and subject to a burglary charge. Whether or not an actor has a privilege or license to be in a location is a matter of civil law,[182] and must account for a wide-variety of factors such as actual use (e.g. a bedroom used exclusively by a co-tenant as compared to a common kitchen), relationship of the actor and complainant (e.g. a parent to their child as compared to a host to their guest), or the existence of a civil protection order. Like the RCC trespass statute, the revised burglary statute depends on civil law to determine whether a person's presence in the location is lawful, and only if it is not lawful is criminal liability possible (depending on whether the other offense elements are met).
- This revision changes District law as described in the commentary. This change clarifies and improves the proportionality of the revised statute.

(2) *PDS, App. C at 83, recommends requiring for completed burglary liability that the actor fully enter the location, excluding fact patterns such as someone reaching a hand through a window or putting a stick through a chain link fence to extract an item. PDS says such partial entry poses a lesser danger than full entry and is better treated as an attempted burglary.*

- The RCC incorporates this recommendation by revising the statutory text to require that a person "fully" enters or surreptitious remains in a location. 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

[182] Civil law here encompasses contract, housing, family, and other non-criminal branches of law.

caught on top of a fence to a business yard) or be subject to liability as an attempt or completed form of the predicate crime (e.g. theft, where a person reaches through a window to take an object from a building). In either case, criminal liability would exist under the RCC. However, the additional penalties associated with a completed burglary would not be available because the partial entry does not create a substantially greater risk of harm to another person or property at the location, nor pose the same violation of expectations of privacy.

- The revision changes District law[183] as described in the commentary. This change clarifies and improves the proportionality of the revised statute.

(3) *PDS, App. C at 83, recommends requiring a reckless mental state as to whether the location is occupied.*

- The RCC incorporates this change by revising the statute and commentary to require recklessness, instead of strict liability, as to the presence of another person in the location in first degree burglary (with respect to a dwelling) and second degree burglary (with respect to a building). A person who is not at least reckless as to the presence of others in a location will remain liable for burglary, but will be subject to a lower penalty. This change improves the proportionality of the revised offense and its consistency with the RCC arson offense.[184]
- This change clarifies the revised statute and may change District law.[185]

(4) *OAG, App. C at 67, recommends amending the revised statute to clarify that a houseboat is a dwelling for purposes of the revised burglary statute.*

- The RCC partially incorporates this change by revising the commentary to clarify that a dwelling includes houseboats. Further statutory clarification appears to be unnecessary, however. In RCC § 22E-701, "dwelling" is defined as, "a structure that is either designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each individual unit is a dwelling."
- This revision to the commentary does not change District law. This change clarifies the revised statute.

(5) *OAG, App. C at 67, recommends amending the statute to state that should the person enter a dwelling dragging a victim behind, the dwelling is considered occupied.*

- The RCC incorporates this change by revising the statute and commentary to provide higher penalties for burglary of a dwelling or building when "a person who is not a participant in the burglary is inside *or is entering with* the actor…" (emphasis added). The CCRC agrees with OAG that there is

[183] *See Edelen v. United States*, 560 A.2d 527, 530 (D.C. 1989); *Davis v. United States*, 712 A.2d 482, 485 (D.C. 1998).
[184] RCC § 22E-2501.
[185] Current D.C. Code § 22-801 elevates a burglary to first degree "if any person is in any part of such dwelling or sleeping apartment at the time." The DCCA has not considered or decided whether a defendant is strictly liable as to the location being occupied.

no meaningful distinction in seriousness between pushing another person across the threshold first into a dwelling, a fact pattern recognized in case law as sufficient to prove a location is occupied,[186] and the actor first stepping over the threshold and pulling another person behind them into the location. The CCRC notes, however, that fact patterns that involve the nonconsensual forcing of someone into a dwelling or building in order to facilitate commission of a crime may more appropriately be charged under the RCC's criminal restraint or kidnapping statutes.

- This revision changes District law as described in the commentary. This change clarifies and reduces a possible gap in the revised statute.

(6) *The CCRC recommends limiting the target crimes within the scope of the burglary statute to District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property. Without any limitation, burglary charges potentially could be brought against an individual acting with intent to violate a federal drug[187] or regulatory crime, or to engage in District crimes such as unlawful demonstration[188] or aggressive panhandling.[189] However, the more serious penalties associated with burglary should not be available when a person's criminal intent did not pertain to conduct that could create a substantially greater risk of harm to another person or property at the location. Notably, such a limitation on burglary is in accord with many or most other jurisdictions[190] and at least one D.C. Circuit Court opinion.[191]*

- This revision may constitute a change of District law. This change improves the clarity and proportionality of the revised statute.

(7) *The CCRC recommends removing as a possible location where burglary can occur a watercraft that does not constitute a dwelling. The current District statute includes in second degree burglary a "steamboat, canalboat, vessel, or other watercraft,"[192] and the prior RCC draft included in its gradations a "watercraft" generally. However, many watercraft (e.g. rubber boats, canoes, and small sailboats) are open and accessible or have a small windowed enclosure similar to a car. Such watercraft pose neither the same danger of isolation and an inability to escape an intruder nor the same expectation of privacy as securely walled or fenced business yards, buildings, or dwellings. Such watercraft, therefore, should not be categorically included in the burglary statute, like bicycles, motorbikes, automobiles, and trucks. Where a watercraft, nonetheless is*

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[186] *Edelen v. United States*, 560 A.2d 527, 529 (D.C. 1989).
[187] E.g., obtaining possession of marijuana, in violation of 21 U.S.C. § 844.
[188] RCC § 22E-4204.
[189] D.C. Code § 22-2302.
[190] *See* § 21.1(e), Intent to commit a felony, 3 Subst. Crim. L. § 21.1(e) (3d ed.) (listing 4 states that limit burglary liability to felonies alone, 13 states that limit burglary to felonies or some form of theft, 7 states that limit burglary to felonies, theft, or assault, and 3 states that limit burglary to an offense against person or property.
[191] *See, e.g., United States v. Frank*, 225 F. Supp. 573, 575 (D.D.C 1964) (reversing a conviction for burglary predicated on intent to violate of 47 U.S.C. § 301, operating a radio apparatus without a station license).
[192] D.C. Code § 22-801(b).

a dwelling, either by design or use, the watercraft is within the scope of the revised statute (again, similar to motor vehicles). Intrusions into a non-dwelling watercraft may still be subject to prosecution as trespassing or, depending on the crime intended therein, attempted theft, attempted robbery, etc.

- This revision changes District law as described in the commentary. This change clarifies and reduces unnecessary overlap in the revised statutes.

(8) *The CCRC recommends limiting liability for second degree burglary in a building to locations where "a person who is not a participant in the burglary is inside and perceives the actor or is entering with the actor." There is a significantly reduced expectation of privacy in buildings outside their homes and whether there is any greater risk from isolation with the intruder varies greatly depending on the physical location. For example, a burglar entering an office building entryway with intent to steal a package poses only a minor risk to a cleaning crew on the fifth floor. This provision requires the actor to be in the vicinity of the occupant such that, by sight or sound, he or she is directly perceived. Burglaries of buildings in which no occupant perceives the actor remain criminalized as third degree.*

- This revision changes District law as described in the commentary. This change clarifies and improves the proportionality of the revised statute.

(9) *The CCRC recommends specifically excluding liability for burglary from locations which are "open to the general public at the time of the offense." The revised offense requires that the location be "without a privilege or license to do so under civil law." Typically, such a privilege or license will exist in a location that is "open to the general public" at that time, a defined term in the RCC that means "no payment or permission is required to enter."*[193] *However, this provision clearly exempts from burglary liability intrusions into a location open to the public at that time with intent to commit a crime—e.g., a person entering a drug store during business hours with intent to shoplift an item. There is no significant expectation of privacy in such locations and providing burglary penalties for all thefts or shoplifting from a public area of an open commercial store may be disproportionate.*

- This revision changes District law as described in the commentary. This change clarifies and improves the proportionality of the revised statute.

(10) *Comments concerning typographical errors are incorporated.*

[193] RCC § 22E-701.

RCC § 22E-2702. Possession of Tools to Commit Property Crime.

(1) *OAG, App. C at 67, recommends expanding the offense to include tools designed or specifically adapted for cutting glass.*

- The RCC incorporates this change by adding the phrase "cutting glass" to the statutory text.
- This revision changes District law as described in the commentary. This change improves the completeness of the revised offense.

(2) *The CCRC recommends limiting 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 narrowly to possessing a tool "for picking locks or pockets" with intent to commit "a crime" without specification. By requiring intent to commit a specified type of property crime, the revised offense logically connects the type of tool with the crime involved—e.g., an illegal entry, misuse of a security system, taking of a lock, or damage to a window.*

- This revision changes District law as described in the commentary. This change clarifies and removes a possible gap in the revised offense.

(3) *Comments concerning typographical errors are incorporated.*

RCC § 22E-3401. Escape from a Correctional Facility or Officer.

(1) *PDS, App. C at 201, recommends defining "custody" as "Lawful custody exists where a law enforcement officer has completed an arrest, substantially physically restrained a person, or where the person has submitted to a lawful arrest."*
- The RCC incorporates this recommendation by codifying a definition of custody based on DCCA case law cited by PDS, although the language differs slightly from that recommended by PDS.
- This revision does not change District law. This change clarifies the revised statute.

(2) *PDS, App. C at 202, recommends that the offense be rewritten to clarify that a person escapes the "custody" of a law enforcement officer and escapes the "confinement" of a correctional facility.*
- The RCC partially incorporates this recommendation by referring to the facility itself in subsection (a) and subsection (c).
- This revision does not change District law. This change clarifies the revised statute.

(3) *PDS, App. C at 202, recommends grading escape from the custody of a law enforcement officer as second degree escape so that the conduct is punished less severely than escape from an institution.*
- The RCC partially incorporates this recommendation by creating three offense gradations: escaping the confinement of an institution, escaping the lawful custody of a police officer, and failing to return or report to an institution. The potential risk to public safety is high in both escapes from officers and institutions.
- This revision substantively changes current District law. This change improves the proportionality of the revised offenses.

(4) *PDS, App. C at 202, recommends repealing the consecutive sentencing provision, to maximize judicial discretion. PDS also seeks clarification as to whether the consecutive sentencing provision would apply to a person who escapes from an officer on the street, while serving a probationary sentence.*
- The RCC partially incorporates this recommendation by limiting the consecutive sentencing provision to persons who are serving a sentence of secure confinement at the time of the escape. This change appears to better align the RCC consecutive sentencing with current law. The current D.C. Code provision on consecutive sentencing for escape refers to being: "imprisoned not more than 5 years, or both, said sentence 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." While the statute is not entirely clear, and there is no controlling case law, it appears that the consecutive sentencing provision applies only to persons who have been sentenced or convicted, and who at the time are a "prisoner."
- This revision does not change District law. This change clarifies the revised statute.

(5) *OAG, App. C at 209, recommends specifically stating in the revised statute that a person commits escape if she is "committed to the Department of Youth Rehabilitation Services and is placed in a correctional facility." OAG states: "Unlike when a person is detained in adult cases or in pre-adjudicated juvenile cases, a juvenile who is committed to the Department of Youth Rehabilitation Services (DYRS) is not detained, 'subject to a court order' nor is a DYRS staffer or contractor necessarily a 'law enforcement officer' of the District of Columbia. While in a disposition hearing, a judge may commit a juvenile to DYRS, the judge does not have the authority to order that the respondent be confined. The confinement decision for juveniles is vested solely in DYRS." OAG also cites to legislative history, referring to an earlier District escape statute, which says: "A court order committing a youth to DYRS is not a court order to confine that person in an institution or facility."*

- The RCC partially incorporates this recommendation. The revised definition of "law enforcement officer" is amended to include DYRS employees. OAG is correct that a juvenile commitment order is not a court order to confine, however, the CCRC believes that a juvenile commitment order (much like an adult commitment order) is "a court order that *authorizes* the person's confinement in a correctional facility" or elsewhere. The commentary provides: The word "authorizing" makes clear that an order permitting a custodial agency[194] to choose either a secured or unsecured residential placement is sufficient.[195]
- This revision to the commentary does not change District law. This change clarifies the revised statute.

(6) *OAG, App. C at 211, recommends amending the statutory definition of "correctional facility" to include DYRS congregate care facilities, such as shelter houses and group homes. OAG recommends the amended language refer to "hardware secure or staff secure" confinement.*

- The RCC does not incorporate this recommendation because the offense definition has been changed in another way, addressed immediately below, that renders the recommendation inapplicable. Specifically, the revised escape offense no longer categorically includes juvenile correctional facilities.

(7) *The CCRC recommends including secure juvenile facilities and excluding unsecured juvenile facilities from the scope of the offense. Unlike current D.C. Code § 22-2601(a)(3), the revised statute makes liability for escape from a juvenile facility depend on whether the facility is a secure facility, not whether the placement is or is not post-commitment. The revised offense includes liability for escapes from all secure juvenile facilities, including YSC pre-adjudication, and so expands liability as compared to current D.C. Code § 22-2601(a)(3). On the*

[194] E.g., Department of Corrections, Bureau of Prisons, United States Parole Commission, Department of Youth Rehabilitation Services.

[195] 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.

other hand, the revised statute excludes escapes from unsecured congregate care placements such as group homes, even when they are a post-commitment placement, narrowing liability as compared to current D.C. Code § 22-2601(a)(3). Current D.C. Code § 22-2601(a)(1) does not appear to address juvenile facilities at all.[196] *Distinguishing criminal liability based on the security of the facility better reflects the seriousness of possible dangers that may arise from an escape, to the juvenile and others. The exclusion of criminal liability for escape from a non-secure juvenile facility does not mean that there is no consequence to such action. Even where a child leaves or fails to return to a placement in a physically unrestricting facility, the child will be subject to arrest*[197] *and, if appropriate, court and administrative sanctions.*[198] *However, the child will not be subject to additional prosecution*[199] *or a record of adjudication*[200] *based solely on the escape conduct. In many instances, the purposes of the juvenile justice system may be undermined by prosecuting an escape from a shelter house or group home.*[201]

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[196] Current D.C. Code § 22-2601(a)(1) prohibits escape from "any penal or correctional 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." The plain language appears to indicate that "penal or correctional" modifies both "institution" and "facility." If the statute intended to cover all "facilities," the phrase "penal or correctional institution"—a subset of facilities—would be superfluous. DCCA case law has held that, in addition to the Central Detention Facility ("D.C. Jail"), the phrase "any penal or correctional institution or facility" also includes the District's halfway houses. *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). Case law is silent as to whether any other locations qualify. *See Davis v. United States*, 166 A.3d 944, 945 (D.C. 2017) (discussing legislative history). However, shelter houses and group homes are not considered penal or correctional in nature in other provisions of the D.C. Code. *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. Additionally, the omission of the words "penal or correctional" from paragraph (a)(3) of the current statute is some evidence that paragraph (a)(1) is intended to apply to adult offenders and paragraph (a)(3) is intended to applied to children in need of care and rehabilitation.

[197] Police officers, the Department of Youth Rehabilitation Services, and Court Social Services are statutorily authorized to take a child into custody, if there are reasonable grounds to believe the child has absconded. *See* D.C. Code §§ 16-2309(5), (9), (10) and 16-2337; *see also* D.C. Rule of Juvenile Proceedings 4 (granting the court authority to issue a custody order for a child who may have absconded, upon application of a law enforcement officer, parent, guardian, or custodian); D.C. Code § 24-1102 (an interstate compact designed to allow other states to detain children who have absconded after being adjudicated delinquent).

[198] *See* D.C. Code §§ 16-2310 and 16-2323.

[199] For example, if a child who left shelter care pending a factfinding hearing is found not involved in the underlying offense, the child's delinquency court involvement would be terminated and the child would not be subject to a new and separate prosecution for escape. Nor would that child be permitted—or tempted—to dispose of the underlying charge by pleading guilty to escape.

[200] Juvenile records are, generally, not available to the public. D.C. Code § 16-2331. However, some juvenile adjudications will impact the child's sentencing guideline ranges as an adult in the District and in other jurisdictions. *See, e.g.*, Voluntary D.C. Sentencing Guidelines ("DCSG") R. 2.2.4.

[201] Adult pretrial detention and adult sentencing serve vastly different purposes than juvenile detention and commitment. *Compare* D.C. Code § 23-1321 et seq. *with* 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); *compare also* D.C. Code § 24-403.01 *with* D.C. Code § 16-2320. Relatedly, there is no

- This revision substantively changes current District law. This change improves the proportionality of penalties.

(8) *Comments concerning typographical errors are incorporated.*

juvenile equivalent for the additional penalties for offenses committed during release in D.C. Code § 23-1328.

RCC § 22E-3402. Tampering with a Detection Device.

(1) *PDS, App. C at 204, recommends removing the terms "mask" and "alter" from the statute as unnecessary, given the broader "interfering" language in the statute, and potentially confusing. OAG, App. C at 214, notes that the current tampering with a detection device provision, D.C. Code § 22-1211, does not explicitly tether "masking" or "interfering" to the operation of the device.*

- The RCC incorporates this recommendation by striking 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.
- This revision does not substantively change District law. This change clarifies the revised statute.

(2) *PDS, App. C at 205, recommends clarifying in commentary that, "'Interfere' includes failing to charge the power for the device or allowing the device to lose the power required to operate* when done purposely, meaning with the conscious desire to interfere with the operation of the device.*"*

- The RCC incorporates this recommendation by clarifying in commentary how the culpable mental state of purposely applies to the specific form of interference with a device by failure to charge.
- This revision to commentary does not further change District law. This change clarifies the revised statute.

(3) *PDS, App. C at 205, recommends excluding violations of court orders imposed by other jurisdictions, where the District has no role in ensuring the fulfillment of due process protections for defendants or control over the underlying statutes that allowed for the placement of a detection device.*

- The RCC partially incorporates this recommendation by clarifying in the statutory language that the monitoring must be required in a District of Columbia case, although the language differs slightly from that recommended by PDS. While the current statute appears to provide liability for interference with detection devices worn by a person under any jurisdiction's court order, it is not clear that this was intended by the Council or that the statute has been applied in such circumstances.
- This revision may change District law and clarifies the revised statute.

(4) *OAG, App. C at 213-214, recommends amending the statute to "make it clear that it applies to people who are required to wear detention devices while placed in a shelter house or in shelter care facility." OAG states, "Persons who are in the juvenile justice system may be required to wear a detection device while awaiting trial and placed in a shelter house or shelter care facility. These people are not on pretrial or predisposition release, nor are they incarcerated or committed to the Department of Youth Rehabilitation."*

- The RCC does not incorporate this recommendation because it is not clear what current legal basis for wearing a detection device is not included in the revised statute. The predicate orders and statuses to be liable under

the revised statute match the language in the current statute, D.C. Code § 22-1211.

(5) *OAG, App. C at 214, recommends rephrasing "Incarcerated or committed to the Department of Youth Rehabilitation Services" to read "committed to the Department of Youth Rehabilitation Services or incarcerated," to avoid confusion as to whether a person can be incarcerated to the Department of Youth Rehabilitation Services.*

- The RCC incorporates this recommendation by adopting the phrase "committed to the Department of Youth Rehabilitation Services or incarcerated…"
- This revision does not further change District law. This change clarifies the revised statute.

(6) *OAG, App. C at 214, recommends codifying definitions of "alter," "mask," "interfere," and "unauthorized person" because the definitions described in the prior draft's commentary "are not apparent from the current language nor from the words' dictionary definitions.*

- The RCC does not incorporate this recommendation because the statute has been revised for another reason in way that renders the recommendation inapplicable (namely, the words "alter" and "mask" are stricken as superfluous), and because the ordinary meaning of the terms "interfere" and "unauthorized person" most effectively communicate the intent of the statute. "Interfere" is readily understandable in the context of the revised statute using its common meaning, particularly without the potential confusion raised by inclusion of "alter" and "mask." "Unauthorized person" most immediately refers to a person not authorized by the court or parole commission as specified in the commentary, but in extenuating circumstances others (e.g. a paramedic providing care) may be justified in removing a bracelet. A rigid statutory definition does not appear necessary to distinguish what conduct is illegal in this instance.

(7) *OAG, App. C at 215, recommends defining the term "unauthorized person" to include a reference to DYRS. The commentary currently explains that "unauthorized person" means "a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device."*

- The RCC partially incorporates this recommendation. The commentary explains that the court or parole commission are the only entities that authorize another person or agency to electronically monitor. A DYRS or CSS employee is an example of "someone that the court or parole commission authorized." The commentary has been updated to include these agencies as examples.
- This revision does not further change District law and clarifies the revised statute.

(8) *OAG, App. C at 215, recommends redrafting the statute to clarify whether the phrase "with the operation of" only modifies the word "interferes" or whether it modifies the words "alters" and "mask" as well.*

- The RCC does not incorporate this recommendation because the statute has been revised for another reason in way that renders the recommendation inapplicable. Namely, the words "alter" and "mask" are stricken as superfluous.

(9) *Comments concerning typographical errors are incorporated.*

RCC § 22E-3403. Correctional Facility Contraband.

(1) *PDS, App. C at 207-208, recommends excluding halfway houses from the definition of correctional facilities because many of the concerns about possession of contraband inside of a jail or secure juvenile facility are not applicable to halfway houses.*

- The RCC incorporates this recommendation by limiting the revised offense to secure detention facilities. Recently, the D.C. Council explicitly rejected a proposed amendment to expand the reach of the correctional facility contraband offense to halfway houses and other unsecured facilities.[202]
- This revision does not substantively change District law. This change improves the proportionality of the revised statute.

(2) *PDS, App. C at 208, recommends expanding the exclusion for controlled substances to also encompass any "syringe, needle, or other medical device that is prescribed to the person and for which there is a medical necessity to access immediately or constantly" and explaining in commentary that it "applies to medicines and medical devices necessary to treat chronic, persistent, or acute medical conditions that would require constant or immediate medical response such as diabetes, severe allergies, or seizures."*

- The RCC incorporates this recommendation by adding an exclusion for possession of a syringe, needle, or other medical device by someone for whom there is a medical necessity to have the substance immediately or constantly accessible. This provision does not limit the possibility of imposing administrative sanctions on a person who possesses a medically necessary item in a facility without permission. This provision also does not limit the possibility of other criminal charges arising from misuse of an item (e.g. a needle) to threaten, assault, or engage in other criminal conduct against another person in a facility. There may also be attempt or accomplice liability for correctional facility contraband when a person possesses a needle that they have a medical necessity to have immediate access to, with the additional intent that the item be received by someone confined in a facility. However, the provision does provide that it is not a contraband crime for a confined person to merely possess an item that a person has to have immediate or constant access to as a medical necessity.
- This revision substantively changes District law. This change improves the clarity and proportionality of the revised statute.

(3) *OAG, App. C at 218, recommends amending the definition of "correctional facility" to include DYRS congregate care facilities, such as shelter houses and group homes. It recommends amending the statutory definition of "correctional facility" to include, "Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth*

[202] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-963, "Criminal Code Amendment Act of 2010," (December 6, 2010) at page 4.

Rehabilitation Services for the hardware secure or staff secure confinement of persons committed to the Department of Youth Rehabilitation Services."

- The RCC does not incorporate this recommendation because it was orally withdrawn at an Advisory Group meeting on March 6, 2019. OAG stated that it does not advocate an expansion of the current law to include unsecured or staff secured facilities.

(4) *OAG, App. C at 218, recommends rephrasing "A portable electronic communication device or accessories thereto" in the definition of "Class B contraband" to read "A portable electronic communication device, chargers, batteries, or other accessories thereto" if the definition of "accessories" in the RCC commentary is intended to be controlling.*

- The RCC does not incorporate this recommendation because the proposed language would broadly encompass any charger or battery, including those used for devices other than communication devices. The commentary explains that "accessories" includes anything that enables or facilitates the use of a communication device, including chargers and batteries.

(5) *OAG, App. C at 218, recommends amending the detainment authority provision to apply to bringing contraband into a facility instead of only possessing contraband.*

- The RCC incorporates this recommendation by amending the detainment provision to refer to only introduction of contraband into a facility, consistent with the current D.C. Code statute.
- This revision does not change current District law. This change clarifies the revised statute.

(6) *OAG, App. C at 219, recommends amending the detainment authority provision to authorize detention pending surrender to any law enforcement agency, so as to include U.S. Park Police (with respect to New Beginnings) in addition to the Metropolitan Police Department.*

- The RCC incorporates this recommendation by amending the detainment provision to refer to include "the Metropolitan Police Department or a law enforcement agency acting pursuant to D.C. Code § 10-509.01." In RCC § 22E-701, "law enforcement officer" is defined to include officers or employees of the Department of Corrections. To avoid circularity, the revised statute requires that the law enforcement officer must be one who has the ability to investigate and arrest for a violation of correctional facility contraband.
- This revision may substantively change current District law. This change clarifies and may reduce an unnecessary gap in the revised statute.

(7) *The CCRC recommends amending the exclusion to liability for portable electronic communication devices during the course of a legal visit to include any person present during a legal visit, not only attorneys. The exclusion applies to other members of the defense team, such as investigators and interns, as well as experts present during a legal visit.*

- This revision does not substantively change current District law.[203] This change clarifies the revised statute.

(8) *Comments concerning typographical errors are incorporated.*

[203] D.C. Code § 22-22603.02(e) establishes an exception for "an attorney, or representative or agent of an attorney."

RCC § 22E-4201. Disorderly Conduct.

(1) *PDS, App. C at 153, recommends that disorderly conduct have a third element: "[and] the person knowingly fails to obey a law enforcement officer's order that the person cease engaging in the conduct," out of concern that the draft revised offense allows "too much room for over-policing and over-criminalizing the lives of marginalized persons."*

- The RCC partially incorporates this recommendation by requiring a law enforcement order to cease public fighting in subsection (a)(2)(D). The RCC revisions to the disorderly conduct, public nuisance, failure to disperse, and rioting offenses limit criminal liability (and police intervention) to conduct in which there is at least the reasonable appearance of a likely, imminent harm involving bodily injury, taking of property, or damage to property. However, to require a law enforcement order for other modes of disorderly conduct would create a gap in liability by decriminalizing a large swath of conduct—public breaches of peace occurring outside the presence of a law enforcement officer—traditionally held to be criminal in the District and all 50 states. While there may be improper or disparate enforcement of the disorderly conduct offense, such conduct may be addressed by improved training and oversight rather than decriminalization of what is widely viewed as a criminal social harm. Regarding the possibility, raised by PDS, that social biases may cause some people to believe that actually innocent "horseplay" by African-Americans or others is dangerous, the revised statute requires that a factfinder find that the complainant's belief as to an imminent harm is reasonable. This reasonableness requirement is intended to exclude allegations of disorderly conduct based on the complainant's biased beliefs.
- This revision changes District law, as described in the commentary. This change clarifies and improves the proportionality of the revised statute.

(2) *PDS, App. C at 154, recommends eliminating "taking of property" as a means of committing disorderly conduct, to avoid overlap with attempted theft.*

- The RCC does not incorporate this recommendation because it would create a gap in liability. The revised disorderly conduct offense in significant part does not overlap with attempted theft liability. Unlike an attempt, a person may commit disorderly conduct by creating reasonable public alarm with respect to an immediate taking of property, even if the actor did not intend to complete the offense. Moreover, to the extent that the revised disorderly conduct offense does overlap with liability for attempted theft, retaining such liability in the disorderly conduct offense allows for possible referral and prosecution by the Office of the Attorney General as a lower-level crime. Lastly, to the extent that the offense potentially captures conduct that is, as PDS states, "so minor and ambiguous that to arrest and prosecute someone for it would be arbitrary and unjust," should such a case be prosecuted by the Attorney General, the RCC *de minimis* provision provides a remedy.

(3) *PDS, App. C at 155, recommends that disorderly conduct be jury demandable, regardless of the penalty attached, to protect First Amendment rights and to provide accountability in cases of police abuse.*

- The RCC does not incorporate this recommendation at this time, pending a comprehensive review of appropriate penalties and jury demandability. Notably, unlike the offenses of unlawful demonstration and failure to disperse, most instances of disorderly conduct do not appear to implicate the First Amendment. Unlike the offense of assault on a police officer, there appear to be many instances of disorderly conduct in which the complaining witness is a civilian and not a law enforcement officer.

(4) *OAG, App. C at 159, recommends amending the phrase "bodily injury to another person" in the revised statute so that it is clear that disorderly conduct includes fighting words that may provoke infliction of bodily injury on the speaker.*

- The RCC incorporates this change by prohibiting abusive speech that is likely to provoke a bodily injury to any person (subparagraph (a)(1)(c)), including the speaker.
- This revision does not change current District law. This change clarifies the revised statute.

(5) *OAG, App. C at 160, recommends limiting the law enforcement officer exception to fighting words directed at the officer, so that the statute criminalizes inciting a mob to injure an officer.*

- The RCC partially incorporates this recommendation by revising the current draft to make a law enforcement exception inapplicable to the incitement provision in subparagraph (a)(2)(B). The RCC continues, however, to provide an exception to liability for conduct under subparagraphs (a)(2)(A) and (a)(2)(C) when the other person involved is a law enforcement officer in the course of his or her duties. This change reflects the expectation that law enforcement officers must regularly confront apparently alarming circumstances and use their training to determine whether behavior constitutes an attempted assault or other attempted crime—for which actor's remain liable against the law enforcement officer. Conduct that falls short of such an attempted crime against an on-duty police officer, and that is merely alarming to the law enforcement officer, is not criminalized. This revision may better reflect recent Council determinations about the scope and need for community review (by allowing jury demandability) of interactions with law enforcement officers under the assault of a police officer statute.
- This revision changes current District law as described in the commentary. This change improves the clarity and proportionality of the revised statute.

(6) *OAG, App. C at 160, recommends describing the RCC amended law enforcement officer exception as a change in law instead of as a clarification in the offense commentary.*

- The RCC commentary incorporates this change by revising commentary to clarify that the law enforcement exception in paragraph (b)(2) as a change in law.

- This revision to the commentary does not change current District law. This change clarifies the revised commentary.

(7) *The CCRC recommends restructuring the revised disorderly conduct offense in light of a recent District of Columbia Court of Appeals (DCCA) decision. On Nov. 29, 2018, the DCCA published its first opinion interpreting the current disorderly conduct statute.* Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018) (requiring proof that the actor's conduct under D.C. Code § 22-1321(a)(1) actually placed a complainant in reasonable fear, not that an ordinary person would have been placed in fear). The DCCA opinion differs from the construction of the current disorderly conduct statute that the CCRC had relied on in its prior draft revision, and makes the prior draft revision's merging of subsections (a)(1) and (a)(3) of the D.C. Code § 22-1321 illogical. The second draft of the revised disorderly conduct statute consequently is organized by the mode of misconduct and not by the threatened harm. This allows for incorporation of a provision better matching* Solon*.*

- This revision does not change current District law. This change organizes the criminal statutes in a more logical order.

(8) *The CCRC recommends adding a public fighting provision. Per the recent DCCA decision in* Solon*, it is now clear that two or more people involved in mutual (consensual) combat do not violate D.C. Code § 22-1321(a) unless some third person is present and experiences a "reasonable fear" as specified in the statute. To follow* Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018), the CCRC has restructured and changed the scope of the revised disorderly conduct statute in subparagraph (a)(2)(A) in a way that mutual fighting is no longer necessarily addressed by subparagraphs (a)(2)(A)-(a)(2)(C). Accordingly, to provide liability for public fighting that does not cause any person present to fear for their own person or property, subparagraph (a)(2)(D) now specifically punishes knowingly engaging in public fighting after a law enforcement order to stop doing so. The requirement of a law enforcement order differentiates the statute from common law affrays and may help ensure that otherwise innocent "horseplay" is not criminalized.*

- This revision changes current District law as described in the commentary. This change improves the clarity and proportionality of the revised statute.

(9) *The CCRC recommends a culpable mental state of "purposely" be applied to subparagraphs (a)(2)(B) and (a)(2)(C) regarding efforts to command, request or persuade a person to cause a criminal harm, or to direct abuse speech to a person. The current statute does not specify a culpable mental state for corresponding provisions in the current disorderly conduct statute, D.C. Code §§ 22-1321(a)(1) and (a)(2), and there is no case law on point. The revised statute uses the standardized culpable mental state definitions in the RCC to require such efforts be the conscious object of the actor. This heightened culpable mental state distinguishes the use of speech which the actor does not know, or knows, but does not wish, to be construed as provoking violence.*

- This revision may change current District law as described in the commentary. The change improves the clarity, completeness, and consistency of the revised statute.

(10) *The CCRC recommends reclassifying the exclusion of self-harm liability, other than provoking an injury to oneself by abusive language, as a clarification instead of a possible change in law, in light of recent case law.* Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018). Insofar as* Solon *requires an actor to cause actual fear in another actual person, as opposed to an ordinary person, a person engaging in potential self-harm is not within the scope of D.C. Code § 22-1321(a).*

- This revision does not change current District law. This change clarifies the revised statute.

(11) *The CCRC recommends that the RCC disorderly conduct statute also replace, in relevant part, D.C. Code § 22-1321(g), which makes it "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 wallet." It is unclear what the language "whereby a breach of the peace may be occasioned" means, and there is no case law on point.*[204] *However, the revised disorderly conduct statute, following* Solon*, prohibits recklessly causing another to believe they are likely to suffer a taking of property, appearing to cover most, if not all, occasions where the actor's conduct is detected by the person jostled against. Other RCC offenses, including offensive physical contact, RCC § 22E-1205, and theft from a person, RCC § 22E-205, either attempted or completed, also provide liability for the range of conduct described in D.C. Code § 22-1321(g).*

- This revision may change current District law, as described in the commentary. This change improves the clarity and consistency of the revised offenses and reduces unnecessary overlap.

(12) *The CCRC recommends adding conduct protected by the U.S. Constitution and the Open Meetings Act to the exclusion from liability paragraph, to be consistent with a similar provision in other offenses.*

- This revision does not change current District law. The change improves the clarity and consistency of the revised statute.

(13) *Comments concerning typographical errors are incorporated.*

[204] *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018), briefly discusses the legislative history of the jostling portion of D.C. Code § 22-1321(g), suggesting the jostling provision was intended to reach conduct that did not actually evoke from the victim the state of mind the Council had in mind.

RCC § 22E-4202. Public Nuisance.

(1) *PDS, App. C at 153, recommends that public nuisance have a third element: "[and] the person knowingly fails to obey a law enforcement officer's order that the person cease engaging in the conduct," out of concern for over-policing and over-criminalizing the lives of marginalized persons.*

- The RCC does not incorporate this change because doing so would create a gap in liability between offenses. The proposal would decriminalize a large swath of conduct—public breaches of peace occurring outside the presence of a law enforcement officer—traditionally held to be criminal in the District and all 50 states. While there may be improper or disparate enforcement of the disorderly conduct offense, such conduct may be addressed by improved training and oversight rather than decriminalization of what is widely viewed as a criminal harm.

(2) *PDS, App. C at 155, recommends that public nuisance be jury demandable, regardless of the penalty attached, to protect First Amendment rights and to provide accountability in cases of police abuse.*

- The RCC does not incorporate this recommendation at this time, pending a comprehensive review of appropriate penalties and jury demandability. Notably, unlike the offenses of unlawful demonstration and failure to disperse, there appear to be many instances of public nuisance in which the First Amendment is not implicated. Unlike the offense of assault on a police officer, there appear to be many instances of public nuisance in which the complaining witness is a civilian and not a law enforcement officer.

(3) *PDS, App. C at 155, recommends narrowing the definition of "lawful public gathering" to funerals, so as to exclude graduations and similar events.*

- The RCC partially incorporates this recommendation by limiting paragraph (a)(1) to religious services, funerals, and weddings. The legislative history 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."[205] The Council did not provide other examples of gatherings that it intended to include. Prohibiting a disturbance of any lawful gathering may make the statute vulnerable to challenges for vagueness or overbreadth, however, limiting the provision to funerals would be more restrictive than intended.
- This revision may change current District law as described in the commentary. The change improves the clarity and proportionality of the revised statute, and may ensure its constitutionality.

(4) *PDS, App. C at 155, and OAG, App. C at 162, recommend amending the definition of "public building" so that the public nuisance statute focuses on disruption to government business regardless of building ownership. PDS*

[205] *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.

recommends narrowing the definition to reflect an intended interruption to Council hearings and similar proceedings, whether they occur at the Wilson Building or at an offsite location. OAG recommends the relevant portion of the statute be amended to refer to "the orderly conduct of public business" where the term "public business" is defined as "business conducted by the District of Columbia or federal government."

- The RCC partially incorporates these recommendations by amending the reference to "conduct of business in a public building" to "conduct of a meeting by a District or federal public body" and cross-referencing to the definition of "public body" in the District's Open Meetings Act. This change makes the ownership of the property where the meeting is occurring irrelevant—the focus of the revised offense is on the disruption of a decision-making body's work. The RCC does not cover all business[206] conducted by the District or federal government, which would expand the offense beyond the current statute's limits of "business in that public building." Nor is the revised offense restricted to District government disruption.
- This revision changes current District law as described in the commentary. This change improves the clarity and proportionality of the revised statute.

(5) *OAG, App. C at 163, recommends amending the public conveyance provision to include blocking the pathway of the conveyance vehicle in addition to blocking the pathway of a passenger.*

- The RCC incorporates this change by revising the commentary to state that blocking the pathway of the vehicle is one way of causing a substantial interruption of a person's lawful use of a public conveyance.
- This revision to the commentary does not change current District law. This change clarifies the revised statute.

(6) *OAG, App. C at 163-164, recommends eliminating the requirement that an actor be in a public location at the time the actor interferes with a public gathering or with a person's quiet enjoyment of a residence at night as immaterial to intent or social harm. OAG states that, "the possibility of arrest and prosecution under D.C. Code § 22-1321(d) has been an effective tool in quieting people who in their own house or apartment listen to their stereos, play musical instruments, or host parties that unreasonably annoy or disturb one or more other persons in their residences."*

- The RCC incorporates this recommendation by striking the public location requirement from the revised public nuisance statute.
- This revision does not change current District law. This change clarifies the revised statute.

(7) *OAG, App. C at 164, n. 9, recommends defining the phrase "open to the general public" in an affirmative manner rather than stating that "the phrase 'open to the general public' excludes locations…"*

[206] For example, activities as diverse as mail delivery, street cleaning, and policing might be covered if the statute is expanded to all District or federal business.

- The RCC incorporates this recommendation by defining "open to the general public" in this offense and throughout the revised code as follows: "'Open to the general public' means no payment or permission is required to enter."
- This revision may change current District law as described in the commentary. This change improves the clarity and proportionality of the revised statute.

(8) *The CCRC recommends requiring that, before being liable for disrupting a person's quiet enjoyment of his or residence, a person must continue or resume such conduct after receiving notice that his or her conduct is disruptive. 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 torment the complainant without reaching other legitimate or protected conduct.*

- This revision changes current District law as described in the commentary. This change improves the proportionality and, perhaps, the constitutionality of the revised statute.

(9) *CCRC recommends a requirement that the interruption be "significant" instead of the requirement in the prior draft that the disruption be "unreasonable." This change specifies that liability can only be based on interruptions that are large in effect. For example, purposely standing up in the middle of a public meeting and stretching one's arms overhead may be inappropriate and distracting but is not a "significant" interruption. 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.*[207] *The prior draft's reference to "unreasonable" was vague and, chiefly, was directed at excluding minor or significant but commonplace interruptions. Moreover, as previously drafted, a "purposely" culpable mental state applied to the unreasonableness, which may have led to illogical outcomes—e.g., from the perspective of the actor, a substantial interruption may well seem "reasonable" due to the actor's idiosyncratic behaviors. Besides exclusions for First Amendment and other protected activity per subsection (b) of the revised statute, forthcoming general justification defenses in the RCC will still apply for unusual situations where a person is justified in causing significant interruptions (e.g. to call for an ambulance in the middle of a public meeting).*

- This revision may change current District law as described in the commentary. This change improves the clarity and proportionality of the revised statute.

(10) *Comments concerning typographical errors are incorporated.*

[207] 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.

RCC § 22E-4203. Blocking a Public Way.

(1) *OAG, App. C at 66, recommends adding language stating, "It is unlawful for a person to act alone or in concert with others," to make clear that three or more actors are not required for this offense, contrary to a 1989 DCCA opinion.*

- The RCC does not incorporate this recommendation because the proposed language would not clarify the statute and may create confusion as to why such language is not included in other revised statutes. As OAG notes, the DCCA in *Odum v. District of Columbia*, 565 A.2d 302 (D.C. 1989), interpreted a prior version of the blocking statute, which included language like "assembly," to require three or more persons. However, the CCRC does not believe it is necessary to continue to address the *Odum* opinion given the subsequent legislation, in operation for nearly a decade, that mooted the *Odum* interpretation. As OAG noted, in 2010 the Council revised the blocking statute to still include words like "crowding" but made the offense applicable to a single person's conduct and included the phrase "alone or in concert with others." Unlike prior versions of the statute, the RCC does not use the words "crowding" or "assembly" or any other term that implies more than one actor is required for this offense, and on its face clearly applies to one person's conduct. In this context, introducing the phrase "alone or in concert with others" into the RCC blocking statute may, rather than clarifying, create confusion as to the meaning of "in concert with others" and why such language, if merely clarifying, is not applied uniformly throughout the RCC.

(2) *OAG, App. C at 66, recommends expanding the revised offense to criminalize conduct that "inconvenience[s]" other persons in a public way. OAG states that this would address a situation where people lie down and block two lanes of a highway but, because of a police presence redirecting traffic, the people may not be considered to be causing an unreasonable hazard, and other unspecified situations.*

- The RCC partially incorporates this recommendation by clarifying in commentary that 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. The revised statute's commentary specifically describes OAG's hypothetical situation as covered conduct. The RCC does not, however, add the term "inconvenience" because it is ambiguous and may lead to disproportionate criminal penalties for common, legal, everyday activities.
- This revision to the commentary does not further[208] change District law. This change clarifies the revised statute.

(3) *OAG, App. C at 66, recommends that the commentary explain why the current statute's inclusion of "the passage through or within any park or reservation" is*

[208] As noted in the RCC commentary, the current statute criminalizes in part "incommoding," a synonym for "inconvenience." However, the current statute is silent as to the meaning of the verbs "crowd, obstruct, or incommode," and there is no case law on point.

omitted as a location where blocking can occur, or else redraft the revised statute to refer to "A park, reservation, public street, public sidewalk, or other public way."

- The RCC incorporates this recommendation by amending the revised statute to cover blocking on "a street, sidewalk, bridge, path, entrance, exit, or passageway on land or in a building that is owned by a government, government agency, or government-owned corporation," and explaining in the commentary that this revision includes a passage "through or within any park or reservation." This amendment clarifies that the statute includes points of ingress, points of egress, and paths on public land and within public buildings. The revised statute may broaden current D.C. Code § 22-1307, which uses the word "public" and does not specifically refer to government agencies (such as WMATA) and government-owned corporations (such as Amtrak). However, the revised statute continues to narrow the current statute by excluding entrances that are privately owned, as much of that conduct is now punished as Trespass in RCC § 22E-2601. The revised statute also narrows the current statute by excluding public conveyances, as that conduct is now generally prohibited under the public nuisance statute in RCC § 22E-4202.
- This revision does not further change District law. This change eliminates unnecessary gaps and overlaps in the revised offenses.

(4) *The CCRC recommends clarifying in the statutory language that a person may commit blocking by either continuing or resuming blocking. The prior RCC draft simply said that there was liability where a person engaged in blocking conduct, "After receiving a law enforcement order to stop such obstruction." The revised statute now refers to a person who "continues or resumes such conduct after receiving a law enforcement officer's order…to stop such blocking."*

- This revision does not change District law. This change clarifies the revised statute.

(5) *The CCRC recommends requiring that the law enforcement officer's order to stop blocking is lawful. As a matter of strict liability, a person's belief that they are legally permitted to remain is irrelevant to liability for a blocking offense.*

- This revision may change District law as described in the commentary. This change improves the proportionality of the revised statute.

(6) *The CCRC recommends clarifying in commentary that a person must be given a reasonable opportunity to comply with the law enforcement order to stop blocking.*

- This revision does not change District law. This change clarifies the revised statute.

(7) *The CCRC recommends repealing D.C. Code § 22-1318, Driving or riding on footways in public grounds*[209] *as an archaic and unused statute concerning a*

[209] 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

harm adequately addressed by the revised blocking a public way statute. 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.

- This revision changes District law. The change eliminates an archaic offense and reduces unnecessary overlap between offenses.

(8) *The CCRC recommends repealing D.C. Code § 22-1323, Obstructing a Bridge Connecting Virginia to the District of Columbia.*[210] *The United States House of Representatives is currently considering a bill to repeal this law.*[211] *There are no comparable statutes in other jurisdictions.*[212] *The revised blocking a public way punishes knowingly blocking a bridge, after receiving a law enforcement order to stop such blocking.*

- This revision changes District law. This change improves the consistency and proportionality of the revised offenses.

(9) *The CCRC recommends amending the title of the offense to "Blocking a Public Way" and using the verb "block" instead of "obstruct" to avoid confusion with other offenses referring to broader "obstruction" conduct (e.g. with respect to a law enforcement investigation). "Block" is defined the same as "obstruct" previously was defined.*

- This revision changes District law as described in the commentary. This change clarifies and improves the consistency of the revised statute.

(10) *Comments concerning typographical errors are incorporated.*

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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.").

[210] Under current law, this offense has a lower prison term – 30 days instead of 90 days – and a higher fine – minimum 1000 and maximum 5000 – than obstructing a public way.

[211] District of Columbia Home Rule Bridges Act, H.R. 6153, 115th Cong. (2018).

[212] Some states include obstructing bridges within their more general "obstructing highways" offenses.

RCC § 22E-4204. Unlawful Demonstration.

(1) *OAG, App. C at 67, recommends retaining the current statutory definition of "demonstration" as "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" because that definition "better describes the behavior that this provision is trying to reach."*

- The RCC incorporates this recommendation by retaining the current statutory definition and updating commentary accordingly.
- This revision does not change District law. This change improves the clarity of the revised offense.

(2) *The CCRC recommends reorganizing the offense with public order offenses instead of a property offense because it does not require infringement on private property interests.*

- This revision does not change District law. This change improves the logical organization of the revised offenses.

(3) *The CCRC recommends applying strict liability to the unlawfulness of demonstration in that location.*

- This revision may change District law, as described in the commentary. This change improves the clarity of the revised offense.

(4) *Comments concerning typographical errors are incorporated.*

RCC § 22E-4301. Rioting.

(1) *PDS, App. C at 156, recommends requiring a culpable mental state of knowledge with respect to other people engaging in disorderly conduct nearby, so that the rioting statute does not criminalize a failure to remove oneself from a mass protest when there is a substantial risk that some protestors are engaging in disorderly conduct.*

- The RCC does not incorporate this recommendation because it would create a gap in liability in situations where one cannot be practically certain as to others' actions or the number of participants due to crowding, but is aware of a substantial, unjustifiable risk of their actions and numbers. However, the fact pattern of concern to PDS—remaining in the middle of a disorderly scene while oneself engaging in constitutionally protected conduct (e.g., as a journalist)—is not criminalized under the prior or the current draft rioting statute. Rather, the prior and current draft would criminalize remaining in the middle of a disorderly scene *and* attempting or committing criminal conduct. Moreover, the RCC defines recklessness so as to require proof of the blameworthiness of the actor's conduct in being in the location where the rioting is alleged to occur.

(2) *PDS, App. C at 157, recommends eliminating "taking of property" as a means of committing rioting, to avoid "unnecessary overlap with the offenses of robbery and theft committed by codefendants."*

- The RCC does not incorporate this recommendation because it would create a gap in liability in situations where there is looting and similar activities common in rioting. However, fact pattern of concern to PDS likely is not criminalized under the revised statute. Although rioting includes "taking of property" as a threatened harm, the new statutory threshold of eight actors, in total, will eliminate most group robbery offenses being charged as rioting.

(3) *PDS, App. C at 157, recommends amending "knowingly possessing a dangerous weapon" to "knowingly using or displaying a dangerous weapon" because a hidden weapon does not contribute to public alarm and is separately punishable as possession of a dangerous weapon.*

- The RCC does not incorporate this recommendation because the draft statute no longer provides that possession of a dangerous weapon or knowledge of another person's use or planned use of a dangerous weapon constitutes an alternative element to prove rioting. Additional liability for possessing a dangerous weapon while engaged in rioting may be available under other RCC provisions.[213]

(4) *OAG, App. C at 166, n. 4, recommends adding a definition of "immediate vicinity," so that this term "refers to the area near enough for the accused to see or hear others' activities."*

[213] [CCRC recommendations regarding weapon offenses are forthcoming.]

- The RCC incorporates this recommendation by substituting the phrase "the area perceptible to the actor" for "immediate vicinity."
- This revision does not further change District law and clarifies the revised statute.

(5) *OAG, App. C at 168, recommends amending the phrase "And the conduct is committed…" to read "And the person's conduct is committed…," in subsection (a)(2), to make clear that it is the rioter's disorderly conduct, and not the disorderly conduct of others nearby, that must be committed with intent to facilitate a crime, or while possessing a dangerous weapon, or while knowing another participant is using or plans to use a dangerous weapon.*

- The RCC does not incorporate this recommendation because the draft statute no longer contains the provision it addresses.

(6) *OAG, App. C at 168, recommends clarifying that injury to another rioter may be a basis for rioting liability. OAG states that the offense should apply where a subset of protestors decides to injure another subset of protestors or counter-protestors.*

- The RCC incorporates this recommendation by prohibiting any conduct that causes criminal bodily injury to any person.
- This revision does not change current District law. This change eliminates an unnecessary gap in the revised statute.

(7) *The CCRC recommends making the predicate conduct the commission of crimes involving bodily injury, taking of property, or damage to property. Under current District law (and the first draft of the revised rioting statute) liability for rioting is predicated on conduct described in language that is similar to the elements of the District's disorderly conduct statute. However, continuing to provide rioting liability for engaging in what amounts to disorderly conduct is not recommended for two reasons. First, the District of Columbia Court of Appeals ("DCCA") has recently held that the District's disorderly conduct statute requires actual fear by the complainant regarding his or her own person or property.*[214] *As the disorderly conduct statute now generally*[215] *requires a direct connection between the actor's conduct and the complainant's perception, it is no longer useful to describe wrongdoing that involves the property of persons not present (or government property). Second, predicating rioting liability, and its more serious penalties, on inchoate conduct that does not require actual bodily injury, taking of property, or damage to property—as is the case in disorderly conduct—appears to be disproportionate. Instead of predicating the revised rioting offense on disorderly conduct, the RCC rioting statute provides more severe consequences for otherwise criminal acts committed in a large group. This elevated penalty for what otherwise would constitute low-level property bodily injury, taking of property, or damage to property reflects the greater danger inherent in group misconduct.*

[214] *Solon v. United States*, 196 A.3d 1283 (D.C. 2018).
[215] Disorderly conduct may also be committed by incitement of others.

- This revision changes current District law, as described in the commentary. This change clarifies and improves the proportionality of the revised statutes and reduces unnecessary overlap with other offenses.

(8) *The CCRC recommends raising the minimum number of persons for a riot from five to eight, to better distinguish smaller group misconduct from larger threats to the general public. This change avoids the consequence of a fight between just five people constituting a riot in the revised statute. This change addresses both the OAG comment at App. C 168 regarding the need to cover fighting between rioters, and the PDS comment at App. C at 157, concerning the need to avoid covering offenses like robbery or theft committed by a small group of co-defendants.*

- This revision changes current District law, as described in the commentary. This change clarifies and improves the proportionality of the revised statutes and reduces unnecessary overlap with other offenses.

(9) *The CCRC recommends eliminating the prior draft revision's requirement that conduct occur in a public location. Where eight or more people are simultaneously engaging in conduct that causes injury or damage, that group conduct amounts to a riot under the revised statute, irrespective of where it occurs. Such disturbances, whether in a sports arena or Congress,*[216] *run a similar risk of escalating into mob-like action.*

- This revision may change current District law, as described in the commentary. This change clarifies and eliminates an unnecessary gap in the revised offense.

(10) *The CCRC recommends specifying that there is no attempt rioting offense. 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 provides separate liability.*

- This revision substantively changes District law as described in the commentary. This change improves the proportionality of the revised statute.

(11) *The CCRC recommends adding conduct protected by the U.S. Constitution and the Open Meetings Act to the exclusion from liability paragraph, to be consistent with a similar provision in other offenses.*

- This revision does not change current District law and clarifies the statute.

(12) *Comments concerning typographical errors are incorporated.*

[216] *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/).

RCC § 22E-4302. Failure to Disperse.

(1) *PDS, App. C at 156, recommends clarifying that an officer's assessment about the need for the order to disperse must be objectively accurate.*

- The CCRC incorporates this recommendation by adding the following language to the relevant section of the commentary: "The term 'in fact' requires no culpable mental state 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 or prevent the conduct."
- This revision to the commentary does not further change District law. This change clarifies the revised statute.

(2) *OAG, App. C at 166, n. 4, recommends adding a definition of "immediate vicinity," so that this term "refers to the area near enough for the accused to see or hear others' activities."*

- The RCC incorporates this recommendation by substituting the phrase "the area perceptible to the actor" for "immediate vicinity."
- This revision does not further change District law and clarifies the revised statute.

(3) *OAG, App. C at 166, recommends changing the word "substantial" to "nontrivial" or similar phrase, in reference to the degree of impairment to a law enforcement officer's ability to stop others' illegal conduct that must be shown.*

- The CCRC does not incorporate this recommendation because it may unduly restrict the legitimate exercise of civil liberties by those observing or reporting on others engaging in illegal conduct. As OAG noted, the RCC commentary describes "substantial" impairment as "more than trivial difficulty" and gives an example of a trivial difficulty (e.g. walking around a peaceable demonstrator). This example is not intended to equate "substantial" with "nontrivial," only to exclude the nontrivial. This statute is intended to curtail the ability of observers to exercise civil liberties only in limited situations where such exercise hinders a law enforcement response to a current, actual violation of law. Accordingly, the RCC does not recommend lowering the threshold from "substantial" to "nontrivial." The OAG request for more guidance as to the meaning of "substantial" is understandable, however, precision is not possible given the highly fact-sensitive nature of the issue. Consideration may need to be given to factors such as the delay in response time due to the people's presence, the nature of the criminal conduct occurring, the vulnerability of those nearby to unintended harm in the course of a law enforcement response, etc. However, in response to OAG's concern, an example has been added to the commentary of what would constitute substantial impairment—peaceful demonstrators linking arms in a manner that blocks police access to a site where rioters are engaged in setting fire to a building.

(4) *OAG, App. C at 166, recommends deleting the phrase "or both" from the penalties provision, to avoid litigation about prosecutorial authority.*

- The CCRC does not incorporate this recommendation because the draft has been changed for another reason in a way that makes the recommendation not applicable (changing prosecutorial jurisdiction).

(5) *OAG, App. C at 167, recommends clarifying in commentary if the revised statute does not subsume the existing regulation in 18 DCMR § 2000.2 (Failure to obey a lawful police order).*

- The CCRC incorporates this recommendation by stating in the commentary that the revised offense does not replace or subsume the existing regulation in 18 DCMR § 2000.2. Further changes are not necessary because the draft has been changed for another reason in a way that makes the recommendation not applicable (changing prosecutorial jurisdiction).
- This revision to the commentary does not further change District law. This change clarifies the revised statute.

(6) *The CCRC recommends that prosecutorial authority for the revised offense lie with the Office of the United States Attorney, unlike the prior draft of the revised offense, to allow liability in non-public locations. Where eight or more people are simultaneously committing, or imminently about to commit, a crime involving bodily injury, taking of property, or damage to property, that amounts to rioting. Such disturbances, whether in a location generally open to the public or a private location,[217] run a similar risk of escalating into mob-like action. In such situations, the continued presence of individuals who are not engaged in rioting may impair law enforcement efforts to stop the illegal conduct and the revised statute gives authority to arrest individuals who fail to disperse after a law enforcement order in such a situation. Consequently, the revised statute has been broadened to allow for liability in non-public locations. However, by broadening the locations where rioting and failure to disperse offenses may be applied, the failure to disperse can no longer be construed as within the scope of other offenses historically recognized as subject to prosecution by the Office of the Attorney General. Specifically, the revised failure to disperse offense is restricted to neither pedestrian and traffic locations under 18 DCMR § 2000.2 (Failure to obey a lawful police order), nor specified public locations in the District's current disorderly conduct statute and breach of peace offenses.*

- This revision does not further change District law and eliminates a possible gap in liability due to the location of the rioting.

(7) *The CCRC recommends raising the minimum number of persons required for this offense from five to eight, to distinguish smaller group misconduct from larger threats to the general public. This change avoids the possibility that onlookers at a fight between five people would be subject to the revised statute and aligns the failure to disperse offense with the revised rioting offense.*

[217]For example, a sports arena or Congress. *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/).

- This revision does not further change District law. This change improves the consistency and proportionality of the revised statutes.

(8) *The CCRC recommends that failure to disperse liability be predicated not on the commission of disorderly conduct by others, with strict liability, but on the actor being reckless as to others "attempting to commit or committing a District crime involving bodily injury, taking of property, or damage to property in the area perceptible to the actor." The difference in scope of conduct covered by seeing someone committing "disorderly conduct" and seeing someone "attempting to commit or committing a District crime involving bodily injury, taking of property, or damage to property" is likely slight. Under the RCC, disorderly conduct involves conduct that, in various ways, is likely to result in an immediate and criminal bodily injury, damage to property, or taking of property—but the disorderly conduct offense is framed in terms of the person engaged in or triggering such conduct. The revised failure to disperse offense is similarly concerned with imminent crimes involving bodily injury, damage to property, or taking of property, but the failure to disperse offense is more clearly framed in terms relevant to an observer, and the particular means by which others are about to engage in such crimes is irrelevant. The requirement of a reckless culpable mental state provides additional protection for observers who fail to obey a police order to disperse as compared to strict liability where the observer may be unaware of there being any basis for a law enforcement order to disperse. This culpable mental state of recklessness as to the criminal conduct occurring or imminently about to occur nearby 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 revision does not further change District law. This change improves the clarity, consistency, and proportionality of the revised statutes.

(9) *The CCRC recommends elimination of the previous RCC draft's statutory reference to failing to obey "when the person could safely have done so." The commentary has been updated to clarify that this is true for the offense—the actor must have had a way to safely comply with the law enforcement order. However, it is not necessary to codify this requirement specially for the failure to disperse offense and doing so may raise questions as to why such a provision in other offenses. In general, throughout the RCC, a person is not liable for failing to take unreasonable actions to comply with a requirement of criminal law,[218] and may raise a justification defense[219] for any act (or omission) where the harm that would result from compliance is greater than that which the law seeks to address.*

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[218] *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).

[219] [CCRC recommendations regarding justification defenses are forthcoming.]

- This revision does not further change District law. This change improves the consistency and proportionality of the revised statutes.

(10) *The CCRC recommends adding an exclusion of liability paragraph, to clarify that this statute does not prohibit conduct protected by the Constitution, the District's First Amendment Assemblies Act, or the District's Open Meetings Act.*

- This revision does not further change current District law. This change clarifies the revised statute.

(11) *Comments concerning typographical errors are incorporated.*

APPENDIX J:

COMPILATION OF PRIOR RELATION TO NATIONAL LEGAL TRENDS ENTRIES

This appendix contains the relation to national legal trends entries (hereinafter, "entries"), which the CCRC staff previously produced in conjunction with prior drafts of the statutory provisions addressed in the First Draft of Report #36, *Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code* (Report). These entries have been excerpted from the staff commentary accompanying those prior drafts and are presented in this appendix in the same form as when they were originally released.

These entries are included in this Report for reference purposes only, and should be viewed with a few important caveats in mind. First, these entries reflect the analysis of national legal trends that informed the CCRC staff's work at the time of their initial release. Since that time, however, the relevant national legal trends and/or staff's understanding of them may have subsequently changed or shifted. Second, these entries track older versions of proposed CCRC legislation, which may significantly depart from the corresponding CCRC legislation recommended in this Report. Third, the internal references and citations (e.g., supra and infras) utilized in these entries have not been updated, and, therefore, are no longer accurate.

Subtitle I. General Part.

RCC § 22E-212. Merger of Related Offenses.

Relation to National Legal Trends. RCC § 212 has mixed support in the law of other jurisdictions.

Many of the substantive policies incorporated into RCC § 212—for example, the elements test[1] and the principles of lesser harm, lesser culpability, and more specific offenses[2]—appear to reflect majority or prevailing national trends governing the law of merger. Other policy recommendations—for example, the principle of reasonable accounting[3] and the RCC treatment of offenses comprised of alternative elements[4]—address issues upon which American criminal law is either unclear or divided.

Comprehensively codifying merger principles generally accords with modern legislative practice. However, the manner in which RCC § 212 codifies these requirements departs from modern legislative practice in some basic ways.

A more detailed analysis of national legal trends and their relationship to RCC § 212 is provided below. The analysis is organized according to two main topics: (1) substantive merger policy; and (2) codification practices.

RCC § 212: Relation to National Legal Trends on Merger Policy. The issue of merger is "[o]ne of the more important and vexing legal issues" confronting sentencing courts. [5] At the heart of the problem is the fact that "federal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions."[6] If a defendant is charged with, and subsequently

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[1] RCC § 212(a)(1).
[2] RCC § 212(a)(2).
[3] RCC § 212(a)(4).
[4] RCC § 212(a)(c).
[5] Tom Stacy, *Relating Kansas Offenses*, 56 U. KAN. L. REV. 831, 831-32 (2008); *see, e.g.*, Bruce A. Antkowiak, *Picking Up the Pieces of the Gordian Knot: Towards A Sensible Merger Methodology*, 41 NEW ENG. L. REV. 259, 285-86 (2007) ("Merger is one of those portal issues that can take us to the center of our basic conceptions about the place criminal law has in our society. What we make criminal generally defines the frontier we establish between the individual and the state in any democratic society."); *Com. v. Campbell*, 351 Pa. Super. 56, 70, 505 A.2d 262, 269 (1986) ("In recent years, there have not been many issues which have received . . . a more uneven treatment than claims that offenses have merged for purposes of sentencing.").
[6] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 518-19 (2001). To take just a few examples at the state level:

> Illinois has ten kidnapping offenses, thirty sex offenses, and a staggering forty-eight separate assault crimes. Virginia has twelve distinct forms of arson and attempted arson, sixteen forms of larceny and receiving stolen goods, and seventeen trespass crimes. In Massachusetts, the section of the code labeled "Crimes Against Property" contains 169 separate offenses.

Id. (collecting citations). Similar issues of offense overlap exist on the federal level. For example, it has been observed that:

convicted of, two or more of these overlapping crimes based on a single course of conduct,[7] the sentencing court will then be faced with deciding whether to "merge" one or more of these convictions into the other(s).[8]

This judicial determination, while implicating the Fifth Amendment's prohibition against "twice [placing someone] in jeopardy of life or limb" for the "same offense,"[9] is ultimately one of discerning legislative intent, not constitutional limitation.[10] This is because, insofar as the validity of convictions and punishment imposed in a single proceeding is concerned, the United States Supreme Court has held that constitutional double jeopardy protections only preclude the imposition of punishment beyond what the legislature has authorized.[11] Practically speaking, then, a legislature is free to impose as

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> Although the federal criminal code has a generic false statement statute that prohibits lies in matters under federal jurisdiction, it also contains a bewildering maze of statutes banning lies in specified settings. [There may be] 325 separate federal statutes proscribing fraud or misrepresentation.

Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453 (2009).

[7] The merger analysis in this section solely focuses on what are sometimes referred to as "multiple description claims," which "arise when a defendant who has been convicted of multiple criminal offenses under *different* statutes alleges that the statutes punish the same offense." *State v. Smith*, 436 S.W.3d 751, 766 (Tenn. 2014). Excluded are so-called "unit-of-prosecution claims," which arise "when a defendant who has been convicted of multiple violations of the *same* statute asserts that the multiple convictions are for the same offense." *Id.*; *see, e.g.*, Jeffrey M. Chemerinsky, *Counting Offenses*, 58 DUKE L.J. 709 (2009); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 68 (2d. Westlaw 2018).

[8] More specifically, the choice presented by merger is whether to: (1) impose multiple convictions for all of the offenses, thereby subjecting the defendant to the prospect of punishment equivalent to the aggregate statutory maxima; or, alternatively, (2) vacate one or more of the underlying convictions, thereby limiting the collective statutory maxima to that authorized by the remaining offenses. *See, e.g., State v. Watkins*, 362 S.W.3d 530, 559 (Tenn. 2012) (observing that where a court concludes that the legislature does not intend to permit dual convictions under different statutes, the remedy is to set aside one of the convictions, even if concurrent sentences were imposed) (citing *Ball v. United States*, 470 U.S. 856, 864-65 (1985) ("The second conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.")).

[9] U.S. Const., Amdt. 5; *see, e.g., North Carolina v. Pearce*, 395 U.S. 711, 717 ("[The double jeopardy] guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.").

[10] *See, e.g.*, Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. Colo. L. Rev. 595, 596–97 (2006) ("Under the Double Jeopardy Clause, when the defendant complains only of multiple punishment, and not successive prosecution, the defendant essentially complains that two convictions were obtained and two sentences were imposed where only one was permitted. But the issue is one of legislative intent rather than constitutional limitation."); Antkowiak, *supra* note 180, at 263 ("[M]erger is not a constitutional issue. It is, from beginning to end and in all particulars, an issue of statutory construction. The court's sole task is to discern the intent of the legislature . . . .").

[11] *See, e.g., Albernaz v. United States*, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution."); *Whalen v. United States*, 445 U.S. 684, 691–92 (1980) ("The assumption underlying the [*Blockburger*] rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the

much overlapping liability upon a single criminal act as it sees fit, provided that the penal consequences fall within the broad range permitted by the constitutional prohibition on cruel and unusual punishment and the due process requirement of fundamental fairness.[12] As a result, when courts are confronted with merger issues, "the focus is legitimately, inevitably, and almost exclusively on legislative intent."[13]

Discerning what the legislature intends in this particular legal context, however, is often quite difficult.[14] In the easy cases, the underlying offenses are part of the same grading scheme, and the only difference between them is that one incorporates a single additional element—for example, assault and assault *of a police officer*. Under these circumstances, it is reasonably safe to assume that the legislature *did not* intend to impose multiple liability. Conversely, where the offenses of conviction are not part of the same grading scheme, and share no common elements—for example, assault and theft—it is reasonably safe to assume that the legislature *did intend* to authorize multiple liability. Frequently, however, the underlying offenses being considered for purposes of a court's merger analysis will not clearly fit into either of these categories.[15] Instead, they will share some common elements but not others, bare a modicum of topical similarity, and will more generally have been drafted in a manner that renders legislative intent as to merger an enigma.[16] In these situations, courts must ultimately rely on default principles of statutory construction to guide their merger analyses.

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absence of a clear indication of contrary legislative intent."); *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) ("Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."); *Todd v. State*, 917 P.2d 674, 677 (Alaska 1996) (concluding that role of Double Jeopardy Clause is "limited to protecting a defendant against receiving more punishment than the legislature intended"); *People v. Leske*, 957 P.2d 1030, 1035 (Colo. 1998) ("[D]efendant may be subjected to multiple punishments based upon the same criminal conduct as long as such punishments are 'specifically authorized' by the General Assembly."); *State v. Watkins*, 362 S.W.3d 530, 556 (Tenn. 2012).

[12] Poulin, *supra* note 185, at 647; *see, e.g.*, Susan R. Klein, *Review Essay: Double Jeopardy's Demise: Double Jeopardy: The History, the Law*, 88 CAL. L. REV. 1001, 1006 (2000). For case law illustrating the narrowness of these constitutional restrictions on a legislature's sentencing prerogative, see *Ewing v. California*, 538 U.S. 11 (2003) (rejecting challenge to a sentence of 25 years to life for grand theft under three strikes law); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (rejecting challenge to consecutive terms of 25 years to life based on theft of videotapes worth approximately $150). *See also* MICHAEL S. MOORE, ACT AND CRIME 309 (1993) (discussing difference between a double jeopardy question and an Eighth Amendment question).

[13] Poulin, *supra* note 185, at 647.

[14] *See, e.g., Dixon v. State*, 278 Ga. 4, 8, 596 S.E.2d 147, 150-51 (2004) ("We encourage the legislature to examine this case and make a more recognizable distinction between statutory rape, child molestation, and the other sexual crimes, and to clarify the sort of conduct that will qualify for the ten-year minimum sentence accompanying a conviction for aggravated child molestation. The conflicting nature of the statutory scheme relating to sexual conduct, especially with respect to teenagers, may lead to inconsistent results.").

[15] *See, e.g.*, Stacy, *supra* note 180, at 855 (observing that while "courts must determine the permissibility of multiple convictions and punishments with reference to legislative intent," the "legislature generally has not addressed the matter").

[16] In rare situations, a criminal statute will communicate legislative intent as to the imposition of multiple liability for specific combinations of offenses. For illustrative examples involving *limits* on multiple liability, see Tenn. Code Ann. § 39–14–404(d) ("Acts which constitute an offense under this section may

Over the years, American legal authorities have developed a variety of principles for accomplishing this task.[17] The oldest and most widely adopted principle is the judicially-developed elements test.[18] Originally promulgating by the U.S. Supreme Court in *Blockburger v. United States*[19] as a constitutional limit on cumulative punishments, the elements test has since been utilized as the basis for discerning legislative intent as to merger.[20]

The elements test asks whether, in the situation of a criminal defendant who has engaged in a single course of conduct that satisfies the requirements of liability for two different statutes, "each provision requires proof of an additional fact which the other does not."[21] If an affirmative answer can be given to this question, then the operative

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be prosecuted under this section or any other applicable section, but not both."); Tenn. Code Ann. § 39–14–149(c) ("If conduct that violates this section [a]lso constitutes a violation of § 39–14–104 relative to theft of services, that conduct may be prosecuted under either, but not both, statutes as provided in § 39–11–109."); Tenn. Code Ann. § 39–12–204(e) ("A person may be convicted either of one (1) criminal violation of this section, including a conviction for conspiring to violate this section, or for one (1) or more of the predicate acts, but not both."). For an illustrative example involving the *authorization* of multiple liability, see 18 U.S.C. § 924(c)(1) ("Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.").

[17] *See generally, e.g.*, *Com. v. Jones*, 590 Pa. 356 (2006); *Whitton v. State*, 479 P.2d 302 (Alaska 1970). Likewise, individual jurisdictions have themselves vacillated between principles. *See infra* note 247 (highlighting shifting approaches).

[18] *See, e.g.*, ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 68; *Brown v. Ohio*, 432 U.S. 161 (1977); *Jones*, 590 Pa. at 365; *State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987); *State v. Trail*, 174 W.Va. 656, 328 S.E.2d 671 (1985); *United States v. Mehrmanesh*, 682 F.2d 1303 (9th Cir. 1982); *United States v. Howard-Arias*, 679 F.2d 363 (4th Cir. 1982).

[19] 284 U.S. 299, 304 (1932). The defendant in *Blockburger* was charged with violations of federal narcotics legislation, and was ultimately convicted on one count of having sold a drug not in or from the original stamped package in violation of a statutory requirement, and on another count, of having made the same sale of the same drug not pursuant to a written order of the purchaser as required by the same statute. *Id.* The defendant contended that the two statutory crimes constituted one offense for which only a single penalty could be imposed. *Id.* The Court rejected this argument, holding that although both sections of the same statute had been violated by one sale, two offenses were committed because different evidence was needed to prove each of the violations, and therefore the defendant could be punished for both violations. *Id.*

[20] Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 400-01 (2005) ("The Blockburger test itself originated as a limit on cumulative punishments, but later cases abandoned the elements test as an absolute bar against multiple punishment and instead deployed the test as a guide to legislative intent."). The elements test also governs a variety of different legal issues, including successive prosecutions. *United States v. Dixon*, 509 U.S. 688, 696 (1993) ("The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."); *Gavieres v. United States*, 220 U.S. 338, 342 (1911); *see infra* notes 345-52 and accompanying text. For discussion of the differences between U.S. Supreme Court review of state and federal statutes in the context of multiple punishment issues, see *State v. Keffer*, 860 P.2d 1118, 1131 (Wyo. 1993).

[21] *Blockburger*, 284 U.S. at 304 ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."); *see id.*

assumption is that the legislature intended to impose multiple convictions and punishments, notwithstanding a substantial overlap in the proof offered to establish the crimes.[22] The emphasis of this evaluation is generally (though not invariably) placed on scrutinizing the elements of the two crimes, without regard to how those crimes were committed.[23]

While judicial adoption of the elements test is widespread, there is significant confusion and disagreement surrounding its particular details.[24] For example, although the *Blockburger* rule was first clearly articulated by the U.S. Supreme Court in 1932, "no Court majority exists on how to apply the test."[25] Indeed, both state and federal courts routinely struggle with the particular mechanics of the test.[26] Perhaps the greatest source of confusion revolves around the appropriate unit of analysis under the elements test—and the concomitant relevance (or lack thereof) of factual considerations—where one or more of the underlying offenses can be proven through alternative means.[27]

To illustrate, consider the question of whether multiple convictions for felony murder and the underlying felony, if based on the same course of conduct and perpetrated against a single victim, should be subject to merger under the elements test. The key question, per *Blockburger*, is whether each offense requires proof of a fact that the other does not. The answer to that question, however, depends upon how broadly/narrowly one understands the "offense" of felony murder. Consider, for example, a simplified felony murder statute that reads:

("A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.").

[22] *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975).

[23] *See infra* notes 202-11 and accompanying text.

[24] Hoffheimer, *supra* note 195, at 400-01.

[25] George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027, 1032 (1995). As various members of the Court have observed:

> The (elements) test has emerged as a tool in an area of our jurisprudence that the Chief Justice has described as 'a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.' . . . Some will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's "Serbonian Bog . . . Where Armies whole have sunk.

Texas v. Cobb, 532 U.S. 162, 185-86 (2001) (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting) (quoting *Albernaz v. United States*, 450 U.S. 333, 343 (1981) (Rehnquist, C.J.) and I JOHN MILTON, PARADISE LOST 55 (A.W. Verity ed., Cambridge Univ. Press 1934) (1667)).

[26] *See, e.g.*, *Dixon*, 509 U.S. at 711; *Com. v. Jenkins*, 2014 PA Super 148, 96 A.3d 1055, 1056–57 (2014); *Texas v. Cobb*, 532 U.S. 162, 185 (2001) (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 196 (1995) (collecting authorities); Robert A. Scott, *The Uncertain Status of the Required Evidence Test in Resolving Multiple-Punishment Questions in Maryland Eldridge v. State, 329 Md. 307, 619 A.2d 531 (1993)*, 24 U. BALT. L. REV. 251, 272 (1994).

[27] *See, e.g.*, Hoffheimer, *supra* note 195, at 367 ("A [great] source of indeterminacy in applying the elements test results from the fact that legislation routinely defines alternative methods of committing a crime.").

> § 100: *Felony Murder*. No person shall unlawfully kill another person in the course of committing or attempting to commit:
>
> (A) Rape;
>
> (B) Burglary;
>
> (C) Arson; or
>
> (D) Robbery.

A conviction for felony murder under this statute, if based on commission of one of the four underlying felonies, is subject to being construed in one of two ways: (1) as *felony murder generally*, in violation of § 100; or (2) as *felony murder as alleged and/or proven*, in violation of one of the specific subsections that comprise § 100.

The choice between these two constructions is quite significant for purposes of understanding the relationship between felony murder and the offense that serves as the basis of aggravation under the elements test. For example, selecting the broader offense-level characterization indicates that felony murder and the underlying offense should not merge since, in order to prove *felony murder generally*, one need not present facts that will establish that underlying offense (i.e., proof of any other underlying offense will suffice).[28] But if, in contrast, one applies the narrower, theory-specific view of felony murder—that is, *felony murder as alleged and/or proven*—then the elements test would seem to support merger as the only difference between the two offenses would be that the greater offense requires proof of a homicide.[29]

The U.S. Supreme Court, both in *Blockburger* and in various other cases, has frequently articulated the elements test in a manner that seems to support the first construction.[30] The Court often says, for example, that the elements test is comprised of a purely legal analysis, which is to be conducted without regard to the facts of a case.[31] If

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[28] *See, e.g.*, JOSHUA DRESSLER & ALAN MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION § 14.07[C] (4d ed. 2006) ("If one looks exclusively at the statutory definition of the offenses, as *Blockburger* requires, the crimes of "felony murder" and "robbery" each require proof of an element that the other does not: felony murder requires proof of a killing (which robbery does not); robbery requires proof of a forcible taking of another's personal property (a fact not necessary to prove felony murder, since proof of the commission of a different enumerated felony will suffice).").

[29] *See id.*

[30] *See Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991) ("The Supreme Court [has frequently] reaffirmed the position that in applying [the elements] test, the court looks at the statutorily-specified elements of each offense and not the specific facts of a given case as alleged in the indictment or adduced at trial.") (citing, e.g., *Garrett v. United States*, 471 U.S. 773, 778-79 (1985); *United States v. Woodward*, 469 U.S. 105, 108 (1985); *Gore v. United States*, 357 U.S. 386, 389 (1958); *American Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946)).

[31] *See, e.g.*, *Albernaz v. United States*, 450 U.S. 333, 338 (1981) ("'[T]he Court's application of the test focuses on the statutory elements of the offense.'") (quoting *Iannelli v. United States*, 420 U.S. 770, 785, n.17 (1975)); *United States v. Dixon*, 509 U.S. 688, 716–17 (1993) ("Our double jeopardy cases applying *Blockburger* have focused on the statutory elements of the offenses charged, not on the facts that must be proved under the particular indictment at issue . . ."); *Grady v. Corbin*, 495 U.S. 508, 528 (1990)

true, however, this would seem to effectively preclude the more theory-specific understanding of an offense that comprises the second construction, which hinges upon a consideration of the charging document and/or the facts proven at trial to appropriately circumscribe the merger analysis.[32]

At the same time, the U.S. Supreme Court has itself done just that, relying on the government's theory of felony murder liability in *Whalen v. United States*[33] to support the conclusion that both felony murder and the underlying offense (in that case, rape[34]) are subject to a presumption *against* cumulative punishment under the elements test.[35] "In this regard, the [*Whalen*] Court demonstrated a recognition that examination of the elements of the crimes *as charged* is sometimes necessary, especially when dealing with an offense that can be proven in alternate ways."[36]

Nuances in application aside, though, one aspect of the elements test is clear: it constitutes an exceedingly narrow approach to merger. In general, two offenses satisfy the elements test when (but only when) it is impossible to commit one offense without also committing the other offense. Practically speaking, this means that even the most minor variances in the elements between two substantially related offenses can provide the basis for concluding that one "requires proof of a fact that the other does not."[37] In

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("Th[e] test focuses on the statutory elements of the two crimes with which a defendant has been charged, not on the proof that is offered or relied upon to secure a conviction").

[32] *See, e.g.*, Dressler & Michaels, *supra* note 203, at § 14.07[C].

[33] *Whalen v. United States*, 445 U.S. 684 (1980).

[34] The version of the District of Columbia felony murder statute at issue in *Whalen* reads:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, . . . rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

D.C. Code § 22–2401 (1973). And the version of the District rape statute under consideration reads, in relevant part: "Whoever has carnal knowledge of a female forcibly and against her will . . . shall be imprisoned for any term of years or for life." D.C. Code § 22–2801 (1973).

[35] *Whalen*, 445 U.S. at 689-90. *Compare Whalen*, 445 U.S. at 708-12 (Rehnquist, J. dissenting) (rather than defining "felony murder" in a factual vacuum, the *Whalen* court effectively "looked to the facts alleged in a particular indictment" to deem rape an LIO of felony murder) *with Whalen*, 445 U.S. at 694 ("Contrary to the view of the dissenting opinion, we do not in this case apply the *Blockburger* rule to the facts alleged in a particular indictment . . . We have simply concluded that . . . Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of rape.").

[36] *Com. v. Baldwin*, 604 Pa. 34, 48, 985 A.2d 830, 839 (2009) ("A 'strict elements approach,' which does not consider the offenses as charged and proven in each particular case, invariably leads to the conclusion that the crimes do not merge. Nevertheless, a majority of the Court, relying on *Blockburge*r (often used synonymously with 'strict elements approach') held that the two convictions merged for sentencing."); *see, e.g.*, Hoffheimer, *supra* note 195, at 370 ("Though this result makes good sense, commentators have had difficulty reconciling it with the elements test because it is possible, analyzing the elements in the abstract, to commit the more serious crime (murder) without committing the less serious crime . . ."); DRESSLER & MICHAELS, *supra* note 203, at § 14.07[C] (same).

[37] *See, e.g.*, King, *supra* note 201, at 196 (discussing the "remarkable decision by the Illinois Court of Appeals in *People v. Pudlo*, 651 N.E.2d 676 (Ill. App. Ct. 1995), in which two of the three judges decided

effect, then, application of the elements test to issues of merger creates a strong presumption in favor of multiple liability for substantially overlapping offenses.[38]

With that presumption in mind, the drafters of the Model Penal Code sought to develop a statutory approach to dealing with issues of offense overlap and multiple liability that was both broader and clearer than the common law approach. What they ultimately produced, Model Penal Code § 1.07, establishes that, "[w]hen the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense," but that the defendant "may not . . . be convicted of more than one offense" whenever the combination of offenses satisfy any one of a collection of legal principles.[39]

The narrowest principle is that embodied by the elements test. The relevant subsection, Model Penal Code § 1.07(4)(a), bars "convict[ion] of more than one offense if . . . [one offense is] established by proof of the same or less than all the facts required to establish the commission of the [other] offense." Such language, as the accompanying commentary clarifies, was intended to incorporate the approach to merger reflected in the U.S. Supreme Court's decision in *Blockburger v. United States*.[40]

Aside from codifying the *Blockburger* rule, the Model Penal Code also embraces a variety of merger principles that go beyond the elements test. For example, Model Penal Code § 1.07(1)(c) bars "convict[ion] of more than one offense if . . . inconsistent findings of fact are required to establish the commission of the offenses." This principle, as the accompanying commentary explains, was intended to preclude the imposition of logically inconsistent convictions, such as, for example, "robbery and receiving the stolen property, in which it was clear that the defendant had either robbed or received the goods but could not have done both."[41]

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that two offenses were not the same under *Blockburger* because one required a property owner to remove refuse and the other prohibited the owner from allowing it to accumulate").

[38] *See, e.g.*, Stacy, *supra* note 180, at 856 ("The Blockburger test, and even more so the same-elements test, reflexively stack the deck in favor of multiple convictions and punishments."); *State v. Carruth*, 993 P.2d 869, 875 (Utah 1999) ("I believe that the 'statutory elements' test (contained in the state legislation) is too rigid and should be repealed by the legislature and replaced with a more realistic test.") (Howe, C.J., concurring in the result).

[39] Note that the meaning of the phrase "same conduct," as employed in Model Penal Code § 1.07, is left vague. *See* Model Penal Code § 1.07, cmt. at 118 ("The term[] 'the same conduct' [is] intended to be sufficiently flexible to relate realistically to the defendant's behavior and, at the same time, to provide sufficiently definite guidance to make administration reasonably certain."). The word "conduct" is defined under the Code as "an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions." Model Penal Code § 1.13(5). So, while "same conduct" certainly covers the scenario where a single act constitutes multiple offenses, it also protects a defendant from multiple convictions in cases where the offenses were committed by different physical acts. *See, e.g.*, Model Penal Code § 1.07 cmt. at 108 (precluding multiple liability for solicitation and completed offense, such as where X solicits Y to commit crime and Y thereafter commits the crime, notwithstanding the fact that the solicitation by X and subsequent perpetration by Y constitute distinct acts). What remains unclear from the Model Penal Code language and accompanying commentary is where the boundary lies.

[40] *See* Model Penal Code § 1.07, cmt. at 107-08 (discussing *Brown v. Ohio*, and citing *Blockburger* test).

[41] Model Penal Code § 1.07, cmt. at 112 n.32. The Model Penal Code drafters understood this rule to reflect both longstanding common law and important constitutional considerations. *See id.* (citing *Fulfon v. United States*, 45 App.D.C. 27 (1916); *People v. Koehn*, 207 Cal. 605 (1929); *Bargesser v. State*, 95 Fla. 404, (1928); *Fletcher v. State*, 31 Md. 19 (1933); *Commonwealth v. Phillips*, 215 Pa.Super. 5 (1961); *Peek v. State*, 213 Tenn. 323 (1964)).

The Model Penal Code further precludes multiple convictions when one offense is merely a more specific version of the other. The relevant subsection, Model Penal Code § 1.07(1)(d), establishes that a person may not be convicted of more than one offense if "the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." To illustrate, the accompanying commentary gives the example of "a general statute prohibiting lewd conduct and [] a specific-statute prohibiting indecent exposure."[42] "In the absence of an expressed intention to the contrary," the drafters argue, "it is fair to assume that the legislature did not intend that there be more than one conviction under these circumstances."[43]

Yet another bar on multiple liability established by the Model Penal Code applies where one offense is simply a less serious form of the other. The relevant subsection, Model Penal Code § 1.07(4)(c), establishes that a person may not be convicted of more than one offense if one "differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission."[44] Such language, as the accompanying commentary explains, was intended to address two "conceptually distinct situations; either one or both may apply to a given fact pattern."[45] In the first situation, the two offenses at issue differ "only in that a less serious injury or risk of injury is necessary to establish [] commission [of one]."[46] This includes, for example, the relationship between an "offense consisting of an intentional infliction of bodily harm" and "the charge of intentional homicide."[47] The second situation, in contrast, arises where one offense differs from another "only in that it requires a lesser degree of culpability," i.e., "offenses that are less serious types of homicides."[48]

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[42] Model Penal Code § 1.07, cmt. at 114.
[43] *Id.*
[44] This may go beyond the scope of *Blockburger*. Note, for example, that the Commentary to the Hawaii Criminal Code observes that the state's comparable provision, Haw. Rev. Stat. Ann. § 701-109(c), varies from *Blockburger* rule

> in that, although the included offense must produce the same result as the inclusive offense, there may be some dissimilarity in the facts necessary to prove the offense. Therefore [the *Blockburger* rule] would not strictly apply and (c) is needed to fill the gap. For example, negligent homicide would probably not be included in murder under [the *Blockburger* rule], because negligence is different in quality from intention. It would obviously be included under (c), because the result is the same and only the required degree of culpability changes.

Commentary on Haw. Rev. Stat. Ann. § 701-109(c); *see also Stepp v. State,* 286 Ga. 556, 557, 690 S.E.2d 161 (2010) (describing comparable Georgia provision as one of several "additional statutory provisions concerning prohibitions against multiple convictions for closely related offenses") (citation omitted).
[45] Model Penal Code § 1.07, cmt. at 133.
[46] *Id.*
[47] *Id.*
[48] *Id.* (also noting "offenses that are the same [] except that they require recklessness or negligence while the [other] offense [] requires a purpose to bring about the consequences, or, finally, offenses that are the same as the [] except that they require only negligence while the [other] offense [] requires either recklessness or a purpose to bring about the consequences").

The Model Penal Code further precludes multiple liability for an inchoate offense designed to culminate in an offense that is, in fact, completed. The relevant subsection, Model Penal Code § 1.07(1)(b), establishes that a person may not be convicted of more than one offense if one offense "consists only of a conspiracy or other form of preparation to commit the other."[49] The Model Penal Code commentary recognizes that convictions for both a substantive offense and an inchoate offense designed to culminate in that same offense "would not necessarily be barred under the *Blockburger* test."[50] Nevertheless, convictions for both kinds of offenses, the drafters argue, "is not justifiable."[51] Reasoning that general inchoate offenses are "not designed to cumulate sanctions for different stages of conduct culminating in a criminal offense but to reach the preparatory conduct if the offense is not committed,"[52] the drafters ultimately concluded that "[i]t would be a perversion of the legislative intent to use these statutes to pyramid convictions and punishment."[53]

The Model Penal Code provides one other bar on multiple liability for general inchoate crimes in Article 5, which precludes punishing a defendant for combinations of inchoate offenses designed to culminate in the same offense. More specifically, the relevant provision, § 5.05(3) establishes that: "A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime." This language, as the accompanying commentary

[49] Note that Model Penal Code § 1.07(1)(a) also establishes that no person may be convicted of more than one offense if one offense is "included in the other charge," which, as defined in § 1.07(4)(b), includes "an attempt or solicitation to commit the offense charged." *See also, e.g., State v. Mitchell*, 625 P.2d 1155, 1159 (Mont. 1981) (finding that while solicitation is not referred to specifically in state statute barring multiple convictions, the offense is considered a "form of preparation," and thus conviction for the solicitation as well as the target offense was barred) (interpreting Mont. Code Ann. § 46-11-410(2)(b)).

[50] Model Penal Code § 1.07, cmt. at 108 ("For example, convictions of both a substantive offense and its solicitation would be possible since solicitation requires proof of an element, the solicitation, which would not be required to prove the substantive offense, and the substantive offense requires proof of an element, actual commission of the offense, not required to prove the solicitation.").

[51] The drafters of the Model Penal Code recognized that "[c]onviction for both the conspiracy and the completed offense has generally been allowed" as a historical matter. Model Penal Code § 1.07, cmt. at 109.

[52] *Id.* at 108.

[53] *Id.* at 108. It's worth noting, however, that the Model Penal Code still allows for the conviction of a general inchoate crime and the intended substantive offense "if the prosecution shows that the objective of the [general inchoate crime] was the commission of offenses in addition to that for which the defendant has been convicted." *Id.* at 109 ("[T]he limitation of the Code is confined to the situation where the completed offense was the sole criminal objective of the conspiracy"); *see id.* at 110 ("The position taken with regard to conspiracy applies equally to any other conduct that is made criminal only because it is a form of preparation to commit another crime."); Model Penal Code § 5.05, cmt. at 492 ("[A] person may be convicted for one substantive offense and for attempt, solicitation or conspiracy in relation to a different offense."). The drafters believed such conduct to "involve[] a distinct danger in addition to that involved in the actual commission of any specific offense." Model Penal Code § 1.07, cmt. at 109.

This exception is most relevant where a "conspiracy ha[s] as its objective engaging in a continuing course of criminal conduct." *Id.* "For example, if D1 and D2 conspire to rob Bank V and then do so, they may be convicted and punished for robbery or conspiracy, but not for both offenses." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.03 (6th ed. 2012). "In contrast, if D1 and D2 conspire to rob Banks V1, V2, and V3, and they are arrested after robbing Bank V1—thus, before their other criminal objectives were fully satisfied—the conspiracy does not merge with the completed offense." *Id.*

explains, reflects a policy "of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object."[54] Viewed in this way, the drafters believed there to be "no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense."[55]

Only a plurality of jurisdictions that have undergone comprehensive criminal code reform have opted to codify a comprehensive legislative framework modeled on Model Penal Code § 1.07.[56] Nevertheless, the individual limitations on multiple liability endorsed by the Model Penal Code drafters have had a broader influence on the current state of American merger policy as it is reflected in both criminal codes and reported cases.[57]

For example, numerous reform codes incorporate general provisions that—consistent with Model Penal Code § 1.07(4)(a)—preclude multiple liability where one offense "is established by proof of the same or less than all the facts required to establish the commission of the [other] offense."[58] And, various courts in jurisdictions lacking such general provisions have relied on the Model Penal Code's codification of *Blockburger*.[59]

Beyond *Blockburger*, however, "[m]any modern code jurisdictions follow the lead of the Model Penal Code and bar multiple convictions for offenses" that satisfy one of more of the broader general merger principles proscribed by section 1.07.[60] This is reflected in state general provisions applicable: (1) where, in accordance with Model Penal Code § 1.07(1)(c), the offenses implicate inconsistent findings of fact[61]; (2) where, in accordance with Model Penal Code § 1.07(1)(d), one offense is a more specific version

[54] Model Penal Code § 5.05, cmt. at 492.

[55] *Id.* Where, however, a defendant's general inchoate "conduct . . . has multiple objectives, only some of which have been achieved," the Model Penal Code would allow for that individual to be "prosecuted under the appropriate section of Article 5." Explanatory Note on Model Penal Code § 5.05(3).

[56] *See, e.g.*, Ala. Code § 13A–1–9; Ark. Code Ann. § 5–1–110(b); Colo. Rev. Stat. § 18–1–408(5); Del. Code Ann. tit. 11, § 206(b); Ga. Code Ann. § 16–1–6; Haw. Rev. Stat. § 701–109(4); Ky. Rev. Stat. § 505.020(2); Mont. Code Ann. § 46–1–202(8); N.J. Rev. Stat. § 2C:1–8(d).

[57] *See, e.g.*, Model Penal Code § 1.07, cmt. at 106 ("Though differing in the circumstances to which they apply, provisions limiting conviction of more than one offense when the same conduct involves multiple offenses have been enacted or proposed in twenty one of the jurisdictions that have recently enacted or proposed revised penal codes."); *State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999); ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 68.

[58] *See, e.g.*, Ala. Code § 13A-1-9(a)(1); Ark. Code Ann. § 5-1-110(b)(1); Colo. Rev. Stat. Ann. § 18-1-408(5)(a); Del. Code Ann. tit. 11, § 206(b)(1); Ga. Code Ann. §§ 16-1-6(1), 16-1-7(a)(1); Haw. Rev. Stat. Ann. § 701-109(4)(a); Kan. Stat. Ann. § 21-5109(b)(2); Ky. Rev. Stat. Ann. § 505.020(2)(a); Mo. Ann. Stat. § 556.046(1)(1); Mont. Code Ann. §§ 46-1-202(9)(a), 46-11-410(2)(a); N.J. Stat. Ann. § 2C:1-8(d)(1); Utah Code Ann. § 76-1-402(3)(a); Wis. Stat. Ann. § 939.66(1).

[59] *See, e.g., United States v. Whitaker*, 447 F.2d 314, 317 n.5 (D.C. Cir. 1971) (citing *Fuller v. United States*, 407 F.2d 1199, 1228 n.28 (D.C. Cir. 1967)); *State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999).

[60] ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 68.

[61] *See, e.g.*, Ala. Code § 13A-1-8(b)(3); Ark. Code Ann. § 5-1-110(a)(3); Colo. Rev. Stat. Ann. § 18-1-408(1)(c); Del. Code Ann. tit. 11, § 206(a)(3); Haw. Rev. Stat. Ann. § 701-109(1)(c); Ky. Rev. Stat. Ann. § 505.020(1)(b); Mo. Ann. Stat. § 556.041(2); Mont. Code Ann. § 46-11-410(2)(c); N.J. Stat. Ann. § 2C:1-8(a)(3).

of another more general offense[62]; and (3) where, in accordance with Model Penal Code § 1.07(4)(c), one offense implicates a less serious harm and/or a less culpable mental state.[63] These principles have also been endorsed through case law.[64]

The Model Penal Code approach to dealing with merger issues relevant to general inchoate crimes has also been influential. For example, it has been observed that, consistent with Model Penal Code § 1.07(1)(b), "[i]t is almost universally the rule that a defendant may not be convicted of both a substantive offense and an inchoate offense designed to culminate in that same offense."[65] And it has also been observed that, in

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[62] *See, e.g.*, Ala. Code § 13A-1-8(b)(4); Ark. Code Ann. § 5-1-110(a)(4); Colo. Rev. Stat. Ann. § 18-1-408(1)(d); Ga. Code Ann. § 16-1-7(a)(2); Haw. Rev. Stat. Ann. § 701-109(1)(d); Kan. Stat. Ann. § 21-5109(d); Mo. Ann. Stat. § 556.041(3); Mont. Code Ann. § 46-11-410(2)(d); N.J. Stat. Ann. § 2C:1-8(a)(4).

[63] *See, e.g.*, Ala. Code § 13A-1-9(a)(4); Ark. Code Ann. § 5-1-110(b)(3); Colo. Rev. Stat. Ann. § 18-1-408(5)(c); Del. Code Ann. tit. 11, § 206(b)(3); Ga. Code Ann. §§ 16-1-6(2), 16-1-7(a)(1); Haw. Rev. Stat. Ann. § 701-109(4)(c); Ky. Rev. Stat. Ann. § 505.020(2)(d); Mont. Code Ann. §§ 46-1-202(9)(c), 46-11-410(2)(a); N.J. Stat. Ann. § 2C:1-8(d)(3); Wis. Stat. Ann. § 939.66 (2)-(3), (5-7) (codifying limitation only for specific offenses); *see also, e.g., State v. Kaeo*, 132 Haw. 451, 465, 323 P.3d 95, 109 (2014) (applying Haw. Rev. Stat. Ann. § 701-109(4)(c) to uphold merger of assault offenses); *State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999) (interpreting Model Penal Code provision "to include offenses that are still logically related to the charged offense in terms of the character and nature of the offense but in which the injury or risk of injury, damage, or culpability is of a lesser degree than that required for the greater offense"); *Sullivan v. State*, 331 Ga. App. 592, 595–96, 771 S.E.2d 237, 240 (2015).

[64] ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 68. For case law consistent with Model Penal Code § 1.07(1)(c), see, for example, *United States v. Thompson*, 22 M.J. 40 (U.S.C.M.A. 1986); *People v. Hoffer*, 106 Ill.2d 186, 88 Ill.Dec. 20, 478 N.E.2d 335 (1985). For case law consistent with Model Penal Code § 1.07(1)(d), see, for example, *State v. Davis*, 68 N.J. 69, 80 (1975); *State v. Williams*, 829 P.2d 892, 897 (Kan. 1992); *State v. Wilcox*, 775 P.2d 177, 178-79 (Kan. 1989). And for case law consistent with Model Penal Code § 1.07(4)(c), see, for example, *Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014); *Washington v. United States*, 884 A.2d 1080, 1085 (D.C. 2005). *See generally Com. v. Carter*, 482 Pa. 274, 290, 393 A.2d 660, 668 (1978) (identifying overlap between Model Penal Code and Pennsylvania approaches to merger); *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999) (adopting much of Model Penal Code § 1.07).

[65] ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84. Within this trend, however, there is significant variance. Some jurisdictions have adopted general provisions, which explicitly provide that "[n]o person shall be guilty of both the inchoate and the principal offense." 720 Ill. Comp. Stat. Ann. 5/8-5; *see* Utah Code Ann. § 76-4-302; Ala. Code § 13A-4-5(b); Ark. Code Ann. § 5-1-110(a)(2); Haw. Rev. Stat. Ann. § 701-109(1)(b), (4)(b); Ky. Rev. Stat. Ann. § 506.110(1); Mont. Code Ann. § 46-11-410(2)(b); Or. Rev. Stat. Ann. § 161.485; Wis. Stat. Ann. § 939.72. More frequently, though, jurisdictions adopt general provisions that bar conviction for the substantive offense and specific enumerated inchoate offenses. "The list of enumerated offenses commonly includes all inchoate offenses, although either conspiracy or solicitation are often omitted, thereby permitting conviction for those inchoate offenses and the related substantive offense." ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; *see, e.g.*, Alaska Stat. Ann. § 11.31.140(c) (codifying limitation for attempt and solicitation only); Ariz. Rev. Stat. Ann. § 13-111 (codifying limitation for attempt only); Colo. Rev. Stat. Ann. § 18-1-408(5)(b) (codifying limitation for attempt and solicitation only); Del. Code Ann. tit. 11, § 206(b)(2) (codifying limitation for attempt only); Ga. Code Ann. §§ 16-4-2 (codifying limitation for attempt), 16-4-8.1 (codifying limitation for conspiracy); Ind. Code Ann. § 35-41-5-3(b) (codifying limitation for attempt only); Iowa Code Ann. § 706.4 (codifying limitation for conspiracy only); Kan. Stat. Ann. § 21-5109(b)(2) (codifying limitation for attempt only); Minn. Stat. Ann. § 609.04(2) (codifying limitation for attempt only); Mo. Ann. Stat. §§ 556.014 (codifying limitation for conspiracy), 556.046(1)(3) (codifying limitation for attempt); N.J. Stat. Ann. § 2C:1-8(d)(2) (codifying limitation for conspiracy and attempt); Ohio Rev. Code Ann. §§ 2923.01(G) (codifying limitation for conspiracy), 2923.02(C) (codifying limitation for attempt); Okla. Stat. Ann. tit. 21, § 41 (codifying limitation for attempt); Tenn. Code Ann. § 39-12-106(b)-(c) (codifying limitation for attempt

accordance with Model Penal Code § 5.05(3), "[m]any American jurisdictions prohibit conviction for more than one statutory inchoate crime for conduct designed to culminate in the same completed offense."[66]

While the substantive policies incorporated into the Model Penal Code have generally been influential, they nevertheless fail to capture at least three important aspects of contemporary American merger practice.[67] The first relates to the issue discussed earlier in the context of *Blockburger*: whether and to what extent factual considerations have a role to play in the application of merger principles. The Model Penal Code is ambiguous on the issue,[68] which, in practical effect, not only preserves much of the confusion surrounding application of the elements test,[69] but also extends it to many of the other principles contained in § 1.07.[70] Absent clarification by the Model

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and solicitation only and explicitly permitting conviction of conspiracy and substantive offense which was the object of that conspiracy); Va. Code Ann. § 18.2-23.1 (codifying limitation for conspiracy only).

[66] Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 5 n.8 (1989); *see* ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84 ("Most jurisdictions bar multiple convictions for combinations of inchoate offenses designed to culminate in the same offense."). Here again there is some variance between jurisdictions. For example, "[s]ome jurisdictions bar convictions for any and all combinations of inchoate offenses." ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; *see* Ala. Code § 13A-4-5(c); Alaska Stat. Ann. § 11.31.140(b); Ark. Code Ann. § 5-3-102; Haw. Rev. Stat. Ann. § 705-531; Ind. Code Ann. § 35-41-5-3(a); Ky. Rev. Stat. Ann. § 565.110(3); Ohio Rev. Code Ann. §§ 2923.01(G), 2923.02(C); Or. Rev. Stat. Ann. § 161.485(2); 18 Pa. Stat. and Cons. Stat. Ann. § 906; Tenn. Code Ann. § 39-12-106(a). In contrast, "[o]ther jurisdictions bar only certain combinations [] apparently permitting conviction for other combinations." ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; s*ee* Utah Code Ann. § 76-4-302 ("No person shall be convicted of both… an attempt to commit an offense and a conspiracy to commit the same offense."). "Still other jurisdictions provide no statutory guidance on multiple offense limitations for multiple inchoate offenses." ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; *compare, e.g., Monoker v. State*, 321 Md. 214, 223 (1990) (merging solicitation and conspiracy to commit the same offense); *Walker v. State*, 213 Ga. App. 407, 411 (1994) (merging attempt and conspiracy to commit the same offense); *State v. Cintron*, No. A-3874-15T4, 2017 WL 5983201, at *1 (N.J. Super. Ct. App. Div. Dec. 1, 2017) (same), *with People v. Jones*, 601 N.E.2d 1080, 1088 (Ill. App. Ct. 1992) (upholding conviction of attempted armed robbery and conspiracy to commit armed robbery); *see also* sources cited *infra* notes 269-74 and accompanying text (discussing jurisdictions with general categorical bars on multiple liability).

[67] *Cf.* Cahill, *supra* note 123, at 604 (noting that the Model Penal Code does not provide the basis for "a clear and comprehensive [approach] that sets out in detail an underlying basis or practical method for punishing multiple offenses").

[68] *See, e.g.*, Hoffheimer, *supra* note 195, at 410-12 (discussing Model Penal Code § 1.07, cmt. at 130).

[69] *See, e.g.*, Mark E. Nolan, *Diverging Views on the Merger of Criminal Offenses: Colorado Has Veered Off Course*, 66 U. COLO. L. REV. 523, 530–31 (1995) (noting that the Model Penal Code's "reference to proof of the same or less than all the facts seems to indicate that courts making a merger determination should look at the specific evidence surrounding the criminal acts," but that at least one court "has rejected this approach in applying [a similar state-level] merger statute, the doctrine of judicial merger, and the Double Jeopardy Clause").

[70] To illustrate, consider whether multiple convictions for both a reckless manslaughter and a reckless assault perpetrated during a barroom fight against the same victim would be permitted under Model Penal Code § 1.07(a)(4), which precludes multiple liability where one offense "differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission."

The relevant offenses are defined by the Model Penal Code as follows:

§ 210.3. Manslaughter.

Penal Code, resolution of this issue has, in most cases, been delegated to state and federal courts.[71]

Contemporary legal trends pertaining to this issue are difficult to identify with precision.[72] Nevertheless, it can at least generally be said that American legal practice is comprised of three main approaches to conducting "analysis of lesser and greater included offenses" in the context of merger determinations.[73] In some jurisdictions, this

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(1) Criminal homicide constitutes manslaughter when:

(a) it is committed recklessly; or

(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

§ 211.1 Assault.

A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a deadly weapon; or

(c) attempts by physical menace to put another in fear of imminent serious bodily injury.

At first glance, it would seem that merger is clearly required under Model Penal Code § 1.07(a)(4) since the only difference between the manslaughter and the assault raised by the requisite facts is that the latter requires a less serious injury. But is this really the only difference between the two "offense[s]"? That depends upon the appropriate unit of analysis. If the point of comparison is specifically reckless manslaughter, § 210.3(1)(a), and reckless assault, § 211.1(a), then, yes, it seems clear that convictions for manslaughter and simple assault should merge under the Model Penal Code approach. However, if the point of comparison is the statutory elements of "manslaughter" and "assault," otherwise unconstrained by the theories of manslaughter and assault liability raised in the case, then it would seem that other differences between "manslaughter" and "assault" exist, such as, for example, the fact that one prong of assault incorporates, as an alternative element, the use of a "deadly weapon." *See generally* Hoffheimer, *supra* note 195, at 410.

[71] *See, e.g.*, *People v. Rivera*, 186 Colo. 24 (1974); *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999).

[72] *See, e.g.*, *Hopkins v. Reeves*, 524 U.S. 88, 98 (1998) (observing that "Nebraska has alternated between [approaches] in a relatively short period of time") (citing *State v. Williams*, 243 Neb. 959, 963-965, 503 N.W.2d 561, 564-565 (1993) (readopting statutory elements test), *overruling State v. Garza*, 236 Neb. 202, 207-208, 459 N.W.2d 739, 743 (1990) (reaffirming cognate evidence test), disapproving *State v. Lovelace*, 212 Neb. 356, 359-360, 322 N.W.2d 673, 674-675 (1982) (applying statutory elements test)); *Com. v. Jones*, 590 Pa. 356, 361, 912 A.2d 815, 818 (2006) (observing that the Pennsylvania Supreme Court's "own analysis of lesser and greater included offenses has evolved over time, in the sentencing merger context, from a strict statutory elements test to a hybrid of both the statutory elements and cognate-pleadings approaches."); *State v. Schoonover*, 281 Kan. 453, 481, 133 P.3d 48, 70 (2006).

[73] *Com. v. Jones*, 590 Pa. 356, 360–61, 912 A.2d 815, 817–18 (2006). Note that "analysis of lesser and greater included offenses" applies to both merger and other issues, such as the availability of jury instructions for an uncharged crime. *See id.*

judicial analysis is "limit[ed] to comparing the elements of the crimes, without reference to how the crimes were committed in a particular case."[74] The courts in other jurisdictions "assess the relationship between crimes by looking at the pleadings in a case."[75] And in still other jurisdictions, courts "analyze the actual proof submitted at trial, rather than only the pleadings, to examine the relationship between the crimes committed."[76] As a general rule, the fact-sensitive analyses conducted in the latter two groups of jurisdictions are broader, and therefore more likely to support merger, than the purely element-based analyses conducted in the former.[77]

The second way in which the Model Penal Code approach to merger fails to capture contemporary legal practice is reflected in the fact that many jurisdictions have adopted—whether through case law or legislation—general merger principles that are broader than those contained in § 1.07. The proportionality-based standards currently applied across a range of common law and reform jurisdictions are illustrative.

Consider, for example, the Alaska approach to merger. In a "seminal case,"[78] *Whitton v. State*, the Alaska Court of Appeals opted to abandon the *Blockburger* rule, which, while "widely used by the courts," failed to "cop[e] satisfactorily with the problem it was designed to solve."[79] More specifically, the *Whitton* court reasoned that:

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[74] *Jones*, 590 Pa. at 360 (quoting WAYNE R. LAFAVE ET AL., 6 CRIM. PROC. § 24.8(e)) (4th ed. 2018)) (collecting cases in accordance with "statutory elements" approach); *see Howard v. State*, 578 S.W.2d 83, 85 (Tenn. 1979) ("[Multiple jurisdictions] hold that an offense is necessarily included in, or a lesser included offense of, the indicted offense only if it is logically impossible to commit the indicted offense without committing the lesser offense, *under any set of facts that might be imagined*.") (citing, e.g., *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978); *State v. Redmon*, 244 N.W.2d 792 (Iowa 1976); *State v. Leeman*, 291 A.2d 709 (Me. 1972); *Raymond v. State*, 55 Wis.2d 482, 198 N.W.2d 351 (1972)).

[75] *Jones*, 590 Pa. at 360 (quoting LAFAVE ET AL., *supra* note 249, at 6 CRIM. PROC. § 24.8) (collecting cases accordance with "cognate pleadings" approach); *see Howard*, 578 S.W.2d at 85 ("[Multiple jurisdictions] hold that an offense is included in another if it is impossible to commit the greater offense i*n the manner in which that offense is set forth in the indictment without committing the lesser*.") (citing, e.g., *Christie v. State*, 580 P.2d 310 (Alaska 1978); *State v. Neve*, 174 Conn. 142, 384 A.2d 332 (1977); *People v. St. Martin*, 1 Cal.3d 524, 83 Cal. Rptr. 166, 463 P.2d 390 (1970); *State v. Magai*, 96 N.J. Super. 109, 232 A.2d 477 (1967)).

[76] *Jones*, 590 Pa. at 360; (quoting LAFAVE ET AL., *supra* note 249, at 6 CRIM. PROC. § 24.8) (collecting cases in accordance with "evidentiary" approach); *People v. Beach*, 429 Mich. 450, 462, 418 N.W.2d 861, 866-867 (1988) (one offense is an lesser included offense even though all of the statutory elements of the lesser offense are not contained in the greater offense, if the "overlapping elements relate to the common purpose of the statutes" and the specific evidence adduced would support an instruction on the cognate offense) (internal quotation marks and citation omitted)); *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971). The fact-based standards applied to merger of kidnapping in particular would similarly qualify. *See, e.g.*, WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 18.1 (2d ed., Westlaw 2017); *Gov't of Virgin Islands v. Berry*, 604 F.2d 221, 227 (3d Cir. 1979) (summarizing approaches); *People v. Gonzalez*, 80 N.Y.2d 146, 149-50, 603 N.E.2d 938, 941 (1992); *People v. Timmons*, 4 Cal.3d 411, 415, 93 Cal. Rptr. 736, 739, 482 P.2d 648, 651 (1971).

[77] *See, e.g., Com. v. Kimmel*, 2015 PA Super 226, 125 A.3d 1272, 1282 (2015) ("The pure statutory elements approach involves a more restrictive analysis and results in the fewest instances of merger."); Hoffheimer, *supra* note 195, at 432-33 ("Elements test jurisdictions have employed five different strategies to limit the overapplication of the test . . . .").

[78] *Todd v. State*, 917 P.2d 674, 681 (Alaska 1996).

[79] *Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970).

> Legislative refinement of an essentially unitary criminal episode into numerous separate violations of the law has resulted in a proliferation of offenses capable of commission by a person at one time and in one criminal transaction. Since each violation by definition will usually require proof of a fact which the others do not, application of the same-evidence test will mean that each offense is punishable separately. But as the separate violations multiply by legislative action, the likelihood increases that a defendant will actually be punished several times for what is really and basically one criminal act.[80]

Given these shortcomings, the Alaska Court of Appeals chose to instead apply a proportionality-based approach to merger that "focus[es] upon the quality of the differences, if any exist, between the separate statutory offenses," with an eye towards discerning whether the "differences relate to the basic interests sought to be vindicated or protected by the statutes."[81]

More specifically, the *Whitton* framework, which has been applied in Alaska for over four decades, dictates that:

> The trial judge first would compare the different statutes in question, as they apply to the facts of the case, to determine whether there were involved differences in intent or conduct. He would then judge any such differences he found in light of the basic interests of society to be vindicated or protected, and decide whether those differences were substantial or significant enough to warrant multiple punishments. The social interests to be considered would include the nature of personal, property or other rights sought to be protected, and the broad objectives of criminal law such as punishment of the criminal for his crime, rehabilitation of the criminal, and the prevention of future crimes.
>
> If such differences in intent or conduct are significant or substantial in relation to the social interests involved, multiple sentences may be imposed, and the constitutional prohibition against double jeopardy will not be violated. But if there are no such differences, or if they are insignificant or insubstantial, then only one sentence may be imposed under double jeopardy. Ordinarily the one sentence to be imposed will be based upon or geared to the most grave of the offenses involved, with degrees of gravity being indicated by the different punishments prescribed by the legislature.[82]

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[80] *Id.*
[81] *Id.* at 312.
[82] *Id*. (also requiring a statement of reasons for purposes of merger analysis); *see, e.g., Artemie v. State,* No. A-10463, 2011 WL 5904452, at *13 (Alaska Ct. App. Nov. 23, 2011); *Jacinth v. State,* 593 P.2d 263, 266–67 (Alaska 1979); *Catlett v.. State,* 585 P.2d 553, 558 (Alaska 1978).

For another state-level approach to proportionality-based merger, consider the framework applied in Maryland. Under Maryland law, the elements test constitutes the baseline for addressing merger issues, but this baseline is also complemented by two other general merger principles that go beyond *Blockburger*.[83]

The first is a principle of lenity, which holds that, "even though offenses may be separate and distinct under the *Blockburger* [rule]," judges may nevertheless "find as a matter of statutory interpretation that the Legislature did not intend, under the circumstances involved, that a person could be convicted of two particular offenses growing out of the same act or transaction."[84] This principle effectively affords "the defendant the benefit of the doubt"[85] whenever the courts are "uncertain as to what the Legislature intended," notwithstanding the results generated by the elements test.[86]

The second, and even broader principle, applied by the Maryland courts is one of "fundamental fairness."[87] Under this principle, Maryland courts bar multiple convictions and punishment for substantially related offenses whenever it would be "[fundamentally] unfair to uphold convictions and sentences for both crimes."[88] Such an approach, as the Maryland courts have observed, make "[c]onsiderations of fairness and reasonableness" central to merger[89] in the context of an analysis that is "heavily and intensely fact-driven."[90]

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[83] *See, e.g., Pair v. State*, 33 A.3d 1024, 1035 (Md. 2011); *State v. Jenkins*, 515 A.2d 465, 473 (Md. 1986).
[84] *Brooks v. State*, 397 A.2d 596, 600 (Md. 1979).
[85] *Pair*, 33 A.3d at 1035–36.
[86] *Id.* (noting that, in comparison to *Blockburger*, "merger based on the rule of lenity is a different creature entirely").
[87] *Monoker v. State*, 582 A.2d 525, 529 (Md. 1990) ("One of the most basic considerations in all our decisions is the principle of fundamental fairness in meting out punishment for a crime."); *see id.* at 529 ("While solicitation and conspiracy do not merge under the required evidence test, we find it unfair to uphold convictions and sentences for both crimes."); *see, e.g., Alexis v. State*, 87 A.3d 1243, 1262 (Md. 2014).
[88] *Monoker*, 582 A.2d at 529.
[89] *Williams v. State*, 593 A.2d 671, 676 (Md. 1991) ("Considerations of fairness and reasonableness reinforce our conclusion."); *Claggett v. State*, 108 Md.App. 32, 54 (1996) ("The fairness of multiple punishments in a particular situation is obviously important.").
[90] *Pair*, 33 A.3d at 1039 (whereas "[m]erger pursuant to [*Blockburger*] can be decided as a matter of law, virtually on the basis of examination confined within the "four corners" of the charges").

A similar fact-driven, proportionality-based principle is reflected in the New Jersey. Interpreting their state's Model Penal Code-influenced provision governing issues of multiple liability, N.J. Stat. Ann. § 2C:1-8, the New Jersey courts have recognized a holistic approach to merger, which entails:

> [A]nalysis of the evidence in terms of, among other things, the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.

State v. Tate, 79 A.3d 459, 463 (N.J. 2013) (concluding that defendant's conviction for third-degree possession of a weapon for an unlawful purpose merged with his conviction for first-degree aggravated manslaughter); *see State v. Davis*, 68 N.J. 69, 77, 342 A.2d 841, 845 (1975) ("Such a proscription not only tends to insure that the punishment imposed is commensurate with the criminal liability, by limiting judges and prosecutors alike to acting within the bounds of the legislative design; but it also addresses the inevitable conflict between legislative attempts to stuff all kinds of anti-social conduct into the general

While, in most instances, these more expansive merger principles have been promulgated by courts, in at least a few instances, they are the product of legislative enactment. For example, the Ohio Criminal Code contains a broad general merger provision, which provides that, "[w]here the same conduct . . . can be construed to constitute two or more allied offenses of similar import . . . the defendant may be convicted of only one."[91]

"The basic thrust of the section," as the accompanying commentary explains, "is to prevent 'shotgun' convictions":

> For example, a thief theoretically is guilty not only of theft but of receiving stolen goods, insofar as he receives, retains, or disposes of the property he steals. Under this section, he may be charged with both offenses but he may be convicted of only one, and the prosecution sooner or later must elect as to which offense it wishes to pursue . . . .
>
> [Conversely,] an armed robber who holds up a bank and purposely kills two of the victims can be charged with and convicted of one count of aggravated robbery and of two counts of aggravated murder. Robbery and murder are dissimilar offenses, and each murder is necessarily committed with a separate animus, though committed at the same time.[92]

Interpreting this statute, the Ohio courts have explained that:

> [W]hen determining whether offenses are allied offenses of similar import within the meaning of [the Ohio Criminal Code], courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they

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language of a limited number of criminal offense categories, and the legislative desire not to be inordinately vague about what behavior is deemed 'criminal.'"); *see also State v. Robinson*, 439 N.J. Super. 196, 200, 107 A.3d 682, 684 (App. Div. 2014) (discussing *Tate* and *Davis*).

For other comparatively broad approaches, *see, e.g., United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012) ("[I]t was within the military judge's discretion to conclude that for sentencing purposes the three specifications should be merged and that it would be inappropriate to set the maximum punishment based on an aggregation of the maximum punishments for each separate offense. It is not difficult to see how the three specifications in this case might have exaggerated Appellant's criminal and punitive exposure in light of the fact that, from Appellant's perspective, he had committed one act implicating three separate criminal purposes."); *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971) (analysis of LIO based on existence of an 'inherent' relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense."); *see also, e.g., Staton v. Berbary*, No. 01-CV-4352(JG), 2004 WL 1730336, at *8-9 (E.D.N.Y. Feb. 23, 2004) ("The guiding principle," for purposes of merger of kidnapping and other crimes against persons, "is whether the restraint was so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that *independent criminal responsibility may not fairly be attributed to them*.") (quoting *People v. Gonzalez*, 80 N.Y.2d 146, 153, 603 N.E.2d 938, 943 (1992)).

[91] Ohio Rev. Code Ann. § 2941.25.

[92] *Id.*

> committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.[93]

Most expansive of all merger principles—whether judge-made or legislatively enacted—are the categorical bars on multiple convictions incorporated into the criminal codes in Minnesota and California (and perhaps also Arizona[94]). For example, Section 609.035 of the Minnesota Criminal Code establishes, in relevant part, that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses . . ."[95] Motivated by a legislative desire "to protect against exaggerating the criminality of a person's conduct and to make both punishment and prosecution commensurate with culpability,"[96] the Minnesota courts have construed this provision to "prohibit[] multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident."[97]

The California legislature has adopted a similar approach through § 654 of its state code, which provides, in relevant part, that:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.[98]

This language, as the California courts have explained, is intended:

> to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court

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[93] *State v. Pope*, 2017-Ohio-1308, ¶ 32, 88 N.E.3d 584, 591–92.

[94] Note that Arizona incorporates a comparable bar on *consecutive sentences*. *See* Ariz. Rev. Stat. Ann. § 13-116 ("An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent."). However, this statute appears to have been interpreted as applying to *multiple convictions* too. *See, e.g., State v. Rogowski*, 130 Ariz. 99, 101, 634 P.2d 387, 389 (1981) ("The provision also bars double convictions for one act or offense.") (quoting *State v. Castro*, 27 Ariz. App. 323, 325, 554 P.2d 919, 921 (1976)).

[95] Minn. Stat. Ann. § 609.035.

[96] *State ex rel. Stangvik v. Tahash*, 281 Minn. 353, 360, 161 N.W.2d 667, 672 (1968) (quoting *People v. Ridley*, 63 Cal. 2d 671, 678, 408 P.2d 124 (1965)). *Compare State v. Edwards*, 774 N.W.2d 596, 605 (Minn. 2009) ("[M]ultiple convictions arising from a single behavioral incident did not violate our rule against double punishment because where multiple victims are involved, a defendant is equally culpable to each victim.") *with State v. Ferguson*, 808 N.W.2d 586, 589–90 (Minn. 2012) ("But a defendant 'may not be sentenced for more than one crime for each victim' when the defendant's conduct is motivated by a single criminal objective.'") (quoting *State v. Prudhomme*, 303 Minn. 376, 379, 228 N.W.2d 243, 245 (1975).

[97] *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn.1986); *see, e.g., State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016); *State v. Terry*, 295 N.W.2d 95, 96 (Minn. 1980).

[98] Cal. Penal Code § 654.

> may impose sentence for only one offense—the one carrying the highest punishment. In this way, punishment is commensurate with a defendant's culpability.[99]

The above general merger principles, all of which would appear to expand upon the protections afforded in the Model Penal Code, are to be contrasted with the third significant way that many jurisdictions depart from the Model Penal Code approach: by more narrowly curtailing the constraints on multiple liability for general inchoate crimes. This curtailment is reflected in two different ways. First, whereas Model Penal Code § 1.07 would preclude multiple liability for both a substantive offense and *any* inchoate offense designed to culminate in that offense, most jurisdictions instead bar conviction for the substantive offense and specific enumerated inchoate offenses.[100] This departure from the Model Penal Code approach is clearest in the context of criminal conspiracies.

Consider that the drafters of the Model Penal Code, in precluding convictions for both a conspiracy and its completed target, sought to overturn the common law rule, which authorized multiple liability for a conspiracy and its completed target.[101] The common law approach rested on a belief that, as the U.S. Supreme Court famously observed in *Callanan v. United States*, "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts."[102] The Model Penal Code drafters ultimately rejected this rationale, however. Motivated by their belief that punishment for inchoate offenses is justified because of the potential danger that the substantive offense intended will be committed, the drafters concluded that a conviction for a completed offense alone "adequately deals with such conduct."[103] Since publication of the Model Penal Code, however, "only [] a minority of the modern recodifications" have been persuaded by this argument.[104] Rather, the contemporary majority approach recognizes that, "[u]nlike the crimes of attempt and solicitation, the offense of conspiracy does not merge into the [] completed offense that was the object of the conspiracy."[105]

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[99] *People v. Myers*, 59 Cal. App. 4th 1523, 1529, 69 Cal. Rptr. 2d 889, 892 (1997); *see, e.g.*, *People v. Kelly*, 245 Cal. App. 4th 1119, 1136, 200 Cal. Rptr. 3d 477, 489 (2016); *see also People v. Latimer*, 5 Cal. 4th 1203, 1208, 858 P.2d 611, 614 (1993) ("Section 654 has been applied not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.").

[100] *See* sources cited *supra* note 240 and accompanying text.

[101] Model Penal Code § 1.07 cmt. at 109 (noting that the common law rule would "generally [] allow[]" multiple "[c]onviction[s] for both the conspiracy and the completed offense").

[102] 364 U.S. 587, 593-94 (1961). More specifically, the common law rule emphasized that the "collective criminal agreement" at the heart of conspiracies: (1) "increases the likelihood that the criminal object will be successfully attained"; (2) "decreases the probability that the individuals involved will depart from their path of criminality"; and, perhaps most importantly, (3) "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Id.*

[103] Model Penal Code § 1.07 cmt. at 109.

[104] LAFAVE, *supra* note 251, at 2 SUBST. CRIM. L. § 12.4(d) (collecting statutes).

[105] DRESSLER, *supra* note 228, at § 29.03; *see, e.g.*, WAYNE R. LAFAVE, 2 SUBST. CRIM. L. §12.4(d) (3d ed. Westlaw 2018); Commentary on Ky. Rev. Stat. Ann. § 506.110; *Lythgoe v. State*, 626 P.2d 1082, 1083 (Alaska 1980).

The second area of curtailment relates to merger of multiple general inchoate crimes. Both the text of Model Penal Code § 5.05(3) and the accompanying commentary indicate that the drafters intended to preclude liability for more than one general inchoate crime directed towards a single criminal objective, without regard to the nature of the conduct/amount of time that has elapsed between criminal efforts.[106] Practically speaking, this means that (for example) where X unsuccessfully attempts to murder V in 2010, and thereafter unsuccessfully attempts to murder V again (or, alternatively, unsuccessfully solicits Y to murder V) in 2012, X *cannot* be convicted for more than one general inchoate crime.[107] Given the unintuitive nature of this outcome, many jurisdictions with general provisions based on Model Penal Code § 5.05(3) appear to have incorporated—whether by statutory revision[108] or through judicial interpretation[109]—a "same course of conduct" requirement, which effectively limits merger to situations where the multiple inchoate offenses share a relatively close temporal/substantive relationship to one another.[110]

Viewed holistically, American merger practice exists on a spectrum. On the narrowest end are those jurisdictions that strictly apply the elements test without regard to any factual considerations. On the broadest end are those jurisdictions that apply a

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[106] *See, e.g.*, Model Penal Code § 5.05(3) ("A person may not be convicted of more than one offense defined by this Article for *conduct designed to commit or to culminate in the commission of the same crime*."); Explanatory Note on Model Penal Code § 5.05(3) (noting exception where inchoate "conduct . . . has *multiple objectives*, only some of which have been achieved"); Model Penal Code § 5.05(3), cmt. at 492 ("This provision reflects the policy, frequently stated in Article 5, of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object. Thus conceived, there is no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense.").

[107] ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; *see id.* ("Apparently the drafters [of the Model Penal Code] believe that . . . where there are two inchoate offenses arising out of separate courses of conduct directed toward the same substantive offense there is only one harm.")

[108] *See, e.g.*, Ala. Code § 13A-4-5(c) ("A person may not be convicted of more than one of the offenses defined in Sections 13A-4-1, 13A-4-2 and 13A-4-3 for a *single course of conduct* designed to commit or to cause the commission of the same crime."); Ky. Rev. Stat. Ann. § 506.110(3) ("A person may not be convicted of more than one (1) of the offenses defined in KRS 506.010, 506.030, 506.040 and 506.080 for a *single course of conduct* designed to consummate in the commission of the same crime.").

[109] *See, e.g.*, *State v. Badillo*, 317 P.3d 315, 321 (Or. Ct. App. 2013) ("[T]he commission intended ORS 161.485(2) to prevent multiple convictions for attempt, solicitation, and conspiracy on the basis of a defendant's *single course of conduct*, as opposed to preventing multiple convictions for multiple instances of one or another of the inchoate crimes."); *State v. Huddleston*, 375 P.3d 583, 586 (Or. Ct. App. 2016).

[110] *Compare State v. Gonzales-Gutierrez*, 171 P.3d 384 (Or. Ct. App. 2007) (merging convictions of attempt, solicitation, and conspiracy to commit murder based on a series of phone conversations had between the defendant and the same police officer posing as a hit man), *with State v. Badillo*, 317 P.3d 315, 321 (Or. Ct. App. 2013) (upholding separate convictions for two counts of solicitation because the defendant solicited two separate individuals, several days apart); *State v. Habibullah* 373 P.3d 1259, 1263 (Or. Ct. App. 2016) (upholding multiple convictions for conspiracy/solicitation to commit murder and attempt to murder the same victim because conduct that formed the basis of the conspiracy/solicitation convictions occurred a month after the attempt); *Id.* (upholding separate convictions for two counts of attempted aggravated murder because the defendant separately solicited two different individuals, weeks apart); *see also Com. v. Grekis*, 601 A.2d 1284, 1295 (Pa. Super. Ct. 1992) (upholding multiple convictions of criminal solicitation to commit involuntary deviate sexual intercourse where each solicitation occurred on unrelated occasions, several weeks apart because the court viewed each solicitation as a discrete act designed to culminate in a different offense).

categorical bar on multiple convictions anytime they rest on the same course of conduct. And, in between those extremes, rests a variety of alternative approaches, including the various principles proscribed by the Model Penal Code and the broader proportionality-based standards. Which, then, is the best approach, all things considered?

In expert commentary, one finds a variety of perspectives on this question. Nevertheless, there appears to be general consensus on two key points. First, and perhaps most clear, is that the elements test is ill suited to provide the sole basis for merger analysis. In support of this conclusion, scholarly critics of the *Blockburger* rule tend to highlight—above and beyond the issues of clarity and consistency discussed earlier[111]—three main problems.

The first is one of disproportionality in convictions. This critique asserts that the elements test, as applied to any criminal code comprised of many substantially related overlapping offenses, effectively treats "defendants who commit what is, in ordinary terminology, a single crime [] as though they committed many different crimes."[112] Such treatment is, sentence length aside, problematic when viewed in light of the many "adverse collateral consequences of convictions."[113] This includes, for example, "the harsher treatment that may be accorded the defendant under the habitual offender statutes of some States; the possible impeachment by prior convictions, if the defendant ever becomes a witness in future cases; and, in some jurisdictions, less favorable parole opportunities."[114]

The second problem, which follows directly from the first, is that of disproportionality in sentencing. It is a product of the fact that a person who has been convicted of two or more offenses will, in many cases, be subject to a period of incarceration equal to the combined statutory maxima (and mandatory minima, if any) of those offenses.[115] Assuming that the statutory maximum (and mandatory minimum, if any) for individual offenses in a criminal code is proportionate, then it will necessarily be the case that aggregating the punishments for two of more substantially overlapping

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[111] *See, e.g.*, Hoffheimer, *supra* note 195, at 437 ("Growing judicial experience with the elements test demonstrates that the test fails to achieve the simplicity and ease of application promised by its promoters. The test is formally indeterminate, has no ready application to common crimes with alternative elements, and facilitates result-oriented manipulation of elements."); LAFAVE ET AL., *supra* note 249, at 6 CRIM. PROC. § 24.8) (noting "the sustained critique of the *Blockburger* rule in the double jeopardy context"); William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 463 (1993); Eli J. Richardson, *Eliminating Double-Talk from the Law of Double Jeopardy*, 22 FLA. ST. U. L. REV. 119, 122 (1994); Aquannette Y. Chinnery, Comment, *United States v. Dixon: The Death of the Grady v. Corbin "Same Conduct" Test for Double Jeopardy*, 47 RUTGERS L. REV. 247, 281 (1994).

[112] Stuntz, *supra* note 181, at 519-20; Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 770-71 (2004) ("from the intuitive perspective of a layperson, the defendant has committed a single crime").

[113] *Com. v. Jones*, 382 Mass. 387, 396 (1981).

[114] *Id.* (citing, e.g., *Benton v. Maryland*, 395 U.S. 784, 790-791 & n.5 (1969); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 299-300 n.161 (1965); Note, *Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970)).

[115] *See, e.g.*, Stacy, *supra* note 180, at 832 ("Allowing multiple convictions can add years to criminal sentences because consecutive sentences are imposed or because the elevated criminal history score lengthens the term of imprisonment for subsequent offenses."); King, *supra* note 201, at 194.

offenses based on the same course of conduct will lead a defendant to face an overall level of sentencing exposure that is disproportionately severe.[116]

The third problem commonly recognized by critics of the elements test emphasizes the corrosive procedural dynamics that flow from the two proportionality problems just noted.[117] More specifically, it is argued that the narrow scope of merger inherent in the elements test encourages a prosecutorial practice known as "charge-stacking," wherein the government brings as many substantially-overlapping charges as possible, thereby providing defendants with "greater incentives to plead guilty."[118]

While the legal commentary clearly supports rejecting an approach to merger limited to the elements test, the relevant authorities are less clear on what, precisely, should replace it. There appears to be general agreement that the right approach is one that goes beyond "merely [] examin[ing] whether two charges share elements," and instead asks judges to engage in a broader evaluation of "whether the statutes serve the same functional purpose or protect against the same harm and public interest, such that punishment under both for a single act constitutes double punishment."[119] Rooted in a "code's implicit principle of proportionality,"[120] this kind of analysis inevitably requires

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[116] For illustrations, see *supra* notes 93-117 and accompanying text. *See generally*, *e.g.*, Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 U. LOUISVILLE L. REV. 173, 178 (2015); King, *supra* note 201, at 193.

[117] *See, e.g.*, Stacy, *supra* note 180, at 832 ("Aside from obvious impacts on offenders' loss of liberty and on public protection, [overlapping offenses/narrow merger] affects prosecutorial charging discretion, judicial sentencing discretion, plea bargaining incentives, and stresses on prison capacity.").

[118] Husak, *supra* note 287, at 770-71 ("Thus the main effect of these overlapping offenses is to allow 'charge-stacking' and thereby subject defendants to more severe punishments. As a consequence, defendants have greater incentives to plead guilty."); Brown, *supra* note 181, at 453 ("Redundant and overlapping criminalization poses a considerable risk for prosecutorial misuse in a relatively low-visibility manner that is hard to monitor. Prosecutors can stack charges that drive defendants into hard bargains; even when charges are ultimately dropped, they have done their work as bargaining chips.").

Here's one useful illustration:

> Suppose a given criminal episode can be charged as assault, robbery, kidnapping, auto theft, or any combination of the four. By threatening all four charges, prosecutors can, even in discretionary sentencing systems, significantly raise the defendant's maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty. The odds of conviction are therefore higher if the four charges can be brought together than if prosecutors must choose a single charge and stick with it—even though the odds that the defendant did any or all of the four crimes may be the same.

Stuntz, *supra* note 181, at 519-20; *compare* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 275 (2007) ("Expansive codes contain more offenses with varying penalties that prosecutors can leverage in bargaining, but there is little evidence that unnecessarily expansive (or duplicative) provisions affect plea practice much.").

[119] Brown, *supra* note 181, at 453; *see, e.g.*, MOORE, *supra* note 187, at 337-50; Thomas, *supra* note 200, at 1032; King, *supra* note 201, at 196; Stacy, *supra* note 180, at 855-59; *see also* Antkowiak, *supra* note 180, at 268 ("If merger is all about legislative intent, then determining legislative intent is all about identifying the harm, evil, or mischief the statute is supposed to remedy.").

[120] Stacy, *supra* note 180, at 855 ("In developing a common law of offense interrelationships, courts do not and should not stand on their own, much less in opposition to the legislature. Instead, they can be guided

the exercise of judicial "common sense" in determining whether the differences between two or more substantially overlapping crimes "fundamentally change the character of one relative to the other."[121]

The most concrete example of this kind of approach is reflected in the writings and draft legislation developed by Paul Robinson and Michael Cahill.[122] Through this

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first by the overall aims of the criminal code, particularly the code's implicit principle of proportionality, and second by offense relationship doctrines.").

[121] Adam J. Adler, *Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem*, 124 YALE L.J. 448, 463–65 (2014); *see, e.g.*, Stacy, *supra* note 180, at 855 ("So how should a court deal with two crimes whose elements overlap only in part? Unfortunately, there is no simple heuristic. Courts should compare the elements of the two offenses, recognize the ways in which the crimes differ, and then use common sense to determine whether the differences between the crimes fundamentally change the character of one crime relative to the other.").

[122] The most recent version of this framework, which has been incorporated into a proposed revision to the Delaware Criminal Code, reads:

> (a) *Limitations on Conviction for Multiple Related Offenses*. The trier of fact may find a defendant guilty of any offense, or grade of an offense, for which he or she satisfies the requirements for liability, but the court shall not enter a judgment of conviction for more than one of any two offenses or grades of offenses if:
>
> (1) they are based on the same conduct and:
>
> (A) the harm or evil of one is:
>
> (i) entirely accounted for by the other; or
>
> (ii) of the same kind, but lesser degree, than that of the other; or
>
> (B) they differ only in that:
>
> (i) one is defined to prohibit a designated kind of conduct generally, and the other to prohibit a specific instance of such conduct; or
>
> (ii) one requires a lesser kind of culpability than the other; or
>
> (C) they are defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses; or
>
> (2) one offense consists only of an attempt or solicitation toward commission of:
>
> (A) the other offense; or (B) a substantive offense that is related to the other offense in the manner described in Subsection (a)(1); or
>
> (3) each offense is an inchoate offense toward commission of a single substantive offense; or
>
> (4) the two differ only in that one is based upon the defendant's own conduct, and another is based upon the defendant's accountability, under Section 211, for another person's conduct; or
>
> (5) inconsistent findings of fact are required to establish the commission of the offenses or grades.

body of work, Robinson and Cahill have developed a comprehensive statutory framework for dealing with issues of multiple liability that generally mirrors the Model Penal Code approach, with one important exception: the elements test is replaced with a broader principle that "asks whether the gravamen of one offense duplicates that of another."[123] More specifically, the key provision would preclude a court from:

> [E]nter[ing] a judgment of conviction for more than one of any two offenses if:
>
> (a) the two offenses are based on the same conduct and:
>
> (i) *the harm or wrong of one offense is*:
>
> (A) *entirely accounted for by the other offense*[.][124]

This italicized language is intended to "require[] facing squarely the challenge of determining what is, and what is not, a distinct harm meriting separate liability."[125] Which is to say: rather than "considering the theoretical possibility of committing one offense without committing another" under *Blockburger*, this "proposed standard calls for a consideration of the relevant offenses' purposes."[126]

One important aspect of the "entirely account for" standard, which sets it apart from the similarly broad standards currently applied by many courts,[127] is that it "could be implemented without reference to the particular facts of specific cases."[128] As a result, application of this standard

> would present issues of law regarding how defined offenses relate to each other—specifically, whether their relation is such that multiple liability is appropriate, or whether imposing liability for one offense would needlessly and improperly duplicate liability already imposed by a conviction for another offense.[129]

Proposed Del. Crim. Code § 210(a)(2017); *see* Proposed Ill. Crim. Code § 254(1)(a) (2003); Proposed Ky. Penal Code § 502.254(1)(a) (2003).

[123] Cahill, *supra* note 123, at 606; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[124] Proposed Del. Crim. Code § 210(a); Proposed Ill. Crim. Code § 254(1)(a); Proposed Ky. Penal Code § 502.254(1)(a).

[125] Cahill, *supra* note 123, at 606; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[126] Cahill, *supra* note 123, at 606; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[127] *See supra* notes 253-65 and accompanying text.

[128] Cahill, *supra* note 123, at 607; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[129] Cahill, *supra* note 123, at 607; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

This aspect of the provision brings with it important benefits, namely, it means that "a court's finding regarding the appropriateness of multiple convictions for two separate offenses could be binding on all future cases involving those same offenses, thereby enhancing predictability, stability, and evenhandedness in the imposition of multiple liability."[130]

In accordance with the above analysis of national legal trends, RCC § 212 incorporates a comprehensive merger framework comprised of substantive policies derived from—but which also depart in important ways from—the Model Penal Code approach.

The first three general merger principles contained in subsection (a) are substantively identical to the corresponding Model Penal Code principles contained in § 1.07. More specifically, RCC § 212(a)(1) adopts the Model Penal Code formulation of the elements test as reflected in § 1.07(4)(a).[131] Thereafter, RCC § 212(a)(2) recognizes the lesser harm, lesser culpability, and greater specificity principles codified by the Model Penal Code.[132] Then, RCC § 212(a)(3)—in accordance with Model Penal Code § 1.07(1)(c)—creates a presumption of merger where conviction for one offense is logically inconsistent with the other.[133] Adoption of these principles finds broad support in nationwide legislation, case law, and commentary.[134]

The fourth merger principle incorporated into subsection (a) goes beyond, and therefore is not rooted in, the Model Penal Code. More specifically, RCC § 212(a)(4) establishes a presumption of legislative intent as to merger when "[o]ne offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each." This principle, which is the broadest in subsection (a), is a modified form of the proposal developed by Professors Robinson and Cahill.[135]

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[130] Cahill, *supra* note 123, at 607; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[131] *See* Model Penal Code § 1.07(4)(a) ("[I]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged.").

[132] *See* Model Penal Code § 1.07(1)(d) ("[T]he offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct"); Model Penal Code § 1.07(4)(c) (c) ("[I]t differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.").

[133] *See* Model Penal Code § 1.07(1)(c) ("[I]nconsistent findings of fact are required to establish the commission of the offenses . . .").

[134] *See* sources cited *supra* notes 233-39 and accompanying text. *Compare* Cahill, *supra* note 123, at 606 ("The provision above does not refer to the concept of an 'included offense.'") *with* Nolan, *supra* note 244, at 547 ("A more appropriate application of the merger rule would first look to the *Blockburger* test as the baseline of rights which defendants must be afforded. However, the *Blockburger* test suffers from some of the weaknesses of the older forms of merger analysis."); Stacy, *supra* note 180, at 859 ("Mechanical elements tests can be useful tools. But they must be used in conjunction with other considerations as part of a larger framework.").

[135] Most significant is that RCC § 212(a)(4) modifies Robinson and Cahill's proposed "*entirely* accounted for" standard with a "*reasonably* accounted for" standard, which may be slightly broader. The following hypothetical illustrates the potential difference.

Imagine the prosecution of an actor who steals a new car worth $75,000 from a victim who has left the keys to her vehicle in the ignition while filling it with gas/has her back turned. Assume the actor satisfies the requirements of liability for two offenses. The first is second degree theft, which applies to anyone who "intentionally takes property of another valued at more than $70,000 dollars." It is subject to a

Adoption of a broader, proportionality-based standard is consistent with judicial practice in several states as well as general scholarly trends.[136] Because, however, the standard codified by RCC § 212(a)(4) is solely focused on a comparison of the elements of offenses—rather than on the specific facts of each case—it is also narrower than many of the proportionality-based approaches applied in the states.[137] Narrowing the scope of merger in this way is justified by the interests of administrative efficiency and uniformity of application.[138]

RCC § 212(a) thereafter incorporates two merger principles for addressing multiple liability in the context of general inchoate crimes. Both are based on, but each is ultimately narrower than, the corresponding Model Penal Code principles.

The first of these principles, RCC § 212(a)(5), generally precludes multiple liability for an attempt or solicitation—but not a conspiracy—and the completed offense.[139] This is in contrast to Model Penal Code § 1.07, which *also* precludes multiple liability for a conspiracy and the completed offense.[140] Both the coverage of attempt and

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statutory maximum of 5 years, and no mandatory minimum. The second is a carjacking offense, which applies to anyone who "intentionally takes a motor vehicle in the immediate possession of another." It is subject to a statutory maximum of 20 years, alongside a 5-year mandatory minimum. Finally, assume that, for purposes of the hypothetical, 95% of carjackings involve vehicles valued at less than $70,000 dollars.

The determination of whether, as a matter of law, convictions for second degree theft and carjacking merge under an "entirely accounted for" standard is unclear. For example, one might argue that they do not since the carjacking statute does not really speak to the theft of *expensive* automobiles, which is outside of the statistical norm (at least as assumed here). *But see* Commentary on Proposed Ill. Crim. Code § 254(1)(a) ("The offense of robbery is essentially a compound offense comprised of theft and an assault offense, and thus *fully accounts* for the harm of wrongfully taking another's property."). In contrast, a "reasonably accounted for" standard would lead to merger based on an evaluation of the harm or wrong, culpability, and penalty proscribed by each.

[136] *See* sources cited *supra* notes 253-65, 287-301 and accompanying text.

[137] *See* sources cited *supra* notes 253-65 and accompanying text.

[138] *See* sources cited *supra* notes 304-05 and accompanying text.

[139] Note that the RCC version of this principle also applies to both the target offense and an offense that is effectively included in the target offense (e.g., attempted armed murder and armed murder, murder, or aggravated assault). *See* RCC § 212(5)(B) ("A different offense that is related to the other offense in the manner described in paragraphs (1)-(4)"). While this outcome is not explicitly endorsed by the Model Penal Code, it seems implicit in the Code's approach. *See supra* notes 224-30 and accompanying text. It is derived from the Robinson and Cahill proposals. For example, the Illinois version requires merger whenever: "(b) one offense consists only of an inchoate offense toward commission of . . . (i) the other offense, or . . . (ii) a substantive offense that is related to the other offense in the manner described in Subsection (1)(a)." Proposed Ill. Crim. Code § 254(1)(b); *see* Commentary on Proposed Ill. Crim. Code § 254(1)(b)(ii)("Section 254(1)(b)(ii) expands on [the rule barring multiple convictions for an inchoate offense and its target] to bar convictions for both (1) an inchoate offense, and (2) any offense that relates to the inchoate offense's target offense in such a way that Section 254(1)(a) would bar convictions for both of them. For example, 254(1)(b)(ii) would preclude convictions (based on the same conduct) for both battery and attempted aggravated battery, or for attempted battery and aggravated battery.") It also finds support in case law and legislation. *See, e.g., People v. Thomas*, 531 N.E.2d 84, 88 (Ill. App. 1988) (vacating aggravated battery conviction where same stabbing was basis for attempted murder conviction); Ala. Code § 13A-1-9(2) ("An offense is an included one if . . . It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense."); Kan. Stat. Ann. § 21-5109(4) (same).

[140] Model Penal Code § 1.07(1)(b) ("[O]ne offense consists only of a conspiracy or other form of preparation to commit the other"); Model Penal Code § 1.07(4)(b) ("[I]t consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein.").

solicitation in this bar on multiple liability, as well as the concomitant exclusion of conspiracy,[141] is supported by nationwide legislation, case law, and legal commentary.[142]

The second relevant merger principle, RCC § 212(a)(6), generally precludes multiple liability for multiple inchoate crimes directed toward completion of the same criminal objective. Because this principle, like the other principles established in subsection (a), is subject to a "same course of conduct" limitation, it is more limited in scope than the principle reflected in Model Penal Code § 5.05(3), which appears to apply without regard to the amount (or nature) of time that has elapsed between criminal efforts.[143] This departure is justified by both state legislative and judicial practice, as well as, more broadly, the unintuitive outcomes that application of the Model Penal Code approach would otherwise appear to support.[144]

Subsections (b), (c), and (d) of RCC § 212 thereafter provide three substantive merger policies, which address issues upon which the Model Penal Code to merger is silent. The first, contained in RCC § 212(b), clarifies that the principles stated in subsection (a) are inapplicable "whenever the legislature clearly manifests an intent to authorize multiple convictions for different offenses arising from the same course of conduct." This explicitly codifies what is otherwise well established in American criminal law: that legislative intent is the touchstone of judicial merger analysis.[145]

The second, RCC § 212(c) provides a legal framework for applying the principles set forth in subsections (a) and (b) to statutes comprised of alternative elements. It requires judges to conduct the merger inquiry with reference to the unit of analysis most likely to facilitate proportionality in sentencing. This framework is supported by both case law and legal commentary.[146]

The third, RCC § 212(d), establishes a rule of priority to guide judicial selection of merging offenses. Under this rule, where two or more offenses are subject to merger, the conviction that ultimately survives—whether at trial or on appeal—should be [t]he

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[141] Given the bilateral definition of conspiracy incorporated into RCC § 303(a), this exclusion is arguably even more justifiable. *See* DRESSLER, *supra* note 228, at § 30.01 ("[I]f the focus of the offense is on the dangerousness of the individual conspirator, her punishment should be calibrated to the crime that she threatened to commit; punishing her for both crimes is duplicative. *The non-merger rule makes sense, however, if one focuses on the alternative rationale of conspiracy law, i.e., to attack the special dangers thought to inhere in conspiratorial groupings.*"); *see also United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) ("[Conspiratorial] agreement is 'a distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.'") (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

[142] *See* sources cited *supra* notes 240, 275-80, & 316 and accompanying text.

[143] *See* sources cited *supra* note 281 and accompanying text.

[144] *See* sources cited *supra* notes 241, 281-85 and accompanying text.

[145] *See supra* notes 186-88 and accompanying text.

[146] *See, e.g.*, Antkowiak, *supra* note 180, at 270 ("Criminal statutes 'contain different elements designed to protect different interests' and it is in the elements that the core of legislative intent may be seen.") (quoting *Commonwealth v. Sayko*, 515 A.2d 894, 895 (Pa. 1986)); *Baldwin*, 604 Pa. at 45 (where crimes comprised of alternative elements, "we caution that trial courts must take care to determine which particular 'offenses,' *i.e.* violations of law, are at issue in a particular case); *Com. v. Jones*, 590 Pa. 356, 365, 912 A.2d 815, 820 (2006) (permitting an analysis of "the elements as charged in the circumstances of a case"); *Commonwealth v. Johnson*, 874 A.2d 66, 71 n.2 (Pa. Super. 2005) (recognizing that a particular subsection of a criminal statute may merge with another crime as a lesser-included offense even though a different subsection of that same statute may not).

most serious offense among the offenses in question."[147] However, "[i]f the offenses are of equal seriousness," then "any offense that the courts deems appropriate" may remain.[148] This framework reflects American legal practice.[149]

The final provision in RCC § 212, subsection (e), establishes two general procedural principles relevant to the administration of the above-enumerated legal framework. The first is that "[a] person may be found guilty of two or more offenses that merge under this [s]ection."[150] And the second is that "no person may be subject to a conviction for more than one of those offenses after: (1) the time for appeal has expired; or (2) the judgment appealed from has been affirmed."[151] The former ensures that the law of merger does not impinge upon the ability of the fact finder to render verdicts, whereas the latter provides trial courts with the flexibility to leave resolution of merger issues to appellate courts. Both of these principles are rooted in state case law; however, it is unclear whether and to what extent they are representative of national legal trends.[152]

RCC § 212: Relation to National Legal Trends on Codification. There is wide variance between jurisdictions insofar as the codification of general merger policies are concerned.[153] Generally speaking, though, the Model Penal Code's general provision, § 1.07,[154] provides the basis for most contemporary reform efforts.[155] The general merger

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[147] RCC § 212(d)(1).

[148] RCC § 212(d)(2).

[149] *See, e.g., State v. Ferguso*n, 808 N.W.2d 586, 589 (Minn. 2012) ("[The Minnesota Penal Code contemplates that a defendant will be punished for the 'most serious' of the offenses arising out of a single behavioral incident because 'imposing up to the maximum punishment for the most serious offense will include punishment for all offenses.'") (quoting *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006)); 42 Pa.C.S. § 9765 ("Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense."); Richard T. Carlton, III, *The Constitution Versus Congress: Why Deference to Legislative Intent Is Never an Exception to Double Jeopardy Protection*, 57 HOW. L.J. 601, 606-07 (2014) ("When a merger occurs . . . the 'lesser' included offense merges into the 'greater' offense, and a sentence is imposed only for the offense with the additional element or elements."); *cf. United States v. Gaddis*, 424 U.S. 544, 550, 96 S.Ct. 1023, 47 L.Ed.2d 222 (1976) (establishing a "rule of priority" for jury consideration of greater and lesser-included offenses). *But see State v. Armengau*, 2017-Ohio-4452, ¶¶ 123-124, 93 N.E.3d 284, 317–18 ("When it is determined that the defendant has been found guilty of allied offenses of similar import, 'the trial court must accept the state's choice among allied offenses . . . .'") (quoting *State v. Bayer*, 10th Dist. No. 11AP-733, 2012-Ohio-5469, 2012 WL 5945118, ¶ 21).

[150] RCC § 212(e). More generally, RCC § 212 does not bar inclusion of multiple counts in a single indictment or information for two or more merging crimes. *See, e.g.*, Alaska Stat. Ann. § 11.31.140; Ala. Code § 13A-4-5.

[151] RCC § 212(e).

[152] *See Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985); *Warrick v. United States*, 528 A.2d 438, 443 n.6 (D.C. 1987); *Fuller v. United States*, 407 F.2d 1199, 1224–25 (D.C. Cir. 1967); *see also State v. Cloutier*, 286 Or. 579, 601–03, 596 P.2d 1278, 1289–91 (1979) ("A trial court might pronounce a judgment of conviction on each of the charges, indicating the sentence he would impose if the conviction stood alone but suspending its execution (or suspending imposition of sentence), and accompany the judgment on each but the gravest charge with an order that the judgment is vacated by its own terms *whenever the time for appeal has elapsed or the judgment appealed from has been affirmed*."); *Green v. State*, 856 N.E.2d 703, 704–05 (Ind. 2006) (observing that "a merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is unproblematic as far as double jeopardy is concerned") (citing *Laux v. State*, 821 N.E.2d 816, 820 (Ind. 2005)).

[153] *See generally* Model Penal Code § 1.07, cmt. at 106-36.

[154] The text of Model Penal Code § 1.07 reads, in relevant part:

principles incorporated into RCC § 212 incorporate aspects of the Model Penal Code approach to drafting while, at the same time, utilizing a few techniques which depart from it. These departures are consistent with the interests of clarity, consistency, and accessibility.

> (1) **Prosecution for Multiple Offenses; Limitation on Convictions.** When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (a) one offense is included in the other, as defined in Subsection (4) of this Section; or
>
> (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or
>
> (c) inconsistent findings of fact are required to establish the commission of the offenses; or
>
> (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
>
> (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses . . . .
>
> (4) **Conviction of Included Offense Permitted.** A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:
>
> (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

[155] *See generally* Model Penal Code § 1.07 cmt. at 106-36. Prior to the Code's completion in 1962, few jurisdictions had any legislation directly addressing sentencing merger. *See id.* Since then, however, numerous American jurisdictions have gone on to codify merger provisions in their criminal codes at least loosely influenced by Model Penal Code § 1.07. *See, e.g.*, Ala. Code § 13A–1–9; Ark. Code Ann. § 5–1–110; Colo. Rev. Stat. § 18–1–408(5); Del. Code Ann. tit. 11, § 206(b); Ga. Code Ann. § 16–1–6; Haw. Rev. Stat. § 701–109(4); Ill. Stat. 5/2-9 609.04; Mo. Stat. § 556.041; Mont. Code Ann. § 46–1–202(8); N.J. Rev. Stat. § 2C:1–8(d); Utah Stat. § 76-1-402; Wis. Stat. Ann. § 939.66; Kan. Stat. Ann. § 21-5109. In addition, some courts have judicially adopted the Model Penal Code's overarching framework. *See State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999); *see also State v. Henning*, 238 W. Va. 193, 200 (2016) (highlighting legal trends); *but see Commonwealth v. Carter*, 393 A.2d 660, 662 (Pa. 1978) (Pomeroy, J., dissenting) (lamenting lack of attention to Model Penal Code). For recently proposed legislation modeled, in large part, on Model Penal Code § 1.07, see Proposed Del. Crim. Code § 210 (2017); Proposed Ill. Crim. Code § 254 (2003); Proposed Ky. Penal Code § 502.254 (2003).

The general thrust of the Model Penal Code approach to communicating statutory limitations on multiple liability is commendable. Section 1.07 codifies a broad set of principles for addressing the issues of sentencing merger that arise when a defendant satisfies the requirements of liability for two or more substantially related criminal offenses arising from the same course of conduct. However, the framework through which the relevant merger principles are articulated suffers from two basic flaws.

The first, and more general, is that the Code's limitations on multiple liability are articulated alongside a variety of other policies, which address materially distinct procedural issues. Beyond issues of sentencing merger, for example, Model Penal Code § 1.07 also addresses: (1) when a defendant may be subject to separate trials for multiple offenses based on the same conduct[156]; (2) the authority of the court to order separate trials[157]; and (3) when a jury may be instructed on (and the defendant convicted of) an offense that was never charged in the indictment.[158]

As a purely organizational matter, employing a single general provision to address disparate topics such as these is problematic. Grouping proportionality-based limitations relevant to multiple punishment alongside procedural limitations on separate trials and the submission of jury instructions is both confusing and unintuitive. However, the specific manner in which these materially different policies are intertwined with one another is—organizational concerns aside—particularly troublesome given that it may have substantive policy implications. This is because the Model Penal Code's approach to both sets of issues, "like most legislative efforts, ultimately leans on the notion of an 'included offense.'"[159]

Consider that Model Penal Code § 1.07(1)(a) precludes multiple convictions where, *inter alia* "one offense is included in the other, as defined in Subsection (4) of this Section."[160] Subsection (4) thereafter enumerates a variety of principles—including the elements test—for determining what constitutes an included offense.[161] Importantly, however, these principles do not only place limitations on multiple convictions under the Code. Rather, they also provide the legal basis for determining: (1) when, pursuant to Subsection (4), "[a] defendant may be convicted of an [uncharged] offense"[162]; as well as (2) when, pursuant to Subsection (5), the court is "obligated to charge the jury with respect to an [uncharged offense]."[163] Subsequent general provisions in the Model Penal

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[156] *See* Model Penal Code § 1.07(2) ("[A] defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.").

[157] *See* Model Penal Code § 1.07(3) ("When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.").

[158] *See* Model Penal Code § 1.07(5) ("The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.").

[159] Cahill, *supra* note 123, at 605.

[160] Model Penal Code § 1.07(1)(a).

[161] Model Penal Code § 1.07(4).

[162] Model Penal Code § 1.07(4).

[163] Model Penal Code § 1.07(5).

Code then further rely on the same included offense principles proscribed in § 1.07(4). For example, Model Penal Code § 1.08(1) provides that "[a] finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside."[164]

That both the Model Penal Code and many state criminal codes utilize the included offense concept in this overlapping way is not surprising. "The Model Penal Code was drafted during the high point of the general theory of lesser included offense law in the mid-twentieth century."[165] And, still today, the included offense concept is employed by the American legal system to serve a variety of functions, which include: (1) "provid[ing] notice to defendants of what crimes, not named in an indictment or formal charge, may be prosecuted at trial"; (2) "offer[ing] prosecutors flexibility in charging offenses by permitting them to add or substitute less serious charges without suffering the cost and delay that would be occasioned by reindicting or amending charging instruments"; (3) "bestow[ing] on defendants an opportunity to reduce their liability to a more appropriate, less serious level"; (4) "recogniz[ing] the right of jurors to be informed of related offenses that might apply"; and (5) "establish[ing] limits on multiple prosecutions and cumulative punishments."[166]

That said, this overlapping usage—reflected in both the Model Penal Code and American legal practice more generally—is problematic given the materially distinct interests safeguarded by the included offense concept across such varied contexts.[167] To illustrate, consider just one of the procedural issues the included offense concept is utilized as the basis for answering: determining when a jury may or should be instructed on an offense that was not specifically charged in the indictment.[168] The general rule is that a jury may be instructed on an uncharged offense if it is necessarily included in a charged offense.[169]

Because instructing a jury on uncharged offenses directly implicates a defendant's constitutional rights to "due process and notice," while raising basic "concerns of fundamental fairness," it may make sense to apply a narrow/formalistic interpretation of what actually constitutes an included offense in this particular context.[170]

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[164] Model Penal Code § 1.08(1).

[165] Hoffheimer, *supra* note 195, at 356.

[166] *Id.* at 357.

[167] *See, e.g.*, Poulin, *supra* note 185, at 596 ("[S]uccessive prosecutions—reprosecution after acquittal or conviction—pose markedly different issues from multiple punishment imposed in a single proceeding."); Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183 (2004) (same); *Grady v. Corbin*, 495 U.S. 508, 509, *overruled by United States v. Dixon*, 509 U.S. 688 (1993) ("Successive prosecutions, whether following acquittals or convictions, raise concerns that extend beyond [] the possibility of an enhanced sentence" implicated by merger/multiple punishment).

[168] *See, e.g., Schmuck v. United States*, 489 U.S. 705, 718 (1989); *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Cole v. Arkansas*, 333 U.S. 196 (1948).

[169] LAVE ET AL., *supra* note 249, at 6 CRIM. PROC. § 24.8(d) ("No area of law relating to jury instructions has created more confusion than that governing when a court may or must put before the jury for its decision a lesser-included offense, that is, an offense not specifically charged in the accusatory pleading that is both lesser in penalty and related to the offense specifically charged.").

[170] As the Pennsylvania Supreme Court has observed:

> Where due process and notice are at issue, it is prudent to primarily focus the analysis on the statutory elements of a crime to determine whether crimes are lesser and greater

Where, in contrast, "sentencing merger is at issue," the central policy interest of proportionate punishment arguably supports a broader reading of what constitutes an included offense.[171] And, just as important, there is no countervailing constitutional interest weighing against an expansive interpretation of "included offense" in the context of merger.[172] (Indeed, if anything, a broader reading of "included offense" in the merger context affirmatively serves a defendant's constitutional rights to be free from cruel and unusual punishment and afforded substantive due process.[173])

Employing the same included offense concept to address different issues which implicate distinct policy/constitutional considerations has the potential to cause a variety of problems.[174] Most relevant here, however, is that it creates a risk that courts will—either unintentionally or unthinkingly—transplant an appropriately limited view of what constitutes an "included offense" for purposes of dealing with instructional issues into the sentencing context for purposes of evaluating legislative intent as to multiple punishment.[175] (Conversely, broad construction of what constitutes an "included offense" for purposes of dealing with sentencing merger may "dilute[] double jeopardy protection from successive prosecution."[176]) From a drafting perspective, then, there

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> included offenses because due process protects an accused against any unfair advantage. [] When a defendant may be convicted on a charge absent from the indictment, concerns of fundamental fairness dictate that analysis of potential greater and lesser included offenses proceed in a more narrow fashion than when sentencing merger is at issue.

Com. v. Jones, 590 Pa. 356, 369-70 (2006) (internal quotations and citations omitted).

[171] *Id.*; *see also Reynolds v. State*, 706 P.2d 708, 711 (Alaska Ct. App. 1985) ("For if two offenses are so fundamentally disparate—so different in their basic social purposes—that merger between them is not compelled and separate sentences would be permissible upon conviction of both, then no greater/lesser-included offense relationship can arise, no matter how clearly intertwined these offenses may be in the factual and evidentiary setting of a given case.").

[172] *See, e.g., Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991) ("The gradation of punishment for an offense is clearly a matter of legislative choice, whether it be as severe as authorizing dual punishment for lesser-included offenses . . . *or as mild as prohibiting the imposition of multiple convictions even where two offenses clearly involve different elements*.").

[173] *See supra* note 187 and accompanying text.

[174] *See, e.g.*, Hoffheimer, *supra* note 195, at 371 (noting that the elements "test goes too far towards permitting subsequent prosecutions and under-protects defendants from multiple prosecution and punishment"); *State v. Keffer*, 860 P.2d 1118, 1131 (Wyo. 1993) ("We are satisfied the statutory elements analysis should be used as the foundation for double jeopardy protection in connection with both multiple prosecutions and multiple or cumulative punishments."); *see generally, e.g.*, Poulin, *supra* note 185; Antkowiak, *supra* note 180; Nolan, *supra* note 244.

[175] *See, e.g., Jones*, 590 Pa. at 356-72 (highlighting historical development of elements test in Pennsylvania); *Fraser v. State*, 523 S.W.3d 320, 330 (Tex. App. 2017) (observing that the "query" into merger of felony murder with the underlying offense "is not the same as determining whether the underlying offense is a lesser-included offense to the offense of murder."); *see also Matter of D.B.H.*, 549 A.2d 351, 353 (D.C. 1988) ("[W]hether or not simple assault is a lesser-included offense of a charged robbery in general, it cannot be considered, for purposes of providing sufficient notice to the accused, a lesser-included offense of the robbery charged here.").

[176] Poulin, *supra* note 185, at 598 ("[M]ultiple punishment as a double jeopardy question not only generates unwarranted confusion, but also dilutes double jeopardy protection from successive prosecution. Because of the dominant role of legislative intent in determining appropriate punishment, the protection from multiple punishment should simply not be treated as an aspect of double jeopardy protection . . ."); *see also id.* at 646 (["T]he courts must distinguish between the analysis appropriate for double jeopardy claims

appears to be little to gain, and much to lose, from applying a single concept to address the qualitatively "different" and "distinct" issues that traditionally fall under the included offense umbrella.[177]

The RCC approach to drafting a general merger provision addresses the above codification problems as follows. First, and most fundamentally, RCC § 212 is solely limited to the topic of merger, and, therefore, avoids the general organizational issues created by the Model Penal Code drafters' decision to address multiple procedural issues—otherwise unrelated to sentencing—in § 1.07. Second, and more specifically, RCC § 212 codifies the requisite sentencing policies without relying on the concept of an "included offense." Instead, the RCC affirmatively articulates the relevant included offense principles in a manner that is specifically oriented towards addressing merger, alongside clarification in accompanying commentary of their substantive independence from other contexts outside of sentencing.

Each of the above revisions finds support in case law,[178] legislation,[179] and legal commentary.[180] When viewed collectively, they should go a long way towards "disentangl[ing]" the problematic "Gordian knot" that overlapping usage of the included offense concept has effectively tied between the law of merger and other procedural topics.[181] And, when considered in light of the substantive modifications/additions to the Model Penal Code made by the rest of RCC § 212, they comprise part of a clear, comprehensive, and accessible merger framework.

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based on successive prosecution, and that appropriate for claims of multiple punishment. Although conflating the two types of analysis has not led to excessive protection against punishment, it has eroded double jeopardy protection against successive prosecution, making it vulnerable to legislative fragmentation of offenses.").

[177] Cahill, *supra* note 123, at 606-07.

[178] *See* sources cited *supra* notes 344 & 354 (cases recognizing the importance of distinguishing between contexts when applying the included offense concept).

[179] *See* sources cited *supra* notes 328-39 (statutes specifically addressing sentencing merger).

[180] *See* sources cited *supra* note 298 (highlighting importance of addressing merger issues separate from other procedural issues, and without reliance on included offense concept).

[181] Poulin, *supra* note 185, at 598; *see id.* at 647 ("Once the courts understand that the propriety of successive prosecution is a question distinct from the question of multiple punishment and that, unlike punishment, successive prosecution threatens the core of double jeopardy protection, they will have taken a critical step toward cutting the Gordian knot of double jeopardy jurisprudence."). At minimum, this separation serves the interests of clarity and consistency. However, it may also serve the interests of proportionality by mitigating the risk that the law of merger will be narrowed in pursuit of unrelated constitutional and policy goals.

RCC § 22E-301. Criminal Attempt.

1. § 22A-301(a)—Definition of Attempt

Relation to National Legal Trends. Subsection 301(a) is in part consistent with, and in part departs from, national legal trends.

As a matter of substantive policy, the principles of *mens rea* elevation (for results) and equivalency (for circumstances) governing the culpable mental state requirement of an attempt, as well as the broad rejection of impossibility claims, incorporated into the Revised Criminal Code generally reflect majority legal trends. In contrast, the dangerous proximity test incorporated into the Revised Criminal Code to deal with incomplete attempts reflects a minority legal trend. The latter departure is primarily based upon considerations of current District law.

Comprehensively codifying the culpable mental state requirement and conduct requirement governing criminal attempts is in accordance with widespread, modern legislative practice. However, the manner in which § 301(a) codifies these requirements departs from modern legislative practice in a variety of ways. The foregoing departures are motivated by considerations of clarity and consistency.

A more detailed analysis of national legal trends and their relationship to § 301(a) is provided below. It is organized according to four main topics: (1) the culpable mental state requirement for an attempt; (2) the definition of an incomplete attempt; (3) the treatment of impossibility; and (4) codification practices.

Subsections (a)(1) & (2): Relation to National Legal Trends on Culpable Mental State Requirement. National legal trends relevant to the culpable mental state requirement governing a criminal attempt strongly support two substantive policies: (1) requiring an intent to cause the results of the target offense; and (2) allowing the culpable mental state, if any, governing the circumstances of the target offense to suffice for an attempt conviction. Both of these substantive policies are incorporated into the Revised Criminal Code.

There exist two basic approaches to the culpable mental state requirement of an attempt: the common law approach, which reflects offense analysis, and the Model Penal Code Approach, which reflects element analysis.[1]

The common law approach to the *mens rea* of attempts is easily summarized: to convict for an attempt to commit any offense, even one of "general intent," requires proof of a "specific intent."[2] However, the meaning of this rule is less than clear: to say that a criminal attempt is a "specific intent crime" papers over the very questions it is supposed

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[1] The crime of attempt is a relatively recent development in the common law, and an even more recent development in state criminal codes. *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.2. The offense first arose in its present form during the late eighteenth century; however, up until the mid-twentieth century, most states punished, but did not define, criminal attempts. Model Penal Code § 5.01 cmt. at 300. Most attempt statutes "were simply general penalty provisions [that] did not elaborate upon the term 'attempt.'" *Id.* This is still true today in some jurisdictions; however, the vast majority of reform codes have adopted comprehensive general attempt statutes, which specifically codify the culpable mental state requirement governing an attempt (among other issues). *Id.*

[2] *See* J. C. Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 429 (1957).

to answer, namely, what *kind* of "intent" is required; and to *which* objective elements of the target offense does that "intent" apply?[3] By conceptualizing criminal offenses as being comprised of a monolithic *actus reus* subject to an "umbrella culpability requirement that applie[s] in a general way to the offense as a whole," the common law approach to culpability, offense analysis, is unable to provide a clear answer to these questions.[4]

What is clear from case law, however, is that the "specific intent" rule governing criminal attempts is intended to set a threshold requirement for the culpable mental state applicable to the result element in a criminal attempt, namely, the government must prove, at minimum, that the actor *intended* to cause the result elements (if any) of the target offense—regardless of whether some lesser culpable mental state will suffice for the target offense.[5] This threshold requirement is clearly reflected in the fact that the common law uniformly rejected the possibility of reckless or negligent attempts.[6]

More ambiguous, however, is the common law view on whether knowledge as to a result element constitutes a sufficient foundation for attempt liability.[7] Although attempt traditionally has been considered to be a "specific intent" crime requiring the most elevated form of mental state, the concept of a specific intent "has always been an ambiguous one and might be thought to include results that the actor believed to be the inevitable consequences of his conduct."[8] There is scant case law on this issue; nevertheless, the common law authorities that do exist are consistent with the "traditional view" of specific intent more generally, namely that it encompasses both a person who "consciously desires [a] result" as well as a person who "knows that that result is practically certain to follow from his conduct."[9]

The common law view of circumstances is similarly unclear, which is perhaps unsurprising given how poorly situated the common law approach to culpability, offense analysis, is to addressing the issue of *mens rea* as to circumstances in any context. That being said, common law authorities have occasionally stumbled across the issue, and, when they have, they appear to have taken the view that the culpable mental state, if any, governing the circumstance of the target offense similarly applies to that offense when charged as an attempt.[10]

The Model Penal Code approach to the *mens rea* of attempts is generally in accordance with the substantive policies reflected in the common law, but more clearly frames them in terms of element analysis.

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[3] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.05 (6th ed. 2012).
[4] PAUL H. ROBINSON & MICHAEL CAHILL, CRIMINAL LAW 155 (2d. 2012).
[5] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; DRESSLER, *supra* note 91, at § 27.05; *Braxton v. United States*, 500 U.S. 344, 350-51 (1991).
[6] *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 749 (1983); *People v. Viser*, 62 Ill. 2d 568, 581 (1975).
[7] *See, e.g.*, Model Penal Code § 5.01 cmt. at 305; LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3.
[8] Wechsler et al., *supra* note 51, at 577.
[9] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 5.2; *see, e.g.*, *Coleman v. State*, 373 So.2d 1254, 1256-57 (Ala. Crim. App. 1979); *Free v. State*, 455 So. 2d 137, 147 (Ala. Crim. App. 1984); *State v. Krocker*, 331 Wis. 2d 487, 489 (2010).
[10] *See, e.g.*, *State v. Davis*, 108 N.H. 158, 160-61 (1967).

Most significantly, Model Penal Code § 5.01(1)(b) establishes that a person may be convicted of a criminal attempt if he or she acts with the "purpose" of causing any results in the target offense, or, alternatively, the "belief"—which is intended to signify the non-conditional form of knowledge[11]—that the person's conduct will cause any results in the target offense.[12] This formulation explicitly establishes that acting with either of the two alternative mental states that comprise the traditional understanding of intent—namely, "desir[ing] that [one's] acts cause [one or more] consequences *or* know[ing] that those consequences are practically certain to result from [one's] acts"[13]—constitutes a sufficient basis for attempt liability.[14] However, by explicitly covering purpose and the non-conditional form of knowledge, the Model Penal Code's statement on the *mens rea* of the results of an attempt implicitly excludes lesser culpable mental states, such as recklessness or negligence, as a viable basis of liability.[15] Which is to say that Model Penal Code § 5.01(b) was intended to be consistent with "the common law rule that one cannot be liable for an attempt to commit a 'crime of recklessness.'"[16]

In contrast to the foregoing intent-based approach to results, the Model Penal Code applies a principle of *mens rea* equivalency to circumstances. The relevant Model Penal Code language establishes that the government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime."[17] The Model Penal Code commentary clarifies that, pursuant to this language, the principle of *mens rea* elevation applicable to results should not be understood to "encompass all the circumstances included in the formal definition of the substantive offense. As to them, it is sufficient that he acts with the culpability that is required for commission of the crime."[18]

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[11] As Robinson and Grall observe: "'Belief' is the conditional form of 'know,' [which] is required here because in an impossible attempt the actor cannot 'know' that he will cause the result, since he in fact cannot." Robinson & Grall, *supra* note 94, at 758 n.301. In other words, "[k]nowledge would not be the proper way to describe this mental state [in the context of attempts], because it would be odd to describe the defendant as having knowledge of a result when the result does not in fact occur." Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1032 n.330 (1998).

[12] Model Penal Code § 5.01(1)(b) explicitly applies to completed attempts, where "the offender has . . . performed all of the conduct that would, if successful, constitute the target offense." Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 901 n.59 (2007) [hereinafter, Cahill, *Reckless Homicide*]. With respect to incomplete attempts, in contrast, wherein the offender is interrupted prior to carrying out his plans, the Model Penal Code states that the accused must "purposely do[] or omit[] to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Model Penal Code § 5.01(1)(c). Some have suggested this indicates a strict purpose requirement applies to results for incomplete attempts. *See* Cahill, *Reckless Homicide*, *supra* note 100, at 900-01. However, the Model Penal Code drafters appear to explicitly rebut this reading in the commentary, clarifying that the principle reflected in § (b) extends to § (c) when both provisions are "read in conjunction with [one another]." Model Penal Code § 5.01 cmt. at 305 n.17; *see e.g.*, DRESSLER, *supra* note 91, at § 27.09.

[13] *Tison v. Arizona*, 481 U.S. 137, 150 (1987); *see, e.g.*, *State v. Smith*, 490 N.W.2d 40, 45 (Wis. Ct. App. 1992).

[14] *See, e.g.*, Wechsler et al., *supra* note 51, at 577.

[15] *See, e.g.*, Michaels, *supra* note 99, at 1031-32.

[16] Robinson & Grall, *supra* note 94, at 749; *see, e.g.*, DRESSLER, *supra* note 91, at § 27.09.

[17] Model Penal Code § 5.01(1).

[18] Model Penal Code § 5.01 cmt. 297.

Finally, the Model Penal Code also tacitly recognizes the distinction between an actor's plans to engage in future conduct and the culpable mental state, if any, an actor possesses with respect to the results and circumstances related to that future conduct. Illustrative is the Model Penal Code's provision on incomplete attempts, § 5.01(1)(c), which, when read in light of other relevant Code language, requires the government to prove the following. First, that the defendant was "acting with the kind of culpability otherwise required for commission of the crime" with respect to circumstances.[19] Second, that the defendant was acting with either the "purpose" to cause, or a "belief" that his or her conduct would likely cause, any relevant results.[20] And third, that the defendant "purposely" engaged in "an act or omission constituting a substantial step in a course of conduct *planned to culminate in his commission of the crime*."[21]

The latter planning requirement complements, but is ultimately distinct from, the culpable mental state requirements governing circumstances and results that precede it. It reflects the common-sense and intuitive notion that in order to be held liable for an attempt to commit an offense, an actor must have been committed to engaging in future conduct that, if completed, would satisfy the objective elements of that offense[22]—separate and apart from whether that actor possessed the requisite *mens rea* as to the results and circumstances of that offense.[23]

Today, American criminal law as a whole is generally consistent with the substantive policies reflected in the Model Penal Code approach to the *mens rea* of attempts (which, in large part, are also the substantive policies reflected in the common law approach).[24] This consistency is reflected in statutes, case law, and commentary.

For example, it appears that in most jurisdictions, proof of either purpose or a knowledge-like mental state as to a result will suffice for an attempt conviction.[25] So, for

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[19] This language is drawn from the generally applicable prefatory clause of Model Penal Code § 5.01(1).

[20] This language is drawn from Model Penal Code § 5.01(1)(b), but is intended to be "read in conjunction with" Model Penal Code § 5.01(1)(c). Model Penal Code § 5.01 cmt. at 305 n.17; *see* DRESSLER, *supra* note 91, at § 27.09.

[21] Model Penal Code § 5.01(1)(c).

[22] That is, "under the circumstances as he believes them to be," at least. Model Penal Code § 5.01(1)(c).

[23] So, for example, with a charge of attempted purposeful murder, "the key question is not (only) whether the actor desires the death of the victim, but whether he is committed to a course of conduct that would, if completed, bring about the death of the victim." Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 755 (2012) [hereinafter, Cahill, *Incomplete Attempt*].

[24] *See, e.g.*, Wechsler et al., *supra* note 51, at 575-76.

[25] In some jurisdictions, this is clearly established by general provisions. *See, e.g.*, Okla. Stat. Ann. tit. 21, § 44; Ark. Code Ann. § 5-3-201; Haw. Rev. Stat. § 705-500; Neb. Rev. Stat. § 28-201; Ohio Rev. Code Ann. § 2923.02; Utah Code Ann. § 76-4-101; *but see* N.J. Stat. Ann. § 2C:5-1. (One state, which lacks a general provision on the *mens rea* of attempt, specifies by statute that knowledge is an appropriate basis for attempted murder. *See* Iowa Code Ann. § 707.11.) Still other jurisdictions have codified general attempt statutes employing broad language that fail to clarify the issue. *See, e.g.*, Alaska Stat. § 11.31.100; 720 Ill. Comp. Stat. Ann. 5/8-4; Tex. Penal Code § 15.01; Ariz. Rev. Stat. Ann. § 13-1001; Colo. Rev. Stat. Ann. §18-2-101(1); Ind. Code Ann. §35-41-5-1(a); N.D. Cent. Code §12.1-06-01; Ariz. Rev. Stat. Ann. § 13-1001; Me. Rev. Stat. tit. 17-A, § 152. The state courts that have addressed the issue in these jurisdictions most frequently appear to fill in the legislative silence with a knowledge rule. *See, e.g., State v. Nunez*, 159 Ariz. 594, 597 (Ct. App. 1989); *Bartlett v. State*, 711 N.E.2d 497, 499-500 (Ind. 1999); *Gentry v. State*, 881 S.W.2d 35, 40 (Tex. App. 1994); *Free v. State*, 455 So. 2d 137, 147 (Ala. Crim. App. 1984); *People v. Krovarz*, 697 P.2d 378, 381 (Colo. 1985). However, a minority appear to have adopted a purpose rule. *See*

example, if "the actor's purpose were to demolish a building and, knowing that persons were in the building and that they would be killed by the explosion, he nevertheless detonated a bomb that turned out to be defective, he could be prosecuted for attempted murder even though it was no part of his purpose that the inhabitants of the building would be killed."[26]

This broad acceptance of knowledge/belief as to a result as an appropriate basis for attempt liability is based on the view that:

> the manifestation of the actor's dangerousness [by way of knowing conduct] is as great—or very nearly as great—as in the case of purposive conduct. In both instances a deliberate choice is made to bring about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause this result to occur. The absence in one instance of any desire for the forbidden result is not, under these circumstances, a sufficient basis for differentiating between the two types of conduct involved.[27]

It's worth noting, however, that the foregoing policy concerning knowledge/belief-based attempts is mostly academic as cases involving the distinction rarely seem to arise.[28]

Vastly more significant, instead, is whether a lesser culpable mental state, such as recklessness or negligence, as to a result is sufficient for an attempt conviction. At stake in this issue is the legal system's treatment of a wide range of endangerment activities, including, perhaps most notably, risky driving.

For example, if recklessness as to a result element is considered to be a viable basis for attempt liability, then many instances of risky driving could be charged as multiple counts of attempted reckless homicide—or perhaps even attempted depraved heart murder—on the following theory. As to *actus reus*: the reckless driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others. As to *mens rea*: the reckless driver who speeds for the thrill of it has consciously created a substantial (or extreme) risk of death to every pedestrian he has passed.

Likewise, if negligence as to a result element is considered to be a viable basis for attempt liability, then many instances of inadvertently risky driving could be charged as

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People v. Kraft, 478 N.E.2d 1154, 1160 (Ill. App. Ct. 1985); *State v. Huff*, 469 A.2d 1251, 1253 (Me. 1984).

In one jurisdiction, Utah, there has been a noteworthy dialogue between the courts and legislature on this issue. Circa 2003 Utah's attempt statute did not clarify the *mens rea* for the result elements of an attempt. *See* Utah Code Ann. § 76–4–101. Interpreting this ambiguous language in *State v. Casey*, the Utah Supreme Court held that knowledge as to a result element was an insufficient basis for an attempt conviction; only purpose would suffice. 82 P.3d 1106, 1110 (2003). The following year, the Utah state legislature amended its attempt provision to "clarify that an attempt to commit a crime includes situations where the defendant is aware that his actions are reasonably certain to cause a result that is an element of the offense . . . ." CRIMINAL OFFENSE ATTEMPT AMENDMENTS, 2004 Utah Laws Ch. 154 (S.B. 143); *see* Utah Code Ann. § 76-4-101.

[26] Model Penal Code § 501 cmt. at 305.

[27] *Id.*; *see, e.g.*, Wechsler et al., *supra* note 51, at 575-76; Cahill, *Reckless Homicide*, *supra* note 100, at 900-01.

[28] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; DRESSLER, *supra* note 91, at § 27.05.

multiple counts of attempted negligent homicide—or even attempted manslaughter—on the following theory. As to a*ctus reus*: the negligent driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others. As to *mens rea*: the negligent driver who inadvertently created a substantial (or extreme) risk of death to every pedestrian he has passed should have been aware of that risk.

As a matter of practice, theories of liability such as these have rarely been accepted: "Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed."[29] Consistent with this prevailing view, American legal authorities have soundly rejected offenses such as attempted depraved heart murder, attempted reckless manslaughter, attempted reckless assault, and attempted negligent homicide.[30] Which is not to say the forms of conduct that would be covered by such offenses goes unpunished; however, it is typically covered by special misdemeanor reckless endangerment statutes or other specific risk-creation laws.[31]

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[29] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; *see, e.g.*, *State v. Stensaker*, 725 N.W.2d 883, 889 (N.D. 2007). In a comprehensive survey of national legal trends on non-intentional attempts Michael Cahill observes that: "In nearly all jurisdictions to consider the question, courts have held that no such offenses exist." Cahill, *Reckless Homicide*, *supra* note 100, at 882. The exception appears to be Colorado, which recognizes the offense of attempted reckless manslaughter, see *People v. Thomas*, 729 P.2d 972 (Colo. 1986), and attempted extreme-indifference murder, see *People v. Castro*, 657 P.2d 932 (Colo. 1983), but not attempted criminally negligent homicide, see *People v. Eggert*, 923 P.2d 230 (Colo. Ct. App. 1995). Cahill also observes that:

> There is authority in Florida and Louisiana suggesting that in those states, attempt may not require intent as to any resulting harm an offense requires. That authority, however, often uses the term "intent" in a way that seems to implicate the common-law distinction, now obsolete under a proper reading of most modern codes, between "specific intent" and "general intent."

Cahill, *Reckless Homicide*, *supra* note 100, at 956.

[30] For rejection of attempted depraved heart murder, see, for example, *State v. Vigil*, 842 P.2d 843, 848 (Utah 1992); *United States v. Kwong*, 14 F.3d 189, 194–95 (2d Cir. 1994). For rejection of attempted reckless manslaughter, see, for example, *Dixon v. State*, 772 A.2d 283, 288 n.9 (Md. 2001); *People v. Foy*, 587 N.Y.S.2d 111, 112 (1992); *State v. Dunbar*, 117 Wash.2d 587 (1991) (*en banc*). As the Hawaii Supreme Court observed:

> Our research efforts have failed to discover a single jurisdiction that has recognized the possibility of attempted involuntary manslaughter. On the other hand, the cases holding that attempted involuntary manslaughter is a statutory impossibility are legion . . . . We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter.

State v. Holbron, 904 P.2d 912, 920, 930 (Haw. 1995). Likewise, "[a]fter reviewing the [pertinent] legal authority," the Nebraska Supreme Court determined that "attempted *reckless* assault" is not a viable offense. *State v. Hemmer*, 3 Neb. App. 769, 777 (1995). For rejection of attempted negligent homicide, and other attempted negligence offenses, see, for example, *State v. Nolan*, 01C01-9511-CC-00387, 1997 WL 351142 (Tenn. Crim. App. June 26, 1997); *Sacchet v. Blan*, 353 Md. 87 (1999); *State v. Hembd*, 197 Mont. 438 (1982).

[31] The basis for these statutes is Model Penal Code § 211.2, which establishes that "[a] person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." As Cahill observes: "Following the Model Penal Code's lead, twenty-four

It's worth noting that the foregoing legal trends appear to be based upon both conceptual and public policy-based rationales.[32] The conceptual rationale emphasizes that because an attempt "seems necessarily to involve the notion of an intended consequence,"[33] the notion of recklessly or negligently attempting to achieve some consequence is—as a variety of courts have phrased it—a "logical impossibility."[34] The public policy-based rationale for rejecting reckless or negligent attempts, in contrast, is focused on keeping the "floodgates [of] attempt liability" shut.[35] It is argued, for example, that allowing for recklessness or negligence (and of course strict liability) as to the result element of an attempt risks turning "every endangering action" into a serious felony.[36]

The circumstances of an attempt, in contrast, are viewed through an entirely different lens by American legal authorities. Consistent with the Model Penal Code approach, modern criminal codes frequently clarify that the culpable mental state requirement, if any, governing the circumstances of the target offense govern that of the attempt.[37] Case law is also in accordance with this principle of *mens rea* equivalency. Noteworthy judicial opinions on the *mens rea* for the circumstances of an attempt have held that strict liability circumstance elements in the target offense should remain a matter of strict liability for an attempt,[38] reckless circumstance elements in the target offense should remain a matter of recklessness for an attempt,[39] and so on and so forth.

The foregoing principle of *mens rea* equivalency is widely understood to achieve "common-sense result . . . in accordance with principle."[40] Here, for example, is how one state legislature has framed the issue:

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states have adopted a general [reckless endangerment] offense." Cahill, *Reckless Homicide*, *supra* note 100, at 924 (collecting citations).

[32] *State v. Stensaker*, 725 N.W.2d 883, 889 (N.D. 2007) (quoting LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3).

[33] Smith, *supra* note 90, at 434.

[34] *State v. Huff*, 469 A.2d 1251, 1253 (Me. 1984); *see, e.g.*, *State v. Coble*, 527 S.E.2d 45, 48 (N.C. 2000); *State v. Grant*, 418 A.2d 154, 156 (Me. 1983); *Knapik v. Ashcroft*, 384 F.3d 84, 91 (3d Cir. 2004); *see also also* Great Britain Law Commission, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*, 102 GREAT BRITAIN LAW COMM'N REP. 1, 12 (1980) (discussing *Regina v. Mohan*, Q.B. 1, 11 (1976)); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 160 (1978).

[35] Michaels, *supra* note 99, at 1033.

[36] *Id; see, e.g.*, Model Penal Code § 5.01 cmt. 303-04.

[37] As a legislative matter, endorsement of a principle of *mens rea* equivalency to circumstance elements appears to be more or less universal in modern criminal codes. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1001; Ark. Code Ann. § 5-3-201; Conn. Gen. Stat. Ann. § 53a-49; Ky. Rev. Stat. Ann. § 506.010;Me. Rev. Stat. tit. 17-A, § 152; Neb. Rev. Stat. § 28-201; N.J. Stat. Ann. § 2C:5-1; N.D. Cent. Code § 12.1-06-01; Ohio Rev. Code Ann. § 2923.02; Okla. Stat. Ann. tit. 21, § 44; Tenn. Code Ann. § 39-12-101. Likewise, judicial decisions, drawn from inside and outside of reform jurisdictions, are similarly in accord. *See, e.g.*, *State v. Sorabella*, 277 Conn. 155, 891 A.2d 897 (2006); *Maxwell v. State*, 168 Md.App. 1 (2006); *State v. Chhom*, 128 Wash.2d 739, 911 P.2d 1014 (1996); *State v. Nunez*, 159 Ariz. 594, 596 (Ariz. Ct. App. 1989); *People v. Miller*, 87 N.Y.2d 211 (1995).

[38] *See, e.g.*, *State v. Mateyko*, 53 S.W.3d 666, 677 (Tenn. 2001); *Neal v. State*, 590 S.E.2d 168 (Ga. Ct. App. 2003).

[39] *See, e.g.*, *State v. Galan*, 134 Ariz. 590, 591-92 (Ct. App. 1982); *Sergie v. State*, 105 P.3d 1150 (Alaska App. 2005).

[40] Smith, *supra* note 90, at 434.

> Suppose, for example, that it is an independent crime to intentionally kill a police officer and that recklessness with respect to the victim's identity as a police officer is sufficient to establish that attendant circumstance. If a defendant attempts to kill a police officer recklessly mistaken as to the intended victim's identity (e.g., the defendant recklessly believes the police officer to be a night security guard), attempt liability ought to result. . . . It would hardly make sense to hold that the defendant should be relieved of attempt liability in the situation hypothesized because the defendant did not intend that the victim be a police officer. Furthermore, it would be anomalous to hold that had the defendant succeeded, and the substantive crime been consummated, the defendant would be guilty of the substantive crime but that, upon the failure of the defendant's attempt, the defendant's lack of intent with respect to an attendant circumstance precludes penal liability for the attempt.[41]

Consistent with the foregoing analysis, "virtually all commentators agree" that a principle of *mens rea* equivalency is appropriate in the context of circumstances.[42]

Finally, the Model Penal Code's recognition of the planning requirement—occasionally referred to as "future conduct intention"[43]—uniquely implicated by incomplete attempts has been well received. For example, numerous reform codes codify the requirement that, for incomplete attempts, the defendant's conduct must have been "planned to culminate in commission of the crime."[44] This basic notion has similarly been recognized by judges, too. As a variety of courts have observed, an attempt conviction requires proof that the defendant possessed an "intent to perform acts which, if completed, would constitute the underlying offense,"[45] in which context the term "intent" serves as a stand-in for the planning requirement.[46] Commentators have also

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[41] Commentary on Haw. Rev. Stat. Ann. § 705-500; *see, e.g.,* Wechsler et al., *supra* note 51, at 575.

[42] DRESSLER, *supra* note 91, at § 27.05; *see, e.g.*, Cahill, *Reckless Homicide*, *supra* note 100, at 900.

[43] Robinson, *Functional Analysis*, *supra* note 27, at 864.

[44] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1001; Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11, § 531; Ky. Rev. Stat. Ann. § 506.010; N.J. Stat. Ann. § 2C:5-1.

[45] *See, e.g., People v. Frysig*, 628 P.2d 1004, 1010 (Colo. 1981); *Bloomfield v. State*, 234 P.3d 366, 372 (Wyo. 2010); *State v. Covarrubias*, A-92-500, 1993 WL 80588, at *12 (Neb. Ct. App. Mar. 23, 1993); *State v. Adams*, 745 P.2d 175, 178 (Ariz. Ct. App. 1987).

[46] Here's how one commentator describes future conduct intention, synonymous with planning, and distinguishes it from present conduct intention, synonymous with voluntariness:

> For all commission offenses, a present conduct intention is required, satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed. For example, an actor does not satisfy this culpability requirement if he does not intend to push the victim but rather does so accidentally as he catches his balance from his own fall. A requirement of present conduct intention essentially duplicates the voluntariness requirement discussed above.
>
> The requirement of a future conduct intention, on the other hand, has a critical independent role to play. It serves to show that the actor is planning to do more than what he has already done. Most prominently, attempt liability requires that the actor must intend . . . to engage in the conduct constituting the offense. Such a future conduct intention also is present in substantive offenses that are or that contain codified inchoate offenses.

been quite supportive of recognizing this planning requirement as distinct from the *mens rea* as to the results and circumstances of an attempt.[47]

Consistent with the strong majority trends relevant to the *mens rea* of attempt, as well as the compelling considerations of public policy that each rests upon, the Revised Criminal Code codifies a definition of attempt comprised of: (1) a principle of *mens rea* elevation applicable to results that allows for both purpose and belief-based attempts, see § 301(a)(1); and (2) a principle of *mens rea* equivalency applicable to circumstances, see § 301(a)(2). Both of these principles are, in turn, preceded by a prefatory requirement of planning, which helps to clarify their appropriate application.

Subsection (a)(3): Relation to National Legal Trends on Incomplete Attempts. American criminal law is comprised of a variety of standards for addressing incomplete attempts each of which finds support in a range of competing policy considerations. Generally speaking, however, the substantial step test, originally developed by the Model Penal Code, is the majority approach while the dangerous proximity test, originally developed by the common law, is the minority approach. Following current District law, § 301(a)(3) incorporates the dangerous proximity test into the Revised Criminal Code.

The nature of the conduct that will support an attempt conviction has long been the subject of controversy in American criminal law.[48] At the heart of the problem is disagreement over the following issue: at what point has an actor crossed the line between mere preparation and perpetration necessary to justify attempt liability?

There is universal agreement that so-called complete attempts—where a person carries out all that he or she planned to do in order to consummate an offense[49]—constitute an appropriate basis for criminal liability.[50] There also is universal agreement

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> Burglary, for example, requires that an actor enter a building "with purpose to commit a crime therein." Note that the requirement of a present conduct intention applies to a corresponding objective element of offense definition, the conduct element, that the actor also must satisfy, just as the requirements of a present circumstance culpability and a future result culpability typically apply to a corresponding objective element. A requirement of a future conduct intention, in contrast, by definition has no corresponding objective element but rather exists on its own; the actor need not be shown to have performed the conduct.

Robinson, *Functional Analysis*, *supra* note 27, at 864.

[47] *See, e.g.*, Robinson, *Functional Analysis*, *supra* note 27, at 864; Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1170-71 (1997); Cahill, *Incomplete Attempts*, *supra* note 111, at 755; Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173, 202-03 (2011).

[48] More than a century ago, Holmes observes that "[e]minent judges" have long "been puzzled where to draw the line" of where an attempt begins, "or even to state the principle on which it should be drawn . . . ." O.W. Holmes, Jr., THE COMMON LAW 68 (1881). Since then, little has changed. *See, e.g.*, Thomas Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 79 (1940); LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3.

[49] A classic completed attempt is the shoot-and-miss scenario, where no further act is need beyond firing the shot; the attempt fails only because of the inaccuracy of the shot. Cahill, *Reckless Homicide*, *supra* note 100, at 901 n.59.

[50] *See, e.g.*, *Gray v. State*, 43 Md. App. 238, 239 (1979); *Regina v. Eagleton*, 6 Cox Crim. Cas. 559 (1855); *Rex v. Scofield*, Cald. 397 (1784).

that incomplete attempts—where a person is frustrated from carrying out his or her plan due to interference from external forces[51]—should, as a general category, provide a basis for criminal liability.[52] What is less clear, however, is how to define the contours of this category, a challenging task that entails deciding where in the "ebb and flow of events leading from preparation to consummation" the line between reprehensible and criminal ought to be drawn.[53]

Over the years, courts and legislatures have developed a wide range of tests to address this issue. Broadly speaking, however, there exist two main categories of approaches: the common law standards and the Model Penal Code standard.

The common law standards, as a class, tend to emphasize the relationship between the conduct of the accused and the end of the chain of criminal activity (that is, how much remains to be done). As a result, they tend to draw the line between preparation and perpetration comparatively late in the criminal timeline.

Most of the common law standards focus on closeness to completion.[54] This emphasis is most obvious under the so-called physical proximity test, which asks whether the defendant's conduct was "sufficiently near [the completed offense] to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made."[55]

Proximity is also at the heart of another influential common law standard, the so-called probable desistance test, which focuses on whether a defendant has become close enough such that it could be said that he or she was otherwise unlikely to voluntarily desist from her criminal efforts.[56] Under this test, the line of preparation has been crossed when the defendant has committed an act that in the *ordinary course of events* would result in the commission of the target crime *except for the intervention of some extraneous factor*.[57]

Perhaps the most influential of all common law standards is the "dangerous proximity" test.[58] Originally set forth by Oliver W. Holmes in a series of opinions[59] and

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[51] An incomplete attempt would be one where the shot has not yet been fired, but the actor has done enough to be liable for an attempt—say, buying the gun, loading it, pursuing the victim, aiming and preparing to fire. Cahill, *Reckless Homicide*, *supra* note 100, at 901 n.59.

[52] Indeed, "[n]o jurisdiction operating within the framework of Anglo-American law requires that the last proximate act occur before an attempt can be charged." Model Penal Code § 5.01 cmt. at 321 n.97; *see, e.g.*, *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950).

[53] FLETCHER, *supra* note 122, at 140.

[54] *See* Model Penal Code § 5.01 cmt. at 325.

[55] *State v. Dowd*, 28 N.C. App. 32, 37 (1975); *see, e.g.*, *United States v. Jackson*, 560 F.2d 112, 119 (2d Cir. 1977).

[56] *See* Model Penal Code § 5.01 cmt. at 325; *see also supra* notes 50-52 and accompanying text (discussing this test).

[57] *See, e.g.*, *Young v. State*, 303 Md. 298, 310 (1985); *Commonwealth v. Kelley*, 58 A.2d 375, 377 (Pa. Super. Ct. 1948).

[58] For an "analysis of criminal law authorities writing near the turn of the century," which "reveals that Justice Holmes' dangerous proximity approach to defining the attempt was . . . dominant," see Mark E. Roszkowski, *Attempted Monopolization: Reuniting A Doctrine Divorced from It's Criminal Law Roots and the Policy of the Sherman Act*, 73 MARQ. L. REV. 355, 389 n.189 (1990); *see, e.g.*, 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW §§ 739, 759(1), 762(4) (8th ed. 1892); 1 J. BISHOP, BISHOP ON CRIMINAL LAW §§ 739, 759(1), 762(4) (9th ed. 1923); 1 F. WHARTON, A TREATISE ON CRIMINAL LAW § 181 (8th ed. 1880); 1 F. WHARTON, WHARTON'S CRIMINAL LAW § 220 (12th ed. 1932).

an acclaimed book,[60] this standard likewise emphasizes closeness to completion, though it also adds an additional gloss, which focuses on dangerousness.[61] More specifically, the dangerous proximity test draws the line between preparation and perpetration at an act that is "dangerously close" to success, where such closeness is calculated by weighing "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result."[62] Under such an approach, the line between preparation and attempt is determined on a sliding scale: the greater the gravity of the offense, the larger the probability of it occurring, and the nearer the act to the crime, the more likely that act is to constitute an attempt.[63]

There exists one additional common law standard worth noting, which does not emphasize proximity, the "unequivocality test" or "*res ipsa loquitur* test."[64] Under the unequivocality test, conduct oriented towards commission of an offense does not constitute a criminal attempt unless it is "of such a nature that it is itself evidence of the criminal intent with which it is done, i.e., an act that bears criminal intent on its face, an act that can have no other purpose than the commission of that specific crime."[65] Which is to say that under such an approach the person's *conduct* must, standing alone, unambiguously manifest her criminal intent to commit an offense.[66]

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[59] *See Commonwealth v. Kennedy*, 170 Mass. 18 (1897); *Commonwealth v. Peaslee*, 177 Mass. 267 (1901); *Hyde v. United States*, 225 U.S. 347 (1912) (Holmes, J. dissenting); *see also Commonwealth v. Bell*, 455 Mass. 408, 429-30 (2009) (describing the genesis of the test).

[60] *See* HOLMES, *supra* note 136, at 68–69.

[61] *See* FLETCHER, *supra* note 122, at 141-42.

[62] *Kennedy*, 170 Mass. at 22.

[63] So, for example, the Massachusetts Supreme Court in *Commonwealth v. Kennedy* (an opinion penned by Holmes) observed that where the relevant act was attempted murder by poisoning, the gravity of the crime, coupled with the great harm likely to result from poison, would warrant finding attempt liability at an earlier stage than might be the case with less dangerous crimes. *Kennedy*, 170 Mass. at 22. Applying this reasoning in *Bell v. State*, the Georgia Supreme Court held the "potentially and immediately dangerous circumstances" presented by D's entry of a company's premises carrying dynamite with intent to destroy one of the company's buildings justified drawing the line between preparation and attempt earlier on in the chain of criminal conduct. 118 Ga. App. 291, 293 (1968).

[64] *See* Model Penal Code § 5.01 cmt. at 325.

[65] *Laster v. State*, 275 S.W.3d 512, 526 n.12 (Tex. Crim. App. 2009); *see, e.g.*, *Young*, 303 Md. at 310.

[66] The true import of the unequivocality test is its robust evidentiary implications, namely, it limits the factfinder to a consideration of external conduct in its evaluation of whether the line between preparation and perpetration has been crossed, thereby excluding from consideration any oral or written communications of the accused, such as a verbal confession or one articulated in writing. In practical effect, this means that:

> It is as if the jury observed the conduct in video form with the sound muted (so as not to hear the actor's potentially incriminating remarks), and sought to decide from the conduct alone whether the accused was attempting to commit the offense for which she was prosecuted.

DRESSLER, *supra* note 91, at § 27.06. "If there is only one reasonable answer to this question then the accused has done what amounts to an 'attempt' to attain that end." J.W. Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230, 236 (1934). But if, in contrast, "there is more than one reasonably possible answer, then the accused has not yet done enough." *Id.* It's worth noting that under this test the government may still prove that the accused satisfied the culpability requirement for an attempt by relying upon any evidence; however, the government may only make its case regarding the conduct requirement

The common law standards can be contrasted with the approach developed by the Model Penal Code, the substantial step test. This relevant standard emphasizes the relationship between the conduct of the accused and the beginning of the chain of criminal activity (that is, how much has been done), and, therefore, draws the line between preparation and perpetration comparatively early in the criminal timeline.

The substantial step test specifically allows for an attempt conviction to rest upon proof that the accused engaged in an "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime."[67] By using the terminology of a substantial *step*, this formulation, like the various proximity approaches, maintains an emphasis on distance. However, it flips the orientation: rather than emphasizing closeness to consummation, it focuses upon how far from the beginning of the chain of criminal activity an actor has gone.[68] "That further major steps must be taken before the crime can be completed," as the MPC drafters, explained, "does not preclude a finding that the steps already undertaken are substantial."[69] The Model Penal Code drafters intended the substantial step test to "broaden[] liability" beyond that provided for under the common law standards.[70]

The comparative breadth of these tests can be observed through the following variations on a burglary scenario involving a locksmith who decides to steal a safe that he's been working on.[71] Here is the first scenario:

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under such an approach by relying on outwardly observable behavior. For further discussion, see ROBINSON & CAHILL, *supra* note 92, at 453; J. SALMOND, JURISPRUDENCE 404 (7th ed. 1924).

[67] Model Penal Code § 5.01(1)(c).

[68] Model Penal Code § 5.01 cmt. at 329. For further discussion, see ROBINSON & CAHILL, *supra* note 92, at 451-452; 1 RUSSELL ON CRIME 182, 184 (J.W. Cecil Turner ed., 12th ed. 1964).

[69] Model Penal Code § 5.01 cmt. at 329; *see, e.g.*, *People v. Hawkins*, 311 Ill.App.3d 418, 428 (Ill. 2000) (Under the Model Penal Code, "[a] substantial step can be the very first step beyond mere preparation. That more steps could conceivably have been taken before actual commission of a crime does not render that first step insubstantial.").

[70] Model Penal Code § 5.01 cmt. at 331. At the same time, the Model Penal Code drafters were also cognizant of the fact that broadening attempt liability in this way enhanced the risk of convicting innocent actors given that attempt prosecutions may uniquely center around innocuous conduct that is susceptible to being misconstrued. *See* ROBINSON & CAHILL, *supra* note 92, at 467; Robinson, *Functional Analysis*, *supra* note 27, at 866. In order to address the increased risk of false positives inherent in the expansion of attempt liability under the substantial step test, then, the Model Penal Code drafters devised a strong corroboration requirement, which provides that an actor's conduct may not "constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose." Model Penal Code § 5.01(2).

This requirement effectively constitutes a modified version of the evidentiary limitation imposed by the unequivocality test. "Rigorously applied," for example, "the res ipsa loquitur doctrine would provide immunity in many instances in which the actor had gone far toward the commission of an offense and had strongly indicated a criminal purpose." Model Penal Code § 5.01 cmt. at 331. The Model Penal Code's corroboration requirement, in contrast, recognizes that "an actor's conduct may be incriminating in a general way without showing beyond a reasonable doubt that the actor had the purpose of committing a particular crime." *Id.* It would therefore allow for other forms of extrinsic evidence, such as confessions, to be considered as part of the fact-finder's overall analysis of whether conduct requirement is met, so long as the conduct being analyzed is not itself wholly equivocal. *See id.*; Wechsler et al., *supra* note 51, at 590.

[71] This scenario is drawn from PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995) (Study 1).

> Ray, a locksmith, recalls working on a safe in a coin shop. The safe was kept in a back room and always contained valuable coins. Ray decides that he will rob the safe in the coin shop. To make sure that the safe is still there, Ray goes to the coin shop and checks out the situation before the robbery. Ray tells a friend what he has decided to do.[72]

On these facts, Ray's conduct would likely provide the basis for an attempt conviction under the substantial step test. For example, the drafters of the Model Penal Code explicitly clarified that this kind of "reconnoitering" behavior should be included within the auspices of the substantial step test.[73] Their view, in turn, is reflected in contemporary judicial application of the substantial step test, which reaches both reconnoitering behavior[74] and other comparable forms of preparation.[75] In contrast, fact patterns merely involving reconnoitering behavior, as well as various other situations wherein important contingencies remain to be fulfilled, tend to fall short of satisfying the common law standards as a matter of case law.[76] Before upholding an attempt conviction reached under the common law standards, appellate judges typically require proof of further progress.

To illustrate the nature of the progress necessary to satisfy the common law standards, consider the following developments to the burglary scenario discussed earlier:

> Ray, having spoken with his friend, decides to make a special tool to crack the safe. Thereafter, he travels to the coin shop, parks his car in the adjoining lot, and exits his vehicle. Ray is then stopped by the police who—having been informed of Ray's plans by Ray's friend—arrest him.[77]

On these facts, Ray's conduct would likely satisfy all of the common law standards. That Ray is sufficiently close to the site of the job would, based upon prevailing case law, indicate that he has satisfied the physical proximity test, dangerous proximity test,

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[72] *See* ROBINSON & DARLEY, *supra* note 159.

[73] More specifically, "reconnoitering the place contemplated for the commission of the crime" is considered to a fact pattern that, "if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law" under Model Penal Code § 5.01(2). In practical effect, this means that where such circumstances are present, the judge "cannot directly acquit the defendant," while the prosecutors are automatically allowed "to discharge their burden of production whenever evidence of the specified acts is present." Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1238-39 (2007).

[74] *See, e.g.*, *United States v. Wesley*, 417 F.3d 612, 620 (6th Cir. 2005); *United States v. Ivic*, 700 F.2d 51, 67 (2d Cir. 1983); *United States v. Rahman*, 189 F.3d 88, 129 (2d Cir. 1999).

[75] *See, e.g.*, *United States v. Spencer*, 439 F.3d 905, 916 (8th Cir. 2006); *United States v. Jessup*, 305 F.3d 300, 304 (5th Cir. 2002); *United States v. Felix*, 867 F.2d 1068, 1071 (8th Cir. 1989); *United States v. Haynes*, 372 F.3d 1164, 1168-9 (10th Cir. 2004); *United States v. Piesak*, 521 F.3d 41, 44–45 (1st Cir. 2008).

[76] *See, e.g.*, *People v. Rizzo*, 246 N.Y. 334, 338-39 (1927); *People v. Volpe*, 122 N.Y.S.2d 342, 348 (Cty. Ct. 1953); *State v. Christensen*, 55 Wash. 2d 490, 493 (1960); *People v. Youngs*, 122 Mich. 292, 293 (1899); *Commonwealth v. Bell*, 455 Mass. 408, 425 (2009).

[77] *See* ROBINSON & DARLEY, *supra* note 159.

and the probable desistance test.[78] And the fact that Ray made a special tool to crack the safe would likely provide the basis for satisfying unequivocality test.[79]

Today, both the common law standards and the Model Penal Code approach have been endorsed by American legislatures and, in those jurisdictions where the legislature has not clearly spoken, by the courts. However, these two different approaches have not been endorsed in equal measure: the Model Penal Code standard appears to reflect the majority approach, while the common law standards appear to reflect the minority approach.

On the legislative level, twenty-four reform codes have adopted a comprehensive general attempt provision that incorporates the substantial step test.[80] Although some of these jurisdictions modify the substantial step test in one or more ways, the core of the relevant legislative provisions reflects the Model Penal Code's more expansive approach to drawing the line between preparation and perpetration.[81] Outside of reform jurisdictions, moreover, courts have also been quite receptive to the Model Penal Code standard: various appellate courts on the state[82] and federal[83] level have adopted the substantial step test by judicial pronouncement.

Notwithstanding the contemporary popularity of the Model Penal Code standard, however, its adoption has not been uniform.[84] For example, a handful of criminal codes

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[78] *See, e.g.*, *Bell v. State*, 118 Ga. App. 291, 293 (1968); *People v. Acosta*, 609 N.E.2d 518, 521-22 (N.Y. 1993); *Cody v. State*, 605 S.W.2d 271, 273 (Tex. 1980); *People v. Mahboubian*, 74 N.Y.2d 174, 191 (1989); *see also* ROBINSON & DARLEY, *supra* note 159.

[79] *See, e.g.*, *People v. Staples*, 6 Cal. App. 3d 61, 68 (Ct. App. 1970); *Laster v. State*, 275 S.W.3d 512, 526 n.12 (Tex. Crim. App. 2009); *see also* ROBINSON & DARLEY, *supra* note 159.

[80] *See, e.g.*, Alaska Stat. § 11.31.100; Ark. Code Ann. § 5-3-201; Colo. Rev. Stat. Ann. § 18-2-101; Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11, § 531; Ga.Code Ann. § 16-4-1; Haw. Rev. Stat. § 705-500; 720 Ill. Comp. Stat. Ann. 5/8-4; Ind. Code Ann. § 35-41-5-1; Ky. Rev. Stat. Ann. § 506.010; Me. Rev. Stat. Ann. tit. 17-A, § 152; Minn. Stat. Ann. § 609.17; Mo. Ann. Stat. § 564.011; Neb. Rev. Stat. § 28-201; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-1; N.D. Cent. Code § 12.1-06-01; Or. Rev. Stat. § 161.405; Pa. Cons. Stat. Ann. tit. 18, § 901; Tenn. Code Ann. § 39-12-101; Utah Code Ann. § 76-4-101 Wash. Rev. Code § 9A.28.020; Wyo. Stat. § 6-1-301.

[81] For example, the North Dakota Criminal Code defines a "a 'substantial step' [as] any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime." N.D. Cent. Code § 12.1-06-01. Or similarly consider the Delaware Criminal Code, which defines a substantial step as "an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which the defendant is charged with attempting." Del. Code Ann. tit. 11, § 532.

[82] *See, e.g.*, *State v. Ferreira*, 463 A.2d 129, 132 (R.I. 1983); *Young*, 303 Md. at 312-13; *State v. Glass*, 139 Idaho 815, 819 (2003); *see also* Ernest G. Mayo, *The Model Penal Code and Rhode Island: A Primer*, R.I. B.J., January/February 2004, at 19, 23.

[83] *See, e.g.*, *United States v. Lam Kwong-Wah*, 924 F.2d 298, 301 (D.C. Cir. 1991); *United States v. Doyon*, 194 F.3d 207, 210 (1st Cir. 1999); *United States v. Ivic*, 700 F.2d 51, 66 (2d Cir. 1983); *United States v. Cruz-Jiminez*, 977 F.2d 95, 101-02 (3d Cir. 1992); *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996); *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir.1974); *United States v. Williams*, 704 F.2d 315, 321 (6th Cir. 1983); *United States v. Leiva*, 959 F.2d 637, 642 (7th Cir. 1992); *United States v. Watson*, 953 F.2d 406, 408 (8th Cir.1992); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1096 (9th Cir. 2011); *United States v. Prichard*, 781 F.2d 179, 181 (10th Cir. 1986); *United States v. McDowell*, 705 F.2d 426, 427 (11th Cir. 1983). *See also United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007); *Braxton v. United States*, 500 U.S. 344, 349 (1991). *But see infra* note 177 (discussing variances in application of the substantial step test, which accord with the common law approach).

[84] *See, e.g.*, Robert Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689, 694-96 (2004).

reflect—either explicitly or as interpreted—the common law standards. Illustrative is the Wisconsin Code, which, by requiring "acts toward the commission of the crime which demonstrate *unequivocally*, under all the circumstances, that the actor formed that intent and would commit the crime *except for the intervention* of another person or some other extraneous factor," explicitly mandates *both* unequivocality *and* proximity.[85] In contrast, the general attempt statutes in other states—for example, California, Massachusetts, and New York—are comprised of vague language that bears the influence of the common law tests,[86] and have been interpreted by the state courts in a manner that reflects their common law origins.[87]

One important caveat to the foregoing survey bears notice: the influence of the substantial step test may be overstated, and the influence of the common law standards understated, by looking solely at the express formulations offered by a given jurisdiction. For example, it is not uncommon for appellate courts—whether at the state[88] or federal level[89]—to construe and apply the substantial step test in fashion so narrow and proximity-focused that it is the equivalent of the common law standards.[90]

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[85] Wis. Stat. Ann. § 939.32.

[86] For example, the California Code requires proof of "a direct but ineffectual act done toward . . . commission" of the target offense. Cal. Penal Code § 21a. Likewise, the Massachusetts Code requires proof of "any act toward . . . commission" of the target offense. Mass. Gen. Laws Ann. ch. 274, § 6. And the New York Code requires proof of "conduct which tends to effect the commission of such crime." N.Y. Penal Law § 110.00. Under the common law, phrases such as these were similarly understood to mean proximity. *See, e.g.*, *United States v. Jackson*, 560 F.2d 112, 119 (2d Cir. 1977).

[87] *See, e.g.*, *Rizzo*, 246 N.Y. at 336-37; *People v. Warren*, 66 N.Y.2d 831, 832-33 (1985); *People v. Luna*, 170 Cal. App. 4th 535, 540-41 (2009); *People v. Dillon*, 668 P.2d 697, 702 n.1 (1983); *Commonwealth v. Bell*, 455 Mass. 408, 425 (2009); *Commonwealth v. Ortiz*, 408 Mass. 463, 472 (1990); *State v. Henthorn*, 581 N.W.2d 544, 547 (Wis. Ct. App. 1998); *State v. Thiel*, 515 N.W.2d 847, 861 (1994).

[88] Illustrative is the experience in Indiana. The Indiana Criminal Code clearly endorses the substantial step test. *See* Ind. Code Ann. § 35-41-5-1 ("A person attempts to commit a crime when, acting with the culpability required for commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime"). However, in *Collier v. State*, the Court of Appeals of Indiana deemed that the following conduct "did not constitute a substantial step toward commission of the crime of murder": (1) the defendant repeatedly told his neighbor he was going to kill his wife; (2) then drove to his wife's place of employment with an ice pick, a box cutter, and binoculars; (3) then parked outside the door through which he knew his wife would exit; (4) then fell asleep or passed out. 846 N.E.2d 340, 345-50 (Ind. Ct. App. 2006). In justifying its decision, the court explicitly relied on the principle of dangerous proximity, which had previously been endorsed by the Indiana Supreme Court. *Id.* at 345 (citing *Ward v. State*, 528 N.E.2d 52, 53 (Ind. 1988)) (quoting HOLMES, *supra* note 136, at 68 (1881) and Francis B. Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 846 (1928)).

[89] Illustrative is the experience in the Ninth Circuit, which, like all federal courts of appeal, has endorsed the substantial step test by case law, but seems to apply it in a manner consistent with the common law approach. Under governing Ninth Circuit precedent, "[a]n attempt conviction requires evidence that the defendant intended to violate the statute and took a *substantial step* toward completing the violation." *E.g.*, *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Yet, "to constitute a substantial step" in the Ninth Circuit a defendant's actions must "unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." *E.g.*, *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010). This framing effectively defines a substantial step by reliance on the common law's unequivocality and probable desistance standards. *See supra* notes 144-54 and accompanying text. Not only that, but this reliance, in turn, appears to have produced outcomes in the case law that are consistent with common law standards. Consider, for example, the following trio of bank robbery decisions, where the Ninth Circuit rejected attempt liability under circumstances which quite clearly seem to satisfy the substantial step test:

The foregoing variance and disagreement over how to deal with incomplete attempts is not surprising when viewed in light of the conflicting policy considerations implicated by this area of law. Drawing the line between preparation and perpetration implicates the classic divide between effective crime prevention and the protection of individual rights.[91]

For example, it is argued that the *broader* the conduct requirement (i.e, the farther the conduct must be to the completion of the offense), the *greater* the risk that "equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime"[92]—or that a person with a less than fully-formed criminal intent will be arrested before she has had the opportunity to reconsider and voluntarily desist.[93] On this view, a narrow conduct requirement—for example, any of the common law standards—is most desirable because it limits the risk that suspicious looking, but innocent, conduct will be punished,[94] while, at the same time, providing people with a reasonable window of time within which to abandon their criminal enterprise.[95]

Conversely, it is argued that the *narrower* the conduct requirement (i.e., the closer the conduct must be to the completion of the offense), the *longer* police will have to abstain from intervention, and the *greater* the risk that an actor will successfully complete an offense.[96] On this view, a broad conduct requirement—for example, the substantial step test—is most desirable because it can help to ensure that police do not "confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge."[97]

The foregoing tension between collective security and individual liberty runs parallel to an even deeper policy dispute pervading the criminal law: what is the

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United States v. Buffington, 815 F.2d 1292, 1301 (9th Cir. 1987); *United States v. Still*, 850 F.2d 607, 608 (9th Cir. 1988); and *United States v. Harper*, 33 F.3d 1143, 1147 (9th Cir. 1994). *See also United States v. Yossunthorn*, 167 F.3d 1267, 1271 (9th Cir. 1999). For relevant discussion, see Batey, *supra* note 172, at 694-96.

[90] For similar variance in the application of the substantial step test in other jurisdictions, see Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 444-45 (1988).

[91] *See, e.g.*, Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 611 (2012).

[92] Model Penal Code § 5.01 cmt. at 294.

[93] DRESSLER, *supra* note 91, at § 27.01.

[94] This is because "[t]he farther that one moves from the paradigm of a completed act—as one moves backwards successively through attempt, to advanced planning, to initial planning, and so forth—the more tenuous the link between the defendant and the anticipated harm becomes and, hence, the more likely it is that false positives will be generated." Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 435 (2007); *see* Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 842 (2011).

[95] The argument here is that "a system of law must treat its citizens as autonomous agents [that provides them with] as much freedom as possible to determine their own conduct," which, in the context of criminal attempts, requires a meaningful *locus poenitentiae*. R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); *see, e.g.*, Garvey, *supra* note 135, at 212.

[96] DRESSLER, *supra* note 91, at § 27.01.

[97] Model Penal Code § 5.01 cmt. at 322; *see, e.g.*, Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299, 328 (1996); *Young*, 303 Md. at 308.

appropriate basis of, and justification for, criminal liability?[98] On this issue, there are two competing viewpoints: objectivism and subjectivism.[99] "At the heart of the dispute" between these two theories is "[t]he distinction between requiring a dangerous act and searching for dangerous persons goes to the heart of the dispute."[100]

Objectivism posits that the criminal law, in determining guilt and calibrating punishment, ought to primarily focus on the dangerousness of an act. Such dangerousness, moreover, ought to be "objectively discernible at the time that it occurs," even without "special knowledge about the offender's intention."[101] This focus on dangerous acts, in turn, supports a narrow conduct requirement, such as any of the common law standards. "Objectivists begin with the commission of some substantive offence as the paradigm of criminality, and seek to capture only conduct that comes close to that paradigm by the general law of attempts: conduct that is 'proximate' to the completion of that offence."[102]

Subjectivism, in contrast, posits that the underlying concern, or gravamen, of a criminal offense is an actor's culpable-decision making—that is, his or her intention to engage in or risk harmful or wrongful activity.[103] This focus on dangerous persons in turn supports a broader conduct requirement, such as the substantial step test. "Subjectivists begin with the assumption that any conduct directed towards the commission of a substantive offence is a candidate for criminalization, and then ask how far beyond the 'first act' the intending criminal needs to have progressed before we can safely and properly convict her."[104]

In sum, while the Model Penal Code approach reflects the majority practice in American criminal law (variance in application aside), there exists a strong minority of jurisdictions that appear to apply the common law standards, including, most notably, the dangerous proximity test at the heart of current District law. Furthermore, this variance among jurisdictions is driven by difficult and conflicting considerations of public policy and penal theory. It is therefore unclear which standard for an incomplete attempt is "best," all things considered. What is clear, however, is that the conduct requirement of attempt currently applied in the District, the dangerous proximity test, falls within the boundaries of American legal practice, is justifiable, and represents a longstanding policy reflected in District law.

Subsection (a)(3)(B): Relation to National Legal Trends on Impossibility. The strong majority trend within American criminal law is to broadly reject the relevance of impossibility claims to attempt liability. However, there also appears to be one generally accepted, if infrequently litigated, exception to this broad rejection of impossibility

[98] *See* DRESSLER, *supra* note 91, at § 27.03.
[99] *See, e.g.*, FLETCHER, *supra* note 122, at 173-174; Garvey, *supra* note 135, at 183; Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L REV. 363 (2004).
[100] FLETCHER, *supra* note 122, at 173-174.
[101] *Id.* at 116.
[102] DUFF, *supra* note 183, at 386.
[103] FLETCHER, *supra* note 122, at 172.
[104] DUFF, *supra* note 183, at 386.

claims: the situation of inherent impossibility, which may constitute a defense to a criminal attempt. Subsection 301(a)(3)(B) incorporates both of these principles into the Revised Criminal Code.

The central question posed by the topic of impossibility is as follows: what is the relevance of a defendant's claim that, by virtue of some mistake concerning the conditions he or she believed to exist at the time he or she acted, the target offense could not have been completed?[105] Typically raised as a defense to an attempt charge, claims of this nature assert that impossibility of completion should by itself—and without regard to whether the defendant acted with the requisite culpable mental states and engaged in significant conduct—preclude the imposition of attempt liability.[106]

Anglo-American criminal law has long struggled to deal with impossibility claims.[107] Part of the reason for the confusion, however, is a general failure on behalf of both courts and commentators to clearly distinguish between the different varieties of impossibility claims.[108] Consider, for example, that there exist four basic categories of impossibility claims with which any legal system seeking to proscribe the limits of attempt liability must grapple.[109]

The first category of impossibility is *pure factual impossibility*, which arises when a person whose intended end constitutes a crime is precluded from consummating that crime because of circumstances unknown to her or beyond her control.[110] Impossibility of this nature may result from the defendant's mistake as to *the victim*: consider, for example, a pickpocket who is unable to consummate the intended theft because, unbeknownst to her, she picked the pocket of the wrong *victim* (namely, one whose wallet is missing).[111] Alternatively, impossibility of this nature may also result from the defendant's mistake as to *the means of commission*: consider, for example, the situation of a murderer-for-hire who is unable to complete the job because, unbeknownst to him, his murder weapon malfunctions.[112]

The second category of impossibility is *pure legal impossibility*, which arises where a person acts under a mistaken belief that the law criminalizes his or her intended objective.[113] For an illustrative scenario presenting impossibility of this nature, consider the situation of a 44-year-old-male who has consensual sexual intercourse with a 17-year-old female in a jurisdiction that sets the age of consent for intercourse at 16. Imagine that this male acts under a false belief that the age of consent is actually 18. On these facts, the actor clearly has not committed statutory rape, but what about attempted statutory

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[105] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 91, at § 27.07.
[106] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 91, at § 27.07.
[107] As Dressler phrases it: "Many pages of court opinions and scholarly literature have been filled in a largely fruitless effort to explain and justify the difference between factual and legal impossibility. Perhaps no aspect of the criminal law is more confusing and confused than the common law of impossible attempts." DRESSLER, *supra* note 91, at § 27.07.
[108] *See* DRESSLER, *supra* note 91, at § 27.07; LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.
[109] This general framework and breakdown is drawn from DRESSLER, *supra* note 91, at § 27.07.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*

rape—that is, might attempt liability be premised on the fact that the man thought he has was committing statutory rape?[114]

The third category of impossibility is *hybrid impossibility*, which arises where an actor's goal is illegal, but commission of the offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the charged offense.[115] Illustrative scenarios of hybrid impossibility involve defendants caught in police sting operations. Consider, for example, the prosecution of a defendant who sends illicit photographs to a person he believes to be an underage female, but who is actually an undercover police officer, for attempted distribution of obscene material to a minor.[116] Or similarly consider the prosecution of a defendant who makes plans to engage in illicit sexual activity with a person he believes to be an underage female, but who is actually an undercover police office, for attempted sexual performance by a child.[117]

The fourth category of impossibility is *inherent impossibility*, which arises when "any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought."[118] Inherent impossibility can take the form of pure factual impossibility: consider, for example, the situation of a person who attempts to kill by witchcraft[119] or by throwing red pepper in the eyes of another.[120] And it can also take the form of hybrid impossibility, such as where a person attempts to kill what is obviously a statue.[121] The common denominator underlying inherent impossibility, then, is that the "attemptor's actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances."[122]

As a matter of legal practice, there exist two main approaches to dealing with impossibility claims: the common law approach and the Model Penal Code approach.

The common law approach to impossibility primarily revolves around two main rules: (1) factual impossibility is not a defense to an attempt charge; and (2) legal impossibility is a defense to an attempt charge.[123] Although it is not always clear what, precisely, the import of these two common law rules is (given the existence of four categories of impossibility claims), at minimum they support two general propositions.

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[114] As Dressler observes, "this is a mirror image of the usual mistake-of-law case, in which an actor believes that her conduct is lawful, but it is not." *Id.* In this context, "D believed that he was violating a law, but he was wrong," thereby raising the following question: "If ignorance of the law does not ordinarily exculpate, may it nonetheless inculpate?" *Id.*

[115] *Id.*

[116] *See People v. Thousand*, 631 N.W.2d 694 (Mich. 2001).

[117] *See Chen v. State*, 42 S.W.3d 926 (Tex. Crim. App. 2001); *see also United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006).

[118] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1099 (1992); Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995).

[119] *See Commonwealth v. Johnson*, 167 A. 344, 348 (Pa. 1933) (Maxey, J., dissenting).

[120] *See Dahlberg v. People*, 80 N.E. 310, 311 (Ill. 1907).

[121] *See Trent v. Commonwealth*, 156 S.E. 567, 569 (Va. 1931).

[122] Brodie, *supra* note 206, at 244-45.

[123] DRESSLER, *supra* note 91, at § 27.07.

First, *pure factual impossibility* claims generally do not constitute a defense to an attempt charge under the common law approach.[124] For example, relying on the common law's rule that factual impossibility is not a defense, courts have upheld attempt convictions in the following situations: (1) a pickpocket who puts her hand in the victim's pocket only to discover that it is empty;[125] (2) a male rapist trying to engage in nonconsensual sexual intercourse only to discover that he is impotent;[126] (3) an assailant shooting into the bed where the intended victim customarily sleeps only to discover that it is empty;[127] and (4) an individual pulling the trigger of a gun aimed at a person who is present only to discover that the gun is unloaded.[128]

Second, *pure legal impossibility* claims do constitute a defense to an attempt charge under the common law approach.[129] So, for example, an actor is not guilty of a criminal attempt if, unknown to her, the legislature has repealed a statute that the actor believes that she is violating, such as when an actor attempts to sell "bootleg" liquor after the repeal of the Prohibition laws.[130] All the more so, actors are not guilty of attempts to violate laws that are purely the figments of their guilty imaginations, such as when an actor fishes in a lake without a license believing that he needs a license for that lake though in fact he does not.[131] The common law approach to these kinds of situations is not at all surprising, however, once one considers what cases of pure legal impossibility really amount to: "perform[ing] a lawful act with a guilty conscience," that is, acting with a mistaken belief that one is committing crime.[132]

Less clear, and more controversial, under the common law approach to impossibility is the disposition of *hybrid impossibility* claims, which, as noted earlier, arise where three conditions are met: (1) the actor's goal is illegal; (2) commission of the target offense is impossible due to a *factual mistake* (and not simply a misunderstanding of the law); and (3) this factual mistake relates to the *legal status* of some attendant circumstance that constitutes an element of the charged offense.[133] Impossibility of this nature is viewed in varying ways under the common law approach.

For example, some courts view hybrid impossibility as a form of legal impossibility, and, therefore, accept such claims as a viable defense to attempt liability. This perspective is reflected in the following judicial holdings: (1) a defendant has not attempted to receive stolen property if the defendant's belief that the goods were stolen

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[124] *See id.*
[125] *See People v. Twiggs*, 223 Cal. App. 2d 455 (Ct. App. 1963).
[126] *See Waters v. State*, 234 A.2d 147 (Md. Ct. Spec. App. 1967).
[127] *See State v. Mitchell*, 71 S.W. 175 (Mo. 1902).
[128] *See State v. Damms*, 100 N.W.2d 592 (Wis. 1960).
[129] *See* DRESSLER, *supra* note 91, at § 27.07.
[130] DRESSLER, *supra* note 91, at § 27.07.
[131] *See Commonwealth v. Henley*, 474 A.2d 1115, 1119 (Pa. 1984).
[132] DRESSLER, *supra* note 91, at § 27.07. The common law's recognition that legal impossibility will provide a defense to an attempt charge accordingly amounts to little more than a necessary extension of the legality principle—the well-accepted prohibition against punishing people for conduct that did not violate a duly-enacted law at the point in time in which he or she acted. *See, e.g.*, ROBINSON & CAHILL, *supra* note 92, at 514; Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles*, 12 LAW & PHIL. 33, 46 (1992).
[133] *See* DRESSLER, *supra* note 91, at § 27.07.

was in error;[134] (2) a defendant has not attempted to take deer out of season if he shoots a stuffed deer believing it to be alive;[135] (3) a defendant has not attempted to bribe a juror when he offers a bribe to a person he mistakenly believes to be a juror;[136] and (4) a defendant has not attempted to illegally contract a valid debt when he believes the debt to be valid but where it was unauthorized and a nullity.[137]

Other courts, in contrast, view hybrid impossibility as a form of factual impossibility, and, therefore, reject such claims as a viable defense to attempt liability. This perspective is reflected in the following judicial holdings: (1) a defendant has attempted to receive stolen property where he mistakenly believed that the property received was stolen;[138] (2) a defendant has attempted to commit a narcotics offense where he mistakenly believed that the substance sold,[139] received,[140] or smoked[141] was an illegal drug; and (3) a defendant has attempted to commit rape when he mistakenly believes the girl with whom he had sexual intercourse is alive.[142]

On one level, the foregoing split over treatment of hybrid impossibility under the common law approach can be understood to reflect a substantive policy disagreement: recognition of hybrid impossibility as a defense to an attempt charge is arguably aligned with objectivist legal principles,[143] while rejection of hybrid impossibility as a defense to an attempt charge is arguably aligned with subjectivist legal principles.[144] That being said, the impetus behind the disparate outcomes under the common law approach may be more directly rooted in a basic confusion surrounding how to characterize situations involving hybrid impossibility under its binary factual/legal categorization scheme.

Consider, for example, a case involving a defendant who shoots a corpse, believing it to be a living human being. On these facts, the defense would describe the situation as one of legal impossibility under the common law approach: "As a matter of law, shooting a corpse is not, and never can, constitute murder, because the offense of

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[134] *See People v. Jaffe*, 185 N.Y. 497 (1906); *Booth v. State,* 398 P.2d 863 (Okla. Crim. App. 1964).
[135] *See State v. Guffey*, 262 S.W.2d 152 (Mo. Ct. App. 1953).
[136] *See State v. Taylor*, 133 S.W.2d 336 (Mo. Ct. App. 1939); *State v. Porter*, 242 P.2d 984 (Mont. 1952).
[137] *See Marley v. State*, 33 A. 208 (N.J. 1895).
[138] *See People v. Rojas*, 358 P.2d 921 (Cal. 1961).
[139] *See United States v. Quijada,* 588 F.2d 1253 (9th Cir. 1978).
[140] *See People v. Siu*, 271 P.2d 575 (Cal. Ct. App. 1954).
[141] *See United States v. Giles*, 42 C.M.R. 960 (A.F. Ct. Mil. Rev. 1970).
[142] *See United States v. Thomas*, 32 C.M.R. 278 (C.M.A. 1962).
[143] That is, an objectivist might argue that hybrid impossibility should constitute a defense to an attempt charge because "only the attempter may know of his mistake as to the circumstance," which means that "such conduct is less likely to be known by others and, therefore less likely to be socially disruptive." ROBINSON & CAHILL, *supra* note 92, at 516. This is particularly true, the objectivist might argue, where hybrid impossibility scenarios "involve objectively innocuous conduct," such as, for example, where "a person shoots at a tree stump believing it to be a human or where a person receives non-stolen property believing it to be stolen." DRESSLER, *supra* note 91, at § 27.07.
[144] That is, the subjectivist would argue that the actor who intends to commit an offense but is unable to do so due to hybrid legal impossibility is no less dangerous than the actor whose inability is the product of factual impossibility. *See, e.g.*, Wechsler et al., *supra* note 51, at 578. What's the difference, for example, between the child rapist who arranges a meeting with what turns out to be an undercover officer and the child rapist who arrives at the wrong meeting spot? Surely not one of dangerousness, the subjectivist would point out, given that both evidence the same propensity for wrongdoing. *See* DRESSLER, *supra* note 91, at § 27.07.

criminal homicide, by definition, only applies to the killing of human beings."[145] The prosecutor, however, would frame with situation in terms of factual impossibility: "If the factual circumstances had been as the defendant believed them to be—that the 'victim' had been alive when the defendant shot him—he would be guilty of murder."[146] As these examples illustrate, skillful lawyering can frame hybrid impossibility claims as either factual or legal impossibility under the common law approach.[147]

One final aspect of the common law approach to impossibility bears notice: broad acceptance of inherent impossibility as a viable basis for defending against an attempt charge.[148] This is reflected in the fact that "where the means chosen are totally ineffective to bring about the desired result,"[149] courts that subscribe to the common law approach generally seem reluctant to impose attempt liability.[150] So, for example, if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations, maledictions, hexing or voodoo," that person would be excluded from the scope of attempt liability under the common law approach.[151]

The rejection of inherently impossible attempts reflected in the common law approach rests upon two basic rationales: (1) the relevant conduct is not sufficiently dangerous to merit criminalization; and (2) it's hard to know whether people who engage in such conduct actually intend to commit the target offense in the first place.[152] While

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[145] DRESSLER, *supra* note 91, at § 27.07.

[146] *Id.*

[147] DRESSLER, *supra* note 91, at § 27.07.

[148] *See, e.g.*, LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 91, at § 27.07; John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999).

[149] *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973).

[150] *See, e.g., Dahlberg v. People*, 225 Ill. 485, 490 (1907); *Attorney General v. Sillen*, 159 Eng. Rep. 178, 221 (1863). For cases generally recognizing the defense, see, for example, *United States v. Lincoln*, 589 F.2d 379, 381 (8th Cir. 1979); *United States v. Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973); *Parham v. Commonwealth*, 347 S.E.2d 172, 174-75 (Va. Ct. App. 1986); *State v. Logan*, 656 P.2d 777, 779-80 (Kan. 1983); *People v. Elmore*, 261 N.E.2d 736, 737 (Ill. App. Ct. 1970); *People v. Richardson*, 207 N.E.2d 453, 456 (Ill. 1965).

[151] Keedy, *supra* note 82, at 469 (collecting citations). As one judge phrases it:

> "[H]exing" with lethal intent, belongs to the category of "trifles," with which "the law is not concerned." Even though a "voodoo doctor" just arrived here from Haiti actually believed that his malediction would surely bring death to the person on whom he was invoking it, I cannot conceive of an American court upholding a conviction of such a maledicting "doctor" for attempted murder or even attempted assault and battery.

Commonwealth v. Johnson, 167 A. 344, 348 (Pa. 1933) (Maxey, J., dissenting).

[152] One commentator lays out these two rationales as follows. First, it is argued that inherently impossible attempts, in contrast to standard impossible attempts, do not even present a *risk* of harm:

> The impossible attempt—the person shooting at an empty bed—still creates a risk that some harm might occur. The obviously impossible attempt, however—the person casting a spell on another—does not. Where the act constituting the attempt does not invoke criminal sanction, the actor is being punished only for his dangerous mental state.

the rationales underlying the common law approach are fairly uniform, however, the actual legal standards developed by American courts, legislatures, and commentators to articulate it vary substantially.[153]

For example, some legal authorities address inherent impossibility through a requirement that the actor's conduct have been "reasonably adapted,"[154] "intrinsically adapted,"[155] or "apparently adapted"[156] to commission of the offense to support an attempt conviction. Others would limit their general rejection of the impossibility defense with a requirement that completion of a crime at least have been "apparently possible," and, therefore, the likelihood of failure not patently "obvious."[157] Where, in contrast, the defendant employs "an absurd or obviously inappropriate selection of means," [158] or the "impossibility would [otherwise] have been clearly evident to a person of normal understanding,"[159] other legal authorities would hold that attempt liability simply may not attach. Communicative differences aside, however, all of the foregoing standards share a fundamental similarity: they render a basic connection between means and ends an essential component of attempt liability.[160]

The common law approach to impossibility can be contrasted with the Model Penal Code approach, which generally eschews categorization and instead broadly renders irrelevant impossibility claims by "focus[ing] upon the circumstances as the actor believes them to be rather than as they actually exist."[161]

Illustrative is the Model Penal Code's formulation of the substantial step test, which establishes that: "[A] person is guilty of an attempt to commit a crime if," *inter*

Brodie, *supra* note 206, at 245. Second, but related, is the fact that, where an inherently impossible attempt is at issue, it can be hard to determine whether the defendant even possessed this "dangerous mental state" in the first place:

> For example, it is difficult to be sure that the person using aspirin to kill actually wanted the victim to die; if he did, why did he use such objectively ineffective means? In determining the actor's intent, we start with his actions, and then swing across a canyon of inference, landing at his probable intent; if the actions are absurd, then the gap between action and intent becomes too wide to cross.

Id. at 245-46. *See, e.g.*, *United States v. Oviedo*, 525 F.2d 881, 885 n.11 (5th Cir. 1976) ("Mens rea is within one's control but . . . it is not subject to direct proof . . . It is not subject to direct refutation either. It is the subject of inference and speculation.")

[153] *See, e.g.*, Jeffrey F. Ghent, Annotation, *Impossibility of Consummation of Substantive Crime as Defense in Criminal Prosecution for Conspiracy or Attempt to Commit Crime*, 37 A.L.R. 3d 375 (1971); J. H. Beale, Jr., *Criminal Attempts*, 16 HARV. L. REV. 491, 492 (1903).

[154] *E.g.*, *Seeney*, 563 A.2d at 1083; *Robinson*, 608 A.2d at 116; *Johnson*, 756 A.2d at 464; *In re N*-----, 2 I. & N. Dec. 201, 202 (B.I.A. 1944).

[155] *E.g.*, *State v. Wilson*, 30 Conn. 500, 506 (1862).

[156] *E.g.*, *Collins v. City of Radford*, 113 S.E. 735, 741 (Va. 1922); *People v. Arberry*, 114 P. 411, 415 (Cal. Ct. App. 1910).

[157] Wechsler et al., *supra* note 51, at 583 (citing *State v. McCarthy*, 115 Kan. 583, 589 (1924); *State v. Block*, 333 Mo. 127, 131 (1933)).

[158] Wechsler et al., *supra* note 51, at 583–84 (citing *Commonwealth v. Kennedy*, 170 Mass. 18, 21, (1897)).

[159] *E.g.*, Minn. Stat. Ann. § 609.17; Iowa Code Ann. § 707.11.

[160] *See, e.g.*, Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225, 273-74 (2014); Preis, *supra* note 236, at 1902-04.

[161] Model Penal Code § 5.01 cmt. at 297.

alia, the person "purposely does or omits to do anything that, *under the circumstances as he believes them to be*, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[162] The inclusion of the foregoing italicized actor-oriented language effectively abolishes impossibility defenses premised on pure factual impossibility or hybrid impossibility.[163] It does so, moreover, in a manner that obviates the need for courts to rely upon the common law's classification scheme.[164] That is, by broadly recognizing that an "actor can be held liable for an attempt to commit the offense he *believed* he was committing, without regard to whether or why the commission of the offense is impossible," the Model Penal Code approach renders distinctions between pure factual impossibility and hybrid impossibility immaterial.[165]

The Model Penal Code approach to impossibility also departs from the common law approach with respect to its treatment of inherent impossibility. Whereas the common law approach recognizes an inherent impossibility defense (by essentially making non-inherent impossibility an element of an attempt), the Model Penal Code views inherent impossibility to be, at most, a matter of sentencing mitigation. That is, "[t]he approach of the Code is to [generally] eliminate the defense of [inherent] impossibility," but to thereafter authorize the court to account for the relevant issues at sentencing.[166]

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[162] Model Penal Code § 5.01(1)(c).

[163] *See* Model Penal Code § 5.01 cmt. at 318; Wechsler et al., *supra* note 51, at 579.

[164] *See* Model Penal Code § 5.01 cmt. at 318; Wechsler et al., *supra* note 51, at 579.

[165] ROBINSON & CAHILL, *supra* note 92, at 514. Model Penal Code § 5.01(c) could also be read to abolish the defense of pure legal impossibility. *See id.* However, the Model Penal Code commentary indicates that the drafters intended that pure legal impossibility remain a defense:

> It is of course necessary that the result desired or intended by the actor constitute a crime. If . . . the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.

Model Penal Code § 5.01 cmt. at 318; *see* Wechsler et al., *supra* note 51, at 579.

[166] Model Penal Code § 5.01 cmt. at 318. In rejecting the common law approach, the drafters of the Model Penal Code reasoned that:

> Using impossibility as a guide to dangerousness of personality presents serious difficulties. Cases can be imagined in which it might be argued that the nature of the means selected, say black magic, substantially negates dangerousness of character. On the other hand, it is probable that one who tries to commit a crime by inadequate methods and fails will realize the futility of his conduct and seek more efficacious means . . . .
>
> The approach of the Code is to eliminate the defense of impossibility in all situations. The litigated cases to date have not presented instances in which the actor's futile efforts indicate that he is not likely to succeed in the future in committing the crime contemplated or some similar offense. Nor is it likely that attempts of this nature, if they do occur, will be detected or prosecuted. Nonetheless, to provide a method of coping with any such case should one arise, article 5 provides, in its sentencing provision, that in "extreme cases" where "neither [the] . . . conduct nor the actor presents a public danger," the court may dismiss the prosecution.

The relevant provision, Model Penal Code § 5.05(2), establishes that "[i]f the particular conduct charged to constitute a criminal attempt . . . is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense," then the court has two alternatives at its disposal.[167] First, the court may "impose sentence for a crime of lower grade or degree."[168] Second, and alternatively, the court may, "in extreme cases, [simply] dismiss the prosecution."[169] In neither case, however, does § 5.05(2) or "the commentaries to Model Penal Code . . . attempt to define what constitutes an 'inherently unlikely' attempt."[170]

Today, the heart of the Model Penal Code approach to impossibility—namely, the Code's broad rejection of factual and hybrid impossibility claims through application of an actor-centric approach that focuses on the situation as the defendant viewed it—appears to constitute the majority American approach.[171] In reform jurisdictions, this is frequently achieved by codifying statutory language modeled on Model Penal Code § 5.05(1)(c), which requires the fact-finder to consider the relevant "circumstances as [the defendant] believes them to be.[172] However, reform jurisdictions also achieve the same policy outcome by codifying more general rules that broadly state that "impossibility"[173] or "factual and legal impossibility" [174] are not defenses.

Comparable trends are also reflected in the case law outside of reform jurisdictions.[175] For example, notwithstanding the absence of a general federal attempt statute, most federal courts seem to reject defenses premised on either factual or hybrid

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Wechsler et al., *supra* note 51, at 585. The Model Penal Code drafters specifically rejected a reasonableness-based test "[s]ince it can not be affirmed that those who make unreasonable mistakes are not potentially dangerous." *Id.*

[167] Model Penal Code § 5.05(2).

[168] *Id.*

[169] *Id.*

[170] Brodie, *supra* note 206, at 247. Indeed, "the accompanying commentaries only restate the rule," namely, "In 'extreme cases' under Section 5.05(2), the court is authorized to 'dismiss the prosecution.'" *Id.* (quoting Model Penal Code § 5.05(2) cmt. 3).

[171] For example, as one commentator observes: "[m]ost states have abolished the defense of hybrid [] impossibility on the subjectivist ground that an actor's dangerousness is 'plainly manifested' in such cases." DRESSLER, *supra* note 91, at § 27.07; *see, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2017).

[172] *See, e.g.*, Ky. Rev. Stat. Ann. § 506.010; Conn. Gen. Stat. Ann. § 53a-49; Neb. Rev. Stat. Ann. § 28-201; Ariz. Rev. Stat. Ann. § 13-1001; Ark. Code Ann. § 5-3-201; Del. Code Ann. tit. 11, § 531; N.H. Rev. Stat. Ann. § 629:1; Wyo. Stat. § 6-1-301; Haw. Rev. Stat. § 705-500; Tenn. Code Ann. § 39-12-101; Okla. Stat. Ann. tit. 21, § 44; La. Rev. Stat. Ann. § 14:27. *See also* Ind. Code Ann. § 35-41-5-1(b) ("It is no defense that, *because of a misapprehension of the circumstances* . . . it would have been impossible for the accused person to commit the crime attempted.").

[173] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/8-4; Ind. Code Ann. § 35-41-5-1; Kan. Stat. Ann. § 21-5301; Minn. Stat. Ann. § 609.17; Mont. Code Ann. § 45-4-103; Or. Rev. Stat. Ann. § 161.425; 18 Pa. Cons. Stat. Ann. § 901.

[174] *See, e.g.*, Ala. Code § 13A-4-2; Alaska Stat. Ann. § 11.31.100; Colo. Rev. Stat. Ann. § 18-2-101; Ga. Code Ann. § 16-4-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 562.012; N.Y. Penal Law § 110.10; N.D. Cent. Code Ann. § 12.1-06-01; Ohio Rev. Code Ann. § 2923.02; Utah Code Ann. § 76-4-101; Wash. Rev. Code Ann. § 9A.28.020.

[175] For an overview, see *People v. Thousand*, 465 Mich. 149, 157-162 (2001).

impossibility.[176] This also appears to be the case in similarly situated non-reform states, where the prevailing trend appears to be the rejection of factual and hybrid impossibility defenses by way of decisional law.[177] At the same time, many courts also seem to agree that the categories of impossibility attempts are themselves so are so "fraught with intricacies and artificial distinctions that the[y] [have] little value as an analytical method for reaching substantial justice."[178] As a result, various courts have "declined to participate in the sterile academic exercise of categorizing a particular set of facts as representing 'factual' or 'legal' impossibility," and instead have applied a non-categorical approach that bears the influence of the Model Penal Code.[179]

Notwithstanding the broad influence of the Model Penal Code approach to impossibility, however, the Code's treatment of inherent impossibility has not been widely followed. Instead, the common law approach—which views "inherent impossibility [as] an accepted defense in attempt cases," and not as a matter of sentencing mitigation—appears to constitute the majority trend in America.[180]

On a legislative level, a majority of jurisdictions have declined to codify general provisions addressing inherent impossibility—presumably, because "the likelihood of prosecution under such circumstances [is] too unrealistic to make such a provision necessary."[181] Among those that have addressed the issue, moreover, there is a split between Model Penal Code and common law-based statutory approaches. On the one hand, the Model Penal Code's mitigation-based sentencing provision intended to deal with inherent impossibility, § 5.05(2), "has only been adopted by some three states."[182] On the other hand, a similar number of jurisdictions codify the common law approach to inherent impossibility by incorporating "a reasonableness element in[to] their definition of attempt crimes."[183] In the absence of applicable general provisions, however, "the

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[176] *See, e.g.*, *United States v. Farner*, 251 F.3d 510, 512-13 (5th Cir. 2001); *United States v. Everett*, 700 F.2d 900, 907 (3d Cir. 1983); *United States v. Johnson*, 767 F.2d 673, 675 (10th Cir. 1985); *United States v. Pennell*, 737 F.2d 521, 525 (6th Cir. 1984); *United States v. Reeves*, 794 F.2d 1101, 1105 (6th Cir. 1986).

[177] *See, e.g.*, *State v. Latraverse*, 443 A.2d 890, 894 (R.I. 1982); *State v. Curtis*, 603 A.2d 356, 358 (Vt. 1991); *State v. Rios*, 409 So. 2d 241, 244-45 (Fla. Dist. Ct. App. 1982); *Duke v. State*, 340 So. 2d 727, 730 (Miss. 1976); *State v. Lopez*, 669 P.2d 1086, 1087-88 (N.M. 1983); *State v. Hageman*, 296 S.E.2d 433, 441 (N.C. 1982).

[178] *State v. Moretti*, 244 A.2d 499, 503 (N.J. 1968).

[179] *Thousand*, 465 Mich at 162 (citing *Darnell v. State*, 558 P.2d 624 (Nev. 1976); *State v. Moretti*, 244 A.2d 499 (N.J. 1968); *People v. Rojas*, 358 P.2d 921 (Cal. 1961)).

[180] Preis, *supra* note 236, at 1902; *see, e.g.*, CHARLES E. TORCIA, 4 WHARTON'S CRIM. L. § 698 (15th ed. Westlaw 2017); *see also* FLETCHER, *supra* note 122, at 166 ("The consensus of Western legal systems is that there should be no liability, regardless of the wickedness of intent, for sticking pins in a doll or chanting an incantation to banish one's enemy to the nether world.").

[181] ROBINSON, *supra* note 259, 1 CRIM. L. DEF. § 85 (quoting Mich. 2d Proposed Rev. § 1001(2), Commentary (1979)).

[182] Brodie, *supra* note 206, at 247 (citing Ark. Code Ann. § 5-3-101; N.J. Stat. Ann. § 2C:5-4; and 18 Pa. Cons. Stat. Ann. § 905); *see also id.* at 247 n.54 ("Colorado also allows a dismissal of prosecutions when there is an inherently unlikely attempt, but limits this dismissal to attempted conspiracy charges") (citing (Colo. Rev. Stat. Ann. § 18-2-206). Furthermore, and "[p]erhaps because of the unpredictable definition of 'inherently unlikely' attempts," courts in these jurisdictions seem to "prefer to address questions of inherently unlikely attempts under the framework of de minimis harm" under Model Penal Code § 2.12. *Id.* at 247-48.

[183] Brodie, *supra* note 206, at 253; *see* Minn. Stat. Ann. § 609.17; Iowa Code Ann. § 707.11; N.J. Stat. Ann. § 2C:5-1.

defense of inherent impossibility is frequently recognized by state and federal courts."[184] And it is also widely supported by legal literature.[185]

Viewed collectively, then, "case law[,] legislative pronouncements and scholarly commentary [on] inherent impossibility" indicate that the common law approach to the issue is the majority trend.[186]

Consistent with the foregoing analysis of national legal trends, § 301(a)(3)(b) is comprised of two different substantive policies relevant to impossibility. First, and most importantly, § 301(a)(3)(b) incorporates the Model Penal Code's actor-centric approach to impossibility. By focusing on the situation as the defendant viewed it, the Revised Criminal Code necessarily abolishes factual impossibility and hybrid impossibility defenses. Second, § 301(a)(3)(b) incorporates the common law approach to inherent impossibility. By requiring that the actor's conduct be reasonably adapted to commission of the target offense, the Revised Criminal Code necessarily excludes inherently impossible attempts from the scope of attempt liability. The foregoing components, when viewed as a matter of substantive policy, appear to reflect majority legal trends and current District law.

Subsection 301(a): Relation to National Trends on Codification. The Model Penal Code's general attempt provision, § 5.01, constitutes the basis for all modern legislative efforts to comprehensively codify the culpable mental state requirement and the conduct requirement for criminal attempts.[187] While broadly influential as a matter of codification, however, the Model Penal Code's definition of an attempt appears to contain a variety of drafting flaws. Consistent with the interests of clarity, consistency, and accessibility, § 301(a) endeavors to address these flaws through a variety of legislative revisions.

The Model Penal Code's approach to codification of a definition for attempt reads:

> (1) *Definition of Attempt*. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

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[184] Preis, *supra* note 236, at 1902; *see* cases cited *supra* notes 237-48.

[185] *See, e.g.*, John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1, 9, 32-33 (2004); Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 544 (2008); Brodie, *supra* note 206, at 247 n.54.

[186] Preis, *supra* note 236, at 1902.

[187] As the Model Penal Code commentary observes:

> [Criminal statutes defin[ing] the scope of attempts with greater particularity . . . to a significant extent reflect the influence of the Model Penal Code proposals, which have formed the basis for the definition of attempt offense in most of the recently enacted and proposed codes.

Model Penal Code § 5.01 cmt. at 300.

> (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
>
> (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.[188]

Reflected in the foregoing language are three notable drafting decisions: (1) a decision to codify three different conduct requirements; (2) a decision to intersperse the culpable mental state requirement governing an attempt among distinct subsections; and (3) a decision to utilize the undefined terms "circumstances" and "belief" to serve different purposes. Each of these decisions is arguably flawed, and, when viewed collectively, they combine to produce a general provision that is confusingly organized, unnecessarily complex, and ambiguous on key issues.

Perhaps the most significant drafting flaw is the Model Penal Code's three-part approach to stating the conduct requirement of an attempt.[189] More specifically, § (a) addresses the situation of a defendant who mistakenly believes he has satisfied the objective elements of the substantive offense—as would be the case where an actor receives what he believes to be stolen property only to discover that he has been embroiled in a sting operation. Thereafter, § (b) addresses the situation of a defendant who believes he has done everything he needs to do to cause the prohibited result—as would be the case when an actor loads an explosive device and then lights the fuse only to discover that the device is inoperable. And finally, § (c) addresses the situation of a defendant who believes he has taken a substantial step towards commission of the offense—as would be the case when an actor mistakenly loads a shotgun with defective bullets, searches out the intended victim, but then is arrested prior to firing his weapon.

These three different formulations make for a lengthy and confusing definition of an attempt. They do so unnecessarily, moreover, since the first two situations are surplusage because they are covered by the third situation. For example, if the defendant believes he has completed the offense (subsection (a)), or believes he has done everything he needed to do to cause the prohibited result (subsection (b)), he necessarily has taken a substantial step towards commission of the offense (subsection (c)). Given, then, that the definition of an incomplete attempt in § (c) is by itself sufficient to create liability for the situations contemplated by §§ (a) and (b), the latter two subsections are superfluous.

The second drafting issue reflected in Model Penal Code § 5.01(1) is the intermingled and disorganized approach it applies to the *mens rea* of criminal attempts. More specifically, the prefatory clause of Model Penal Code § 5.01(1) requires the defendant to have acted "with the kind of culpability otherwise required for commission

[188] Model Penal Code § 5.01(1).

[189] The discussion of this drafting flaw is drawn from Robinson & Grall, *supra* note 94, at 745-51.

of the crime."[190] Thereafter, however, §§ (a) and (c) respectively require that the actor "purposely engage[ ] in conduct which would constitute the crime" and "purposely do[ ] or omit[ ] to do anything which [is] a substantial step in a course of conduct planned to culminate in his commission of the crime."[191] Subsection (b), in contrast, does not have a similar purpose requirement with respect to conduct, but it does apply a belief requirement to the result element: the accused must have the "purpose of causing or [act] with the belief that [he] will cause such result without further conduct on his part."[192] When this disjointed and apparently conflicting language is viewed collectively, it is very difficult to surmise—from the text alone, at least—the policy determinations that the Model Penal Code drafters actually intend to communicate.

The Model Penal Code's structural drafting flaws are exacerbated by a pair of more narrow drafting issues: the overlapping and ambiguous use of the terms "circumstances" and "belief." Consider, for example, that Model Penal Code § 5.01(1)(a) creates liability where the defendant "engages in conduct which would constitute the crime if the attendant *circumstances* were as he *believes* them to be."[193] Likewise, Model Penal Code § 5.01(1)(b) creates liability where the defendant "does or omits to do anything . . . with the *belief* that it will cause such result without further conduct on his part."[194] And Model Penal Code § 5.01(1)(c) creates liability where the defendant "does or omits to do anything that, under the *circumstances* as he *believes* them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[195]

As is evident from these provisions, the terms "circumstances" and "belief" are central to understanding the intended operation of Model Penal Code § 5.01(1). At the same time, these terms are ambiguous, susceptible to differing interpretations, and are never defined in § 5.01 (or in any other general provision).[196] Further complicating matters is the fact that the terms appear to be used to serve different purposes in different contexts.

Consider, for example, that whereas the reference to "circumstances" and "belie[f]" in § (a) seem to be respectively operating as a stand in for circumstance *elements* and the actor's *mens rea* as to such elements,[197] use of the terms

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[190] Model Penal Code § 5.01(1).
[191] Model Penal Code § 5.01(1)(a), (c).
[192] Model Penal Code § 5.01(1)(b).
[193] Model Penal Code § 5.01(1)(a).
[194] Model Penal Code § 5.01(1)(b).
[195] Model Penal Code § 5.01(1)(c).
[196] For example, use of the term "belief" is ambiguous because beliefs come in various degrees. A belief might be as strong as "a practical certainty," which is the purely subjective form of knowledge. But beliefs can also be moderate: for example, one might "believe that something is likely true." Weaker yet, someone might possess "belief as to a mere possibility." It is, therefore, not clear just how strong a belief the Model Penal Code would require when it employs the term. Use of the term "circumstances" is similarly ambiguous because it might refer to circumstance elements, i.e., the statutory requirement that the victim of an assault be a police officer for APO. Alternatively, however, it might more broadly refer to all relevant aspects of the situation—including conduct elements and result elements as well as circumstance elements..
[197] Note, however, that the problem with this reading is that it:

"circumstances" and "belie[f]" in § (c) appear to indicate a much broader scope.[198] (Just how broad, however, is unclear.[199]) And the general use of the term "belie[f]" in §§ (a) and (c) is to be contrasted with the more specialized use of the term "belie[f]" in § (b), which more narrowly deals with the *mens rea* of an attempt for result elements.[200]

When viewed collectively, then, the statutory language employed by the Model Penal Code fails to clearly communicate the intended operation of § 5.01(1). It is only by reference to the commentary of the Model Penal Code—and, in many cases, academic commentary building on that legislative commentary—that the meaning of the relevant terms can be understood.[201]

In accordance with the foregoing analysis, the Revised Criminal Code seeks to improve upon the Model Penal Code approach to statutory drafting in a variety of ways.

First, the Revised Criminal Code expressly states the culpable mental state requirement respectively applicable to results and circumstances. Based on a reading of the statutory text alone, the differential treatment of circumstances, subject to a principle of *mens rea* equivalency under § 301(a)(2), and results, subject to a principle of *mens rea* elevation under § 301(a)(1), is clear. And neither should be confused with the planning requirement stated in the prefatory clause of § 301(a).

Second, and relatedly, the contours of the latter principle of *mens rea* elevation governing results is communicated by the Revised Criminal Code in a more precise manner. By employing the phrase "with intent," "as defined in § 206(b)(3), § 301(a)(1) clearly communicates that a culpable mental state comparable to knowledge will provide the basis for attempt liability as to results, without any of the ambiguities associated with "belief."

> might be interpreted to mean that the only impossible attempts punished are those that arise from an actor's mistake as to an "attendant circumstance" that is an element of the offense charged. The mistake rendering an attempt impossible is often of this nature, as when an actor is prosecuted for attempted bribery when he bribes a person he mistakenly believes is a "public official," as required by one circumstance element of the offense definition of bribery. But in many cases the mistake does not concern a circumstance element of the offense definition.

ROBINSON, *supra* note 259, at § 1 CRIM. L. DEF. § 85.

[198] For example, as one commentator observes:

> Model Penal Code § 5.01(1)'s reference to "circumstances as he believes them to be" includes conduct elements and result elements as well as circumstance elements. Thus, a person who is arrested just as he is about to shoot to kill a person who, as it turns out, is already dead is guilty under Model Penal Code § 5.01(1)(c), despite the fact that the "circumstances" about which he is mistaken is the result element of "killing."

Westen, *supra* note 273, at 565 n.28.

[199] For example, the relevant circumstances presumably encompass not only "conduct elements and result elements as well as circumstance elements," Westen, *supra* note 273, at 565 n.28, but also situational facts—for example, the operability of a murder weapon—which are not elements *per se*, but facts that relate to those elements.

[200] *See, e.g.*, Model Penal Code § 5.01 cmt. at 305; Wechsler et al., *supra* note 51, at 575-76.

[201] *See, e.g.*, Robinson & Grall, *supra* note 94, at 745-51; ROBINSON, *supra* note 259, at § 1 CRIM. L. DEF. § 85.

Third, the Revised Criminal Code articulates the conduct requirement of an attempt through a simpler and more accessible formulation, which respectively addresses incomplete attempts, see § 301(a)(3)(A), and impossibility attempts, see § 301(a)(3)(B). This formulation provides fact-finders with the two most important standards, each of which is articulated in a manner that privileges simplicity and avoids unnecessary complexity.[202]

Fourth, and relatedly, the Revised Criminal Code abolishes the impossibility defense by incorporating actor-centric language into the latter standard, § 301(a)(3)(B) that, while substantively similar to the relevant language employed in the Model Penal Code, avoids any of the above-discussed ambiguities associated with the terms "circumstances" or "belie[f]" reflected in the Model Penal Code. At the same time, the reasonable adaptation limitation that accompanies the relevant impossibility language in § 301(a)(3)(C) effectively imports the common law approach to inherent impossibility.[203]

The foregoing drafting revisions find support in a broad range of authorities, including modern legislative practice,[204] judicial opinions,[205] and scholarly

[202] As discussed *supra*, § 301(a)(3), by codifying the dangerous proximity test, departs from the substantive policies underlying the Model Penal Code's preferred substantial step test. However, it's worth noting that the language in § 301(a)(3) also departs from the articulation in criminal codes that similarly reject the Model Penal Code test. In the latter set of jurisdictions, the relevant general provisions are typically comprised of exceptionally language only broadly gesturing towards the common law approach. *See supra* note 174 and accompanying text. It is only by judicial interpretation, then, that these statutes have been interpreted to yield the dangerous proximity test. *See supra* note 175 and accompanying text. By clearly codifying the dangerous proximity test, in contrast, § 301(c)(a)(3) will avoid the need for this kind of judicial supplementation.

[203] As discussed *supra*, § 301(a)(3)(b), by codifying a reasonable adaptation limitation on impossible attempts, constitutes a codification departure from the majority of reform codes, which decline to codify general provisions addressing the issue of inherent impossibility—whether they follow the Model Penal Code approach or the common law approach. Furthermore, although § 301(a)(3)(b) is generally consistent with the substantive policies reflected in the majority (common law) approach to the issue, its precise language departs from the few criminal codes that do, in fact, codify this approach to inherent impossibility. For example, in these jurisdictions, the relevant statutory language relies on confusing exception clauses framed in the double negative. Illustrative is Minn. Stat. Ann. § 609.17, which reads: "An act may be an attempt notwithstanding the circumstances under which it was performed or the means employed to commit the crime intended or the act itself were such that the commission of the crime was not possible, *unless such impossibility would have been clearly evident to a person of normal understanding*." Similarly consider Iowa Code Ann. § 707.11, which reads: "It is not a defense to an indictment for attempt to commit murder that the acts proved could not have caused the death of any person, provided that the actor intended to cause the death of some person by so acting, and *the actor's expectations were not unreasonable in the light of the facts known to the actor*." Under the Revised Criminal Code, in contrast, the requirement of reasonable adaptation is articulated in the affirmative, alongside the definition of impossible attempts reflected in § 301(a)(3)(B). This departure—which is based on current District law—is intended to enhance the overall clarity of the Revised Criminal Code.

[204] For example, a majority of reform codes substantially simplify the Model Penal Code's three-tier approach to drafting. As Michael Cahill observes: "[o]nly eleven states have adopted some version of [Model Penal Code § 5.01(1)(a)]" while "[o]nly three states have adopted a version of [Model Penal Code § 5.01(1)(b)." Cahill, *Reckless Homicide*, *supra* note 100, at 916 n.103 (collecting statutory citations). Many jurisdictions instead opt for a much simpler and more straightforward formulation along the lines of the general approach to codification reflected in Model Penal Code § 5.01(1)(c). *See, e.g.*, Or. Rev. Stat. Ann. § 161.405; Wash. Rev. Code Ann. § 9A.28.020; Colo. Rev. Stat. Ann. § 18-2-101.

commentary.[206] When viewed collectively, they will enhance the clarity, simplicity, and accessibility of the Revised Criminal Code.

2. § 22A-301(b)—Proof of Completed Offense Sufficient Basis for Attempt Conviction

Relation to National Legal Trends. Subsection (b) is consistent with both common law principles and modern legislative practice.

Historically, the crime of attempt was sometimes "defined as if failure were an essential element," such that a person could not be convicted of an attempt if the crime was actually committed.[207] The basis for this principle was "derived from the old common law rule of merger, whereby if an act resulted in both a felony and a misdemeanor the misdemeanor was said to be absorbed into the felony."[208] However, the relevant "English merger rule was laid to rest by statute in 1851," at which point American legal authorities began to abandon it as well.[209] Today, "the common law rule that 'failure' is an essential element of an attempt, and that a person cannot be convicted of an attempt if the crime was actually committed, has been rejected."[210]

With the contemporary abandonment of failure as an essential element of an attempt there has been a broad acceptance that proof of a completed offense may suffice for an attempt conviction.[211] This approach to the prosecution of criminal attempts is reflected in both contemporary legislative practice and common law authorities. For example, a significant number of modern criminal codes incorporate general provisions effectively establishing that "a defendant may be convicted of the attempt even if the completed crime is proved," subject to a limitation that a person may not be convicted of both an attempt and the completed offense.[212] And "many recent cases" issued in

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[205] For example, courts are apt to utilize clearer and more accessible language to describe the appropriate actor-centric perspective from which impossibility claims are to be evaluated. Rather than relying upon the Model Penal Code's problematic "under the circumstances as he believes them to be" language, Model Penal Code § 5.01(1)(c), for example, some federal judges have instead relied upon the recognition that "a defendant should be treated in accordance with the facts as he supposed them to be." *United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir. 1978); *see United States v. Nosal*, No. CR-08-0237 EMC, 2013 WL 4504652, at *11 (N.D. Cal. Aug. 15, 2013).

[206] For broad academic criticism of the Model Penal Code approach to drafting consistent with § 301(a) across a range of issues, see, for example, Robinson & Grall, *supra* note 94; Westen, *supra* note 273; ROBINSON, *supra* note 259, at 1 CRIM. DEF. § 85; Brodie, *supra* note 206.

[207] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; *see Lewis v. People*, 124 Colo. 62 (1951); *People v. Lardner*, 300 Ill. 264 (1921).

[208] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; *see* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 653 (2d ed.1961).

[209] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.

[210] Commentary to La. Stat. Ann. § 14:27; *see, e.g.*, *Commonwealth v. LaBrie*, 473 Mass. 754 (2016); Model Penal Code § 1.07 cmt. at 132.

[211] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.

[212] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5 (citing Ala. Code § 13A-4-5; Alaska Stat. § 11.31.140; Ariz. Rev. Stat. Ann. § 13-110; Cal. Penal Code § 663; Colo. Rev. Stat. Ann. § 18-2-101; Ga. Code Ann. § 16-4-2; Idaho Code § 18-305; La. Rev. Stat. Ann. § 14:27; Mont. Code Ann. § 45-4-103; Nev. Rev. Stat. Ann. § 193.330; Or. Rev. Stat. § 161.485; Tenn. Code Ann. § 39-12-101; Tex. Penal Code Ann. § 15.01; Utah Code Ann. § 76-4-101; Wis. Stat. Ann. § 940.46.); *but see* Miss. Code Ann. § 97-1-9; Okla.

jurisdictions lacking such general provisions have similarly endorsed these principles by way of common law.[213] Broad acceptance of these principles has endured, moreover, notwithstanding a general recognition that "[w]hen attempt carries a more demanding *mens rea* than a completed offense," it does not necessarily qualify as "a lesser included offense" under the elements test.[214]

Legislatures and courts have offered a range of rationales in support of this "modern view" on attempt prosecutions.[215] It has been observed, for example, that "requiring the government to prove failure as an element of attempt would lead to the anomalous result that, if there were a reasonable doubt concerning whether or not a crime had been completed, a jury could find the defendant guilty neither of a completed offense nor of an attempt."[216] Furthermore, "just as where one indicted for manslaughter or battery . . . cannot escape conviction by showing that he committed the more serious offense of murder or aggravated battery," one who "is indicted for an attempt" should not be able to escape conviction by pointing to "evidence showing that the offense was actually committed."[217] And perhaps most fundamentally, a defendant convicted of an attempt based upon proof of a completed offense can hardly complain "where the determination of his case was more favorable to him than the evidence warranted."[218]

In accordance with the foregoing authorities, § (b) establishes that proof of a completed offense constitutes an alternative basis of establishing attempt liability, subject to a merger rule prohibiting convictions for both the attempt and the completed offense.

Stat. Ann. tit. 21, § 41. This is related to, but distinct from, another proposition established by some criminal codes: that "[a] person charged with commission of a crime may be convicted of the offense of criminal attempt as to that crime without being specifically charged with the criminal attempt in the accusation, indictment, or presentment." Ga. Code Ann. § 16-4-3; *see, e.g.*, Wash. Rev. Code Ann. § 10.61.003; Me. Rev. Stat. Ann. tit. 17-A, § 152; Neb. Rev. Stat. § 29-2025; Nev. Rev. Stat. Ann. § 175.501; N.C. Gen. Stat. § 15-170; Okla. Stat. Ann. tit. 22, § 916; R.I. Gen. Laws Ann. § 12-17-14; Vt. Stat. Ann. tit. 13, § 10 ; Wash. Rev. Code § 10.61.003; W. Va. Code § 62-3-18 Wyo. Stat. § 7-11-502; *see also* Model Penal Code § 1.07(4)(b) (discussed in *Commonwealth v. Sims*, 591 Pa. 506, 522–23 (2007)).

[213] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5 (citing *United States v. York*, 578 F.2d 1036 (5th Cir. 1978); *Richardson v. State*, 390 So.2d 4 (Ala. 1980); *State v. Moores*, 396 A.2d 1010 (Me. 1979); *Lightfoot v. State*, 278 Md. 231 (1976); *State v. Gallegos*, 193 Neb. 651, (1975); *State v. Canup*, 117 N.C.App. 424 (1994); *United States v. Rivera-Relle*, 333 F.3d 914 (9th Cir. 2003); *but see* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW, § 694, at 587–88 (15th ed. 1996); *People v. Bailey*, 54 Cal.4th 740, 143 Cal.Rptr.3d 647 (2012). This is related to, but distinct from, another proposition established by many courts: "that an attempt conviction may be had on a charge of the completed crime." LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5 (citing *State v. Miller*, 252 A.2d 321 (Me. 1969) and *Crawford v. State*, 107 Nev. 345 (1991)). For federal case law addressing this issue, see, for example, *United States v. Castro-Trevino*, 464 F.3d 536, 542 (5th Cir. 2006); *United States v. Marin*, 513 F.2d 974, 976 (2d Cir.1975); *Simpson v. United States*, 195 F.2d 721, 723 (9th Cir. 1952).

[214] LAFAVE & ISRAEL, *supra* note 306, at 6 CRIM. PROC. § 24.8(e).

[215] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.

[216] *LaBrie*, 473 Mass. 754, 46 N.E.3d 519 (2016) (quoting *York*, 578 F.2d 1036).

[217] Commentary to La. Stat. Ann. § 14:27.

[218] *People v. Vanderbilt*, 199 Cal. 461, 249 P. 867 (1926).

3. § 22A-301(c)—Penalties for Criminal Attempts

Relation to National Legal Trends. Subsection 301(c) is in accordance with American legal trends. Consistent with RCC § 301(c)(1), a strong majority of jurisdictions apply a generally applicable proportionate penalty discount to grade criminal attempts. And regardless of which attempt grading principle a given jurisdiction adopts, nearly all of them recognize statutory exceptions consistent with RCC § 301(c)(2).

The historical development of the punishment of attempts, like every other area of attempt policy, can be understood through the competing objectivist and subjectivist perspectives on criminal liability.[219] At the heart of the dispute between these two theories is whether the criminal law—both in determining guilt and calibrating punishment—ought to primarily focus on the dangerousness of an act, or, alternatively, the dangerousness of an actor.[220]

On the objectivist understanding of criminal liability, causing (or risking) social harm is the gravamen of a criminal offense.[221] It therefore follows that greater punishment should be imposed where the harm actually occurs and less punishment when—as is the case with an attempt—it does not.[222] From the objectivist perspective, result-based grading is a fundamental component of any just penal system.[223]

The common law approach to grading criminal attempts reflects this objectivist perspective. In the early years of the common law, any attempt "was a misdemeanor, regardless of the nature or seriousness of the offense that the person sought to commit."[224] In later years, legislatures began to apply more serious penalties to criminal attempts, though these penalties were distributed in varying, and frequently haphazard, ways. [225] For the most part, though, these penalties were still significantly less severe

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[219] *See generally, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978); Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173 (2011); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L REV. 363 (2004).

[220] FLETCHER, *supra* note 99, at 173-174.

[221] *Id.* at 171; *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.05 (6th ed. 2012).

[222] FLETCHER, *supra* note 99, at 173-174.

[223] *See generally* Ashworth, *supra* note 99, at 725; Garvey, *supra* note 99, at 173.

[224] DRESSLER, *supra* note 101, at § 27.05.

[225] Consider, for example, the observations of the Model Penal Code drafters:

> [Common law attempt penalty] statutes fitted into a number of identifiable patterns . . . One common provision set specific maximum penalties, ranging from 10 to 50 years, for attempts to commit crimes punishable by death or life imprisonment, and fixed the penalty for all other attempts at one half of the maximum for the completed crime. Another common provision established a number of categories according to the nature or severity of the completed crime, specifying a different range of penalties, definite prison terms and fines, for attempts to commit crimes encompassed within each category. Closely related was the now common solution in which attempt is graded one class below the object offense. There were also a number of states that used a combination of these approaches. Some jurisdictions, on the other hand, provided a fixed maximum penalty for all attempts encompassed by the general attempt provision. A few . . . authorized a penalty for the attempt that was as great as the penalty for the completed crime.

than those governing the completed offense.[226] There was, however, one notable exception: "Assault With Intent" to offenses (AWIs), which were "functionally analogous to specific applications of the law of attempt, though generally requiring closer proximity to actual completion of the offense and carrying heavier penalties."[227] But even accounting for AWIs, the common law approach to grading attempts was one that viewed the realization of intended harm as material to evaluating the seriousness of an offense.[228]

This objectivist view of attempt liability is to be contrasted with a subjectivist perspective, under which an actor's culpable decision-making—that is, his or her intention to engage in or risk harmful or wrongful activity—is considered to be the gravamen of an offense.[229] If, as subjectivism posits, an actor's dangerous decisionmaking ought to be the focus of criminal laws, then there is no reason to distinguish between an actor who consummates an intended harm and an actor (such as a criminal attempter) who does not—both are equally dangerous, and, therefore, both ought to receive the same punishment.[230]

This subjectivist perspective pervades the work of the Model Penal Code, the drafters of which explicitly sought to replace the common law's objectivist approach to grading with one that affords the actual occurrence of the requisite harm or evil implicated by an offense minimal, if any, significance.[231] Illustrative of the Code's commitment to subjectivism is the general principle of equal punishment reflected in Model Penal Code § 5.05(1), which grades most criminal attempts as "crimes of the same grade and degree as the most serious offense which is attempted."

Premised on the subjectivist view that "sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction," the Model Penal Code approach to grading criminal attempts was intended to render results largerly

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MPC § 5.05, cmt. at 485.

[226] DRESSLER, *supra* note 101, at § 27.05.

[227] Model Penal Code § 211.1 cmt. at 181-82. AWIs prohibit the commission of a simple assault accompanied by an intent to commit some further, typically more serious, criminal offense. Illustrative examples include assault with intent to commit murder, assault with intent to commit rape, and assault with intent to commit mayhem, each of which require proof of a simple assault in addition to the respective inchoate mental states of intending to commit murder, rape, and mayhem. Offenses of this nature were 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).

[228] *See* MPC § 211.1 cmt. at 181-82.

[229] *See* DRESSLER, *supra* note 101, at § 27.05 ("Subjectivists assert that, in determining guilt and calibrating punishment, the criminal law in general, and attempt law in particular, should focus on an actor's subjective intentions (her mens rea)—her choice to commit a crime—which simultaneously bespeak her dangerousness and bad character (or, at least, her morally culpable choice-making), rather than focus on the external conduct (the actus reus), which may or may not result in injury on a particular occasion.").

[230] *See* DRESSLER, *supra* note 101, at § 27.03 ("[A]pplying subjectivist theories, anyone who attempts to commit a crime is dangerous. Whether or not she succeeds in her criminal venture, she is likely to represent an ongoing threat to the community.").

[231] MPC § 211.1 cmt. at 181-82. DRESSLER, *supra* note 101, at § 27.05 ("[T]he criminal attempt provisions of the Model Penal Code are largely based on subjectivist conceptions of inchoate liability, whereas the common law of attempts includes many strands of objectivist thought, as well as some subjectivism.").

immaterial insofar at the maximum statutorily authorized punishment is concerned.[232] Importantly, though, the Model Penal Code does not equalize the sanction for all attempts. Rather, the general rule stated in Model Penal Code § 5.05(1) is also subject to a narrow, but significant, exception: "[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree." This carve out subjects attempts to commit the most serious crimes—for example, murder and aggravated assault—to a principle of proportionate penalty discounting.[233]

One other aspect of the Model Penal Code's broadly (though not entirely) subjectivist approach to grading attempts bears comment: the elimination of AWI offenses, which were frequently employed at common law. The drafters' decision to omit AWI offenses from the Code's Special Part was based on their view that the "modern grading of attempt according to the gravity of the underlying offense [renders] laws of this type unnecessary."[234]

The Model Penal Code approach to grading attempts has, in some respects, been quite influential. For example, since completion of the Code, many state legislatures have applied more uniform grading practices to attempts, while, at the same time, jettisoning their AWI offenses.[235] Importantly, however, the Code's most significant policy proscription—the subjectivist recommendation of equalizing attempt penalties—has not been hugely influential, either inside or outside of reform jurisdictions. Rather,

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[232] Model Penal Code § 5.05 cmt. at 490.

[233] Here's how the drafters of the Model Penal Code justified this collective attempt grading framework:

> To the extent that sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan. It is only when and insofar as the severity of sentence is designed for general deterrent purposes that a distinction on this ground is likely to have reasonable force. It is doubtful, however, that the threat of punishment for the inchoate crime can add significantly to the net deterrent efficacy of the sanction threatened for the substantive offense that is the actor's object, which he, by hypothesis, ignores. Hence, there is basis for economizing in use of the heaviest and most afflictive sanctions by removing them from the inchoate crimes. The sentencing provisions for second degree felonies, including the provision for extended terms, should certainly suffice to meet whatever danger is presented by the actor.

Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 1028–29 (1961).

[234] Model Penal Code § 211.1 cmt. at 181-82.

[235] As one commentator observes, "virtually all modern codes" have eliminated AWI offenses based on the recognition that "the problem [AWI offenses were created to solve] has been resolved by grading the crime of attempt according to the seriousness of the objective crime." LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 16.2; *but see* N.M. Stat. Ann. § 30-3-3 ("Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary."); Nev. Rev. Stat. § 200.400 ("A person who is convicted of battery with the intent to commit mayhem, robbery or grand larceny is guilty of a category B felony . . . A person who is convicted of battery with the intent to kill is guilty of a category B felony . . . ."); Mich. Comp. Laws § 750.83 ("Assault with intent to commit murder—Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years."). For various jurisdictions that have not modernized their codes and still retain such offenses, see MPC § 211.1 cmt. at 182 n.39 (collecting statutes).

the vast majority of American criminal codes continue to reflect the common law, objectivist approach to grading attempts.[236]

For example, the criminal codes in 36 jurisdictions contain general attempt penalty provisions punishing most attempts less severely than completed offenses.[237] In contrast, only 14 jurisdictions appear to have adopted general attempt penalty provisions equalizing the sanction for most criminal attempts,[238] though it should be noted that even where this legislative practice is followed, it's questionable whether the actual sentences imposed for attempts are actually equivalent to those for completed offenses.[239]

Similarly reflective of the Code's relative lack of influence over state level attempt grading policies is the fact that a strong majority of the "modern American codes that are highly influenced by the Model Penal Code" nevertheless adopt an objectivist approach to grading attempts.[240] For example, as one analysis of legislative trends in reform jurisdictions observes: whereas "[n]early two-thirds of American jurisdictions have adopted [MPC-based] codes," fewer "than 30% of these have adopted the Code's [attempt] grading provision or something akin to it."[241]

It's important to point out that within these majority and minority legislative practices, "[c]onsiderable variation is to be found . . . concerning the authorized penalties for attempt."[242] Most significant is that among those criminal codes generally embracing a principle of proportionate punishment discounting, the nature of that discount varies

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[236] *See generally* DRESSLER, *supra* note 101, at § 27.05 ("At common law and in most jurisdictions today, an attempt to commit a felony is considered a less serious crime and, therefore, is punished less severely, than the target offense.").

[237] *See* Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301; Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664; Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42; Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6; Mich. Comp. Laws Ann. § 750.92; Vt. Stat. Ann. tit. 13, § 9; Nev. Rev. Stat. Ann. § 193.330; P.R. Laws Ann. tit. 33, § 3122; D.C. Code § 22-1803. Note that "Rhode Island defines no attempt offenses at all in its code." Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 956 (2007)

[238] Del. Code Ann. tit. 11, § 531; Haw. Rev. Stat. § 705-502; Mont. Code Ann. § 45-4-103; S.C. Code Ann. § 16-1-80; Md. Code Ann., Crim. Law § 1-201; Conn. Gen. Stat. Ann. § 53a-51; N.D. Cent. Code Ann. § 12.1-06-01; Ind. Code Ann. § 35-41-5-1; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-4; Wyo. Stat. § 6-1-304; Pa. Cons. Stat. Ann. tit. 18, § 905; Wyo. Stat. § 6-1-304; Miss. Code. Ann. § 97-1-7.

[239] "It has been noted," for example, "that even when the legislature imposes similar sanctions for attempts and completed crimes, in practice the punishment for an attempt is less than the punishment for a consummated crime." Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299, 319 n.44 (1996) (citing GLANVILLE WILLIAMS, TEXTBOOK ON CRIMINAL LAW 404 (2d ed. 1983)).

[240] Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 381 (2003).

[241] Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 320 (1994).

[242] LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

materially.[243] For example, many of these jurisdictions grade attempts at a set number of penalty classes—usually one but occasionally two[244]—below the class affixed to the completed offense.[245] In contrast, a substantial number of these jurisdictions either explicitly punish attempts at half the amount of the target offense,[246] or, in the alternative, incorporate some combination of grade lowering and halving of statutory maxima.[247]

Another notable area of variance within American legislative attempt grading practices relates to the recognition of exceptions. A strong majority of American criminal codes explicitly recognize statutory exceptions to their generally applicable grading rules (regardless of rules they actually endorse).[248] But at the same time, the contours of these exceptions vary substantially. For example, numerous criminal codes exempt varying categories of offenses from their generally applicable grading rules—and this is so, moreover, in jurisdictions that broadly endorse a principle of proportionate

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[243] This is due, in part, to the fact that the punishment differential between classes varies. For an illustrative example, consider that while Oregon, Colorado, and Arizona all apply a one-grade discount to criminal attempts, the value of that discount varies both between and among jurisdictions.

For example, Oregon's approach treats attempts as a: (1) class A (20 year) felony if the offense attempted is murder or treason (punishable by death); (2) class B (10 year) felony if the offense attempted is a class A (20 year) felony; (3) class C (5 year) felony if the offense attempted is a class B (10 year) felony; (4) class A (1 year) misdemeanor if the offense attempted is a class C (5 year) felony or an unclassified felony; (5) class B (6 month) misdemeanor if the offense attempted is a class A (1 year) misdemeanor; and (6) class C (30 day) misdemeanor if the offense attempted is a class B (6 month) misdemeanor. Or. Rev. Stat. Ann. § 161.405.

Compare this with Colorado's approach, under which a criminal attempt to commit: (1) a class 1 felony (punishable by death) is a class 2 (24 year) felony; (2) a class 2 (24 year) felony is a class 3 (12 year) felony; (3) a class 3 (12 year) felony is a class 4 (6 year) felony; (4) a class 4 (6 year) felony is a class 5 (3 year) felony; (5) a class 5 (3 year) or 6 (1.5 year) felony is a class 6 (1.5 year) felony; (6) a class 1 (1.5 year) misdemeanor is a class 2 (1 year) misdemeanor; (7) a misdemeanor other than a class 1 (1.5 year) misdemeanor is a class 3 (6 month); and (8) a petty offense is a crime of the same class as the offense itself.

Now compare both of these approaches with Arizona's approach—reflected in its maximum statutory guidelines applicable to first time felony offenders—under which a criminal attempt to commit: (1) a class 1 (20) felony is a class 2 (10 year) felony; (2) a class 2 (10 year) felony is a class 3 (7 year) felony; (3) a class 3 (7 year) felony is a class 4 (3 year) felony; (4) a class 4 (3 year) felony is a class 5 (2 year) felony; and a class 5 felony (2 year) is a class 6 (1.5) felony. Ariz. Rev. Stat. Ann. § 13-1001.

[244] States vary widely in the number of penalty classes they use, with most having fewer than those in the RCC. *See* COMMENTARY TO RCC § 801. In states with fewer classes, the difference in penalties between classes is generally greater, such that a downward adjustment of just one class for an attempt penalty may amount to a fifty percent reduction in the maximum imprisonment exposure.

[245] Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Nev. Rev. Stat. Ann. § 193.330; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301.

[246] *See* Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[247] Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6.

[248] Among jurisdictions that apply a principle of equal punishment to grading attempts, only about five appear to apply it unequivocally, without exception. Robinson, *supra* note 121, at 320 n.67.

punishment discounting[249] as well as those that endorse one of equal punishment.[250] Likewise, an even larger number of American criminal codes exempt varying individual offenses from their generally applicable grading rules—which, again, is reflected in jurisdictions that broadly endorse a principle of proportionate punishment discounting [251] as well as those that endorse one of equal punishment.[252]

Statutory variances aside, it is nevertheless clear that American legislative practice, when viewed as a whole, clearly supports the common law, objectivist approach to grading attempts. Less clear, however, is the position supported by expert opinion: there exists a substantial amount of legal commentary on the relevance of results to punishment, which reflects an ongoing and persistent amount of scholarly disagreement over the appropriate grading of criminal attempts.[253] At the same time, there is another

[249] *E.g.*, N.Y. Penal Law § 110.05 (exempting attempts to commit some Class A-I felonies and all class A-II felonies from standard attempt penalty discount); Minn. Stat. Ann. § 609.17(4) (applying different attempt penalty discount to offenses subject to life imprisonment); Ga. Code Ann. § 16-4-6 (applying different attempt penalty discount to offenses subject to life imprisonment or death); Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[250] *E.g.*, Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

[251] *E.g.*, Alaska Stat. § 11.31.100 (exempting attempted murder from standard attempt penalty discount); Ariz. Rev. Stat. Ann. § 13-1001 (exempting attempted murder from standard attempt penalty discount); Fla. Stat. Ann. § 777.04 (applying standard attempt penalty discount "except as otherwise provided"); Ill. Comp. Stat. Ann. ch. 720, § 5/8-4 (exempting attempted murder from standard attempt penalty discount); Me. Rev. Stat. tit. 17-A, § 152 (exempting attempted murder from standard attempt penalty discount); Mo. Ann. Stat. § 564.011 (applying standard attempt penalty discount "unless otherwise provided); N.C. Gen. Stat. Ann. § 14-2.5 (applying standard attempt penalty discount "[u]nless a different classification is expressly stated"); Ohio Rev. Code Ann. § 2923.02 (applying standard attempt penalty discount except for attempts to commit various enumerated serious offenses); Or. Rev. Stat. § 161.405 (exempting attempted murder or treason from standard attempt penalty discount); Utah Code Ann. § 76-4-102 (exempting various enumerated serious felonies from standard attempt penalty discount); Wash. Rev. Code § 9A.28.020 (exempting various enumerated serious felonies from standard attempt penalty discount); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Kan. Stat. Ann. § 21-5301(c)(exempting enumerated list of offenses from standard attempt penalty discount); Wis. Stat. Ann. § 939.32(1) (exempting enumerated list of offenses from standard attempt penalty discount); *see also* Tenn. Code Ann. § 39-12-107 (no attempts to commit class c misdemeanor).

[252] *E.g.*, Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

[253] *See, e.g.*, Theodore Y. Blumoff, *A Jurisprudence for Punishing Attempts Asymmetrically*, 6 BUFF. CRIM. L. REV. 951 (2003); Bjorn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 BYU L. REV. 553; Russell Christopher, *Does Attempted Murder Deserve Greater Punishment than Murder? Moral Luck and the Duty to Prevent Harm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (2004); Michael Davis, *Why Attempts Deserve Less Punishment Than Complete Crimes*, 5 LAW & PHIL. 1 (1986); Bebhimm Donnelly, *Sentencing and Consequences: A Divergence Between Blameworthiness and Liability to Punishment*, 10 NEW CRIM. L. REV. 392 (2007); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1 (2007); Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV.

perspective on the grading of criminal attempts reflected in the scholarly literature, which seems to provide relatively clear support for the common law, objectivist approach: that of the people.[254]

More specifically, public opinion surveys seem to consistently find that lay judgments of relative blameworthiness view the consummation of results as an important and significant grading factor.[255] For example, in one well-known study, researchers found that the failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades."[256] This substantial "no-harm discount" was reflected where study participants were asked to compare the deserved punishment for two actors who had both done everything necessary from their end to consummate the offense, but where one was, due to circumstances outside of his control, unable to cause the intended harm.[257] And when study participants were presented with a scenario involving an actor who was stopped before he was able to carry out his criminal plans, the reduction in liability appears to have been even larger.[258]

Strong public support for the common law, objectivist approach to grading criminal attempts likely explains why both the drafters of Model Penal Code and most of the state legislatures that pursued their subjectivist approach to grading attempts ultimately decided to exempt the most serious offenses from a principle of equal punishment.[259] As one commentator has observed: "The instances where the Model Penal Code drafters have elected to compromise on their view that results ought to be irrelevant are typically instances, like homicide or causing catastrophe, where their unpopular view of results would be highlighted and most likely to cause public stir."[260]

The RCC approach to grading criminal attempts is consistent with the above considerations. RCC § 301(c)(1) codifies a general principle of proportionate punishment discounting that is consistent with the common law, objectivist approach reflected in a strong majority of jurisdictions. And RCC § 301(c)(2) recognizes the possibility of individual exceptions to this principle, which, again, finds support in majority legislative practice.

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143 (1995); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

[254] *See, e.g.*, Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUDIES 409, 430 (1998) (finding that public opinion surveys generally indicate that members of the public are "objectivist-grading subjectivists."); Dressler, *supra* note 101, at § 27.04 n.54 (citing *id.* and explaining that "people tend to be subjectivist (they focus on an actor's state of mind) in determining what the minimum criteria should be for holding an actor criminally responsible for her inchoate conduct, but once it is determined that punishment is appropriate and the only issue is how much punishment to inflict, they tend to become objectivist (they focus on resulting harm) and favor the common law lesser-punishment result.").

[255] *See, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 14-28, 157-97 (1995); Robinson & Darley, *supra* note 134, at 427-30.

[256] Robinson & Darley, *supra* note 134, at 428.

[257] *See id.*

[258] *See id.* at 429.

[259] *See* Robinson, *supra* note 120, at 379-85.

[260] *Id.*

Relation to National Legal Trends. Subsection 301(c) is in accordance with American legal trends. Consistent with RCC § 301(c)(1), a strong majority of jurisdictions apply a generally applicable proportionate penalty discount to grade criminal attempts. And regardless of which attempt grading principle a given jurisdiction adopts, nearly all of them recognize statutory exceptions consistent with RCC § 301(c)(2).

The historical development of the punishment of attempts, like every other area of attempt policy, can be understood through the competing objectivist and subjectivist perspectives on criminal liability.[261] At the heart of the dispute between these two theories is whether the criminal law—both in determining guilt and calibrating punishment—ought to primarily focus on the dangerousness of an act, or, alternatively, the dangerousness of an actor.[262]

On the objectivist understanding of criminal liability, causing (or risking) social harm is the gravamen of a criminal offense.[263] It therefore follows that greater punishment should be imposed where the harm actually occurs and less punishment when—as is the case with an attempt—it does not.[264] From the objectivist perspective, result-based grading is a fundamental component of any just penal system.[265]

The common law approach to grading criminal attempts reflects this objectivist perspective. In the early years of the common law, any attempt "was a misdemeanor, regardless of the nature or seriousness of the offense that the person sought to commit."[266] In later years, legislatures began to apply more serious penalties to criminal attempts, though these penalties were distributed in varying, and frequently haphazard, ways. [267] For the most part, though, these penalties were still significantly less severe

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[261] *See generally, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978); Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173 (2011); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L REV. 363 (2004).

[262] FLETCHER, *supra* note 99, at 173-174.

[263] *Id.* at 171; *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.05 (6th ed. 2012).

[264] FLETCHER, *supra* note 99, at 173-174.

[265] *See generally* Ashworth, *supra* note 99, at 725; Garvey, *supra* note 99, at 173.

[266] DRESSLER, *supra* note 101, at § 27.05.

[267] Consider, for example, the observations of the Model Penal Code drafters:

> [Common law attempt penalty] statutes fitted into a number of identifiable patterns . . . One common provision set specific maximum penalties, ranging from 10 to 50 years, for attempts to commit crimes punishable by death or life imprisonment, and fixed the penalty for all other attempts at one half of the maximum for the completed crime. Another common provision established a number of categories according to the nature or severity of the completed crime, specifying a different range of penalties, definite prison terms and fines, for attempts to commit crimes encompassed within each category. Closely related was the now common solution in which attempt is graded one class below the object offense. There were also a number of states that used a combination of these approaches. Some jurisdictions, on the other hand, provided a fixed maximum penalty for all attempts encompassed by the general attempt provision. A few . . . authorized a penalty for the attempt that was as great as the penalty for the completed crime.

MPC § 5.05, cmt. at 485.

than those governing the completed offense.[268] There was, however, one notable exception: "Assault With Intent" to offenses (AWIs), which were "functionally analogous to specific applications of the law of attempt, though generally requiring closer proximity to actual completion of the offense and carrying heavier penalties."[269] But even accounting for AWIs, the common law approach to grading attempts was one that viewed the realization of intended harm as material to evaluating the seriousness of an offense.[270]

This objectivist view of attempt liability is to be contrasted with a subjectivist perspective, under which an actor's culpable decision-making—that is, his or her intention to engage in or risk harmful or wrongful activity—is considered to be the gravamen of an offense.[271] If, as subjectivism posits, an actor's dangerous decisionmaking ought to be the focus of criminal laws, then there is no reason to distinguish between an actor who consummates an intended harm and an actor (such as a criminal attempter) who does not—both are equally dangerous, and, therefore, both ought to receive the same punishment.[272]

This subjectivist perspective pervades the work of the Model Penal Code, the drafters of which explicitly sought to replace the common law's objectivist approach to grading with one that affords the actual occurrence of the requisite harm or evil implicated by an offense minimal, if any, significance.[273] Illustrative of the Code's commitment to subjectivism is the general principle of equal punishment reflected in Model Penal Code § 5.05(1), which grades most criminal attempts as "crimes of the same grade and degree as the most serious offense which is attempted."

Premised on the subjectivist view that "sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction," the Model Penal Code approach to grading criminal attempts was intended to render results largerly immaterial insofar at the maximum statutorily authorized punishment is concerned.[274]

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[268] DRESSLER, *supra* note 101, at § 27.05.

[269] Model Penal Code § 211.1 cmt. at 181-82. AWIs prohibit the commission of a simple assault accompanied by an intent to commit some further, typically more serious, criminal offense. Illustrative examples include assault with intent to commit murder, assault with intent to commit rape, and assault with intent to commit mayhem, each of which require proof of a simple assault in addition to the respective inchoate mental states of intending to commit murder, rape, and mayhem. Offenses of this nature were 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).

[270] *See* MPC § 211.1 cmt. at 181-82.

[271] *See* DRESSLER, *supra* note 101, at § 27.05 ("Subjectivists assert that, in determining guilt and calibrating punishment, the criminal law in general, and attempt law in particular, should focus on an actor's subjective intentions (her mens rea)—her choice to commit a crime—which simultaneously bespeak her dangerousness and bad character (or, at least, her morally culpable choice-making), rather than focus on the external conduct (the actus reus), which may or may not result in injury on a particular occasion.").

[272] *See* DRESSLER, *supra* note 101, at § 27.03 ("[A]pplying subjectivist theories, anyone who attempts to commit a crime is dangerous. Whether or not she succeeds in her criminal venture, she is likely to represent an ongoing threat to the community.").

[273] MPC § 211.1 cmt. at 181-82. DRESSLER, *supra* note 101, at § 27.05 ("[T]he criminal attempt provisions of the Model Penal Code are largely based on subjectivist conceptions of inchoate liability, whereas the common law of attempts includes many strands of objectivist thought, as well as some subjectivism.").

[274] Model Penal Code § 5.05 cmt. at 490.

Importantly, though, the Model Penal Code does not equalize the sanction for all attempts. Rather, the general rule stated in Model Penal Code § 5.05(1) is also subject to a narrow, but significant, exception: "[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree." This carve out subjects attempts to commit the most serious crimes—for example, murder and aggravated assault—to a principle of proportionate penalty discounting.[275]

One other aspect of the Model Penal Code's broadly (though not entirely) subjectivist approach to grading attempts bears comment: the elimination of AWI offenses, which were frequently employed at common law. The drafters' decision to omit AWI offenses from the Code's Special Part was based on their view that the "modern grading of attempt according to the gravity of the underlying offense [renders] laws of this type unnecessary."[276]

The Model Penal Code approach to grading attempts has, in some respects, been quite influential. For example, since completion of the Code, many state legislatures have applied more uniform grading practices to attempts, while, at the same time, jettisoning their AWI offenses.[277] Importantly, however, the Code's most significant policy proscription—the subjectivist recommendation of equalizing attempt penalties—has not been hugely influential, either inside or outside of reform jurisdictions. Rather,

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[275] Here's how the drafters of the Model Penal Code justified this collective attempt grading framework:

> To the extent that sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan. It is only when and insofar as the severity of sentence is designed for general deterrent purposes that a distinction on this ground is likely to have reasonable force. It is doubtful, however, that the threat of punishment for the inchoate crime can add significantly to the net deterrent efficacy of the sanction threatened for the substantive offense that is the actor's object, which he, by hypothesis, ignores. Hence, there is basis for economizing in use of the heaviest and most afflictive sanctions by removing them from the inchoate crimes. The sentencing provisions for second degree felonies, including the provision for extended terms, should certainly suffice to meet whatever danger is presented by the actor.

Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 1028–29 (1961).

[276] Model Penal Code § 211.1 cmt. at 181-82.

[277] As one commentator observes, "virtually all modern codes" have eliminated AWI offenses based on the recognition that "the problem [AWI offenses were created to solve] has been resolved by grading the crime of attempt according to the seriousness of the objective crime." LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 16.2; *but see* N.M. Stat. Ann. § 30-3-3 ("Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary."); Nev. Rev. Stat. § 200.400 ("A person who is convicted of battery with the intent to commit mayhem, robbery or grand larceny is guilty of a category B felony . . . A person who is convicted of battery with the intent to kill is guilty of a category B felony . . . ."); Mich. Comp. Laws § 750.83 ("Assault with intent to commit murder—Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years."). For various jurisdictions that have not modernized their codes and still retain such offenses, see MPC § 211.1 cmt. at 182 n.39 (collecting statutes).

the vast majority of American criminal codes continue to reflect the common law, objectivist approach to grading attempts.[278]

For example, the criminal codes in 36 jurisdictions contain general attempt penalty provisions punishing most attempts less severely than completed offenses.[279] In contrast, only 14 jurisdictions appear to have adopted general attempt penalty provisions equalizing the sanction for most criminal attempts,[280] though it should be noted that even where this legislative practice is followed, it's questionable whether the actual sentences imposed for attempts are actually equivalent to those for completed offenses.[281]

Similarly reflective of the Code's relative lack of influence over state level attempt grading policies is the fact that a strong majority of the "modern American codes that are highly influenced by the Model Penal Code" nevertheless adopt an objectivist approach to grading attempts.[282] For example, as one analysis of legislative trends in reform jurisdictions observes: whereas "[n]early two-thirds of American jurisdictions have adopted [MPC-based] codes," fewer "than 30% of these have adopted the Code's [attempt] grading provision or something akin to it."[283]

It's important to point out that within these majority and minority legislative practices, "[c]onsiderable variation is to be found . . . concerning the authorized penalties for attempt."[284] Most significant is that among those criminal codes generally embracing a principle of proportionate punishment discounting, the nature of that discount varies

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[278] *See generally* DRESSLER, *supra* note 101, at § 27.05 ("At common law and in most jurisdictions today, an attempt to commit a felony is considered a less serious crime and, therefore, is punished less severely, than the target offense.").

[279] *See* Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301; Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664; Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42; Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6; Mich. Comp. Laws Ann. § 750.92; Vt. Stat. Ann. tit. 13, § 9; Nev. Rev. Stat. Ann. § 193.330; P.R. Laws Ann. tit. 33, § 3122; D.C. Code § 22-1803. Note that "Rhode Island defines no attempt offenses at all in its code." Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 956 (2007)

[280] Del. Code Ann. tit. 11, § 531; Haw. Rev. Stat. § 705-502; Mont. Code Ann. § 45-4-103; S.C. Code Ann. § 16-1-80; Md. Code Ann., Crim. Law § 1-201; Conn. Gen. Stat. Ann. § 53a-51; N.D. Cent. Code Ann. § 12.1-06-01; Ind. Code Ann. § 35-41-5-1; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-4; Wyo. Stat. § 6-1-304; Pa. Cons. Stat. Ann. tit. 18, § 905; Wyo. Stat. § 6-1-304; Miss. Code. Ann. § 97-1-7.

[281] "It has been noted," for example, "that even when the legislature imposes similar sanctions for attempts and completed crimes, in practice the punishment for an attempt is less than the punishment for a consummated crime." Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299, 319 n.44 (1996) (citing GLANVILLE WILLIAMS, TEXTBOOK ON CRIMINAL LAW 404 (2d ed. 1983)).

[282] Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 381 (2003).

[283] Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 320 (1994).

[284] LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

materially.[285] For example, many of these jurisdictions grade attempts at a set number of penalty classes—usually one but occasionally two[286]—below the class affixed to the completed offense.[287] In contrast, a substantial number of these jurisdictions either explicitly punish attempts at half the amount of the target offense,[288] or, in the alternative, incorporate some combination of grade lowering and halving of statutory maxima.[289]

Another notable area of variance within American legislative attempt grading practices relates to the recognition of exceptions. A strong majority of American criminal codes explicitly recognize statutory exceptions to their generally applicable grading rules (regardless of rules they actually endorse).[290] But at the same time, the contours of these exceptions vary substantially. For example, numerous criminal codes exempt varying categories of offenses from their generally applicable grading rules—and this is so, moreover, in jurisdictions that broadly endorse a principle of proportionate

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[285] This is due, in part, to the fact that the punishment differential between classes varies. For an illustrative example, consider that while Oregon, Colorado, and Arizona all apply a one-grade discount to criminal attempts, the value of that discount varies both between and among jurisdictions.

For example, Oregon's approach treats attempts as a: (1) class A (20 year) felony if the offense attempted is murder or treason (punishable by death); (2) class B (10 year) felony if the offense attempted is a class A (20 year) felony; (3) class C (5 year) felony if the offense attempted is a class B (10 year) felony; (4) class A (1 year) misdemeanor if the offense attempted is a class C (5 year) felony or an unclassified felony; (5) class B (6 month) misdemeanor if the offense attempted is a class A (1 year) misdemeanor; and (6) class C (30 day) misdemeanor if the offense attempted is a class B (6 month) misdemeanor. Or. Rev. Stat. Ann. § 161.405.

Compare this with Colorado's approach, under which a criminal attempt to commit: (1) a class 1 felony (punishable by death) is a class 2 (24 year) felony; (2) a class 2 (24 year) felony is a class 3 (12 year) felony; (3) a class 3 (12 year) felony is a class 4 (6 year) felony; (4) a class 4 (6 year) felony is a class 5 (3 year) felony; (5) a class 5 (3 year) or 6 (1.5 year) felony is a class 6 (1.5 year) felony; (6) a class 1 (1.5 year) misdemeanor is a class 2 (1 year) misdemeanor; (7) a misdemeanor other than a class 1 (1.5 year) misdemeanor is a class 3 (6 month); and (8) a petty offense is a crime of the same class as the offense itself.

Now compare both of these approaches with Arizona's approach—reflected in its maximum statutory guidelines applicable to first time felony offenders—under which a criminal attempt to commit: (1) a class 1 (20) felony is a class 2 (10 year) felony; (2) a class 2 (10 year) felony is a class 3 (7 year) felony; (3) a class 3 (7 year) felony is a class 4 (3 year) felony; (4) a class 4 (3 year) felony is a class 5 (2 year) felony; and a class 5 felony (2 year) is a class 6 (1.5) felony. Ariz. Rev. Stat. Ann. § 13-1001.

[286] States vary widely in the number of penalty classes they use, with most having fewer than those in the RCC. *See* COMMENTARY TO RCC § 801. In states with fewer classes, the difference in penalties between classes is generally greater, such that a downward adjustment of just one class for an attempt penalty may amount to a fifty percent reduction in the maximum imprisonment exposure.

[287] Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Nev. Rev. Stat. Ann. § 193.330; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301.

[288] *See* Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[289] Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6.

[290] Among jurisdictions that apply a principle of equal punishment to grading attempts, only about five appear to apply it unequivocally, without exception. Robinson, *supra* note 121, at 320 n.67.

punishment discounting[291] as well as those that endorse one of equal punishment.[292] Likewise, an even larger number of American criminal codes exempt varying individual offenses from their generally applicable grading rules—which, again, is reflected in jurisdictions that broadly endorse a principle of proportionate punishment discounting [293] as well as those that endorse one of equal punishment.[294]

Statutory variances aside, it is nevertheless clear that American legislative practice, when viewed as a whole, clearly supports the common law, objectivist approach to grading attempts. Less clear, however, is the position supported by expert opinion: there exists a substantial amount of legal commentary on the relevance of results to punishment, which reflects an ongoing and persistent amount of scholarly disagreement over the appropriate grading of criminal attempts.[295] At the same time, there is another

[291] *E.g.*, N.Y. Penal Law § 110.05 (exempting attempts to commit some Class A-I felonies and all class A-II felonies from standard attempt penalty discount); Minn. Stat. Ann. § 609.17(4) (applying different attempt penalty discount to offenses subject to life imprisonment); Ga. Code Ann. § 16-4-6 (applying different attempt penalty discount to offenses subject to life imprisonment or death); Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[292] *E.g.*, Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

[293] *E.g.*, Alaska Stat. § 11.31.100 (exempting attempted murder from standard attempt penalty discount); Ariz. Rev. Stat. Ann. § 13-1001 (exempting attempted murder from standard attempt penalty discount); Fla. Stat. Ann. § 777.04 (applying standard attempt penalty discount "except as otherwise provided"); Ill. Comp. Stat. Ann. ch. 720, § 5/8-4 (exempting attempted murder from standard attempt penalty discount); Me. Rev. Stat. tit. 17-A, § 152 (exempting attempted murder from standard attempt penalty discount); Mo. Ann. Stat. § 564.011 (applying standard attempt penalty discount "unless otherwise provided); N.C. Gen. Stat. Ann. § 14-2.5 (applying standard attempt penalty discount "[u]nless a different classification is expressly stated"); Ohio Rev. Code Ann. § 2923.02 (applying standard attempt penalty discount except for attempts to commit various enumerated serious offenses); Or. Rev. Stat. § 161.405 (exempting attempted murder or treason from standard attempt penalty discount); Utah Code Ann. § 76-4-102 (exempting various enumerated serious felonies from standard attempt penalty discount); Wash. Rev. Code § 9A.28.020 (exempting various enumerated serious felonies from standard attempt penalty discount); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Kan. Stat. Ann. § 21-5301(c)(exempting enumerated list of offenses from standard attempt penalty discount); Wis. Stat. Ann. § 939.32(1) (exempting enumerated list of offenses from standard attempt penalty discount); *see also* Tenn. Code Ann. § 39-12-107 (no attempts to commit class c misdemeanor).

[294] *E.g.*, Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

[295] *See, e.g.*, Theodore Y. Blumoff, *A Jurisprudence for Punishing Attempts Asymmetrically*, 6 BUFF. CRIM. L. REV. 951 (2003); Bjorn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 BYU L. REV. 553; Russell Christopher, *Does Attempted Murder Deserve Greater Punishment than Murder? Moral Luck and the Duty to Prevent Harm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (2004); Michael Davis, *Why Attempts Deserve Less Punishment Than Complete Crimes*, 5 LAW & PHIL. 1 (1986); Bebhimm Donnelly, *Sentencing and Consequences: A Divergence Between Blameworthiness and Liability to Punishment*, 10 NEW CRIM. L. REV. 392 (2007); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1 (2007); Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV.

perspective on the grading of criminal attempts reflected in the scholarly literature, which seems to provide relatively clear support for the common law, objectivist approach: that of the people.[296]

More specifically, public opinion surveys seem to consistently find that lay judgments of relative blameworthiness view the consummation of results as an important and significant grading factor.[297] For example, in one well-known study, researchers found that the failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades."[298] This substantial "no-harm discount" was reflected where study participants were asked to compare the deserved punishment for two actors who had both done everything necessary from their end to consummate the offense, but where one was, due to circumstances outside of his control, unable to cause the intended harm.[299] And when study participants were presented with a scenario involving an actor who was stopped before he was able to carry out his criminal plans, the reduction in liability appears to have been even larger.[300]

Strong public support for the common law, objectivist approach to grading criminal attempts likely explains why both the drafters of Model Penal Code and most of the state legislatures that pursued their subjectivist approach to grading attempts ultimately decided to exempt the most serious offenses from a principle of equal punishment.[301] As one commentator has observed: "The instances where the Model Penal Code drafters have elected to compromise on their view that results ought to be irrelevant are typically instances, like homicide or causing catastrophe, where their unpopular view of results would be highlighted and most likely to cause public stir."[302]

The RCC approach to grading criminal attempts is consistent with the above considerations. RCC § 301(c)(1) codifies a general principle of proportionate punishment discounting that is consistent with the common law, objectivist approach reflected in a strong majority of jurisdictions. And RCC § 301(c)(2) recognizes the possibility of individual exceptions to this principle, which, again, finds support in majority legislative practice.

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143 (1995); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

[296] *See, e.g.*, Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUDIES 409, 430 (1998) (finding that public opinion surveys generally indicate that members of the public are "objectivist-grading subjectivists."); Dressler, *supra* note 101, at § 27.04 n.54 (citing *id.* and explaining that "people tend to be subjectivist (they focus on an actor's state of mind) in determining what the minimum criteria should be for holding an actor criminally responsible for her inchoate conduct, but once it is determined that punishment is appropriate and the only issue is how much punishment to inflict, they tend to become objectivist (they focus on resulting harm) and favor the common law lesser-punishment result.").

[297] *See, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 14-28, 157-97 (1995); Robinson & Darley, *supra* note 134, at 427-30.

[298] Robinson & Darley, *supra* note 134, at 428.

[299] *See id.*

[300] *See id.* at 429.

[301] *See* Robinson, *supra* note 120, at 379-85.

[302] *Id.*

RCC § 22E-302. Solicitation.

Relation to National Legal Trends. RCC §§ 302(a), (b), and (c) are in part consistent with, and in part depart from, national legal trends.

Many of the substantive policies incorporated into RCC §§ 302(a), (b) and (c)—for example, those governing the conduct requirement, the requirement of purpose as to conduct, and the general rejection of an impossibility defense—reflect majority or prevailing national trends governing the law of solicitation. The most notable exception is limiting general solicitation liability to crimes of violence under RCC § 302(a)(3), which reflects a minority trend. Other policy recommendations—for example, the principle of intent elevation applicable to results and circumstances—address issues upon which American criminal law has largely been silent in the solicitation context.

Comprehensively codifying the culpable mental state requirement and conduct requirement applicable to criminal solicitations is in accordance with widespread, modern legislative practice. However, the manner in which RCC §§ 302(a), (b), and (c) codify these requirements departs from modern legislative practice in a few notable ways.

A more detailed analysis of national legal trends and their relationship to RCC §§ 302(a), (b), and (c) is provided below. It is organized according to five main topics: (1) the conduct requirement; (2) the culpable mental state requirement; (3) impossibility; (4) target offenses; and (5) codification practices.

RCC § 302(a): Relation to National Legal Trends on Conduct Requirement. The "essence" of the general inchoate offense of solicitation is asking another person to commit a crime.[1] Over the years, however, "[c]ourts, legislatures and commentators have utilized a great variety of words to describe the required acts for solicitation."[2] Variances aside, though, all American legal authorities seem to agree that commanding,[3] requesting,[4] or, more broadly, attempting to persuade[5] another to commit a crime will suffice for purposes of general solicitation liability.[6]

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[1] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (Westlaw 2018) ("[T]he essence of the crime of solicitation is asking a person to commit a crime"); *People v. Nelson*, 240 Cal. App. 4th 488, 496 (2015) ("The essence of criminal solicitation is an attempt to induce another to commit a criminal offense."); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 29 (1989); ("Solicitation . . . is the act of trying to persuade another to commit a crime that the solicitor desires and intends to have committed.").

[2] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[3] *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012); LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Ala. Code § 13A-4-1; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Colo. Rev. Stat. Ann. § 18-2-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-7; Haw. Rev. Stat. § 705-510; Idaho Code § 18-2001; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Iowa Code Ann. § 705.1; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.030; Me. Rev. Stat. Ann. tit. 17-A, § 153; Mont. Code Ann. § 45-4-101; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; N.D. Cent. Code § 12.1-06-03; Or. Rev. Stat. § 161.435; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Tex. Penal Code Ann. § 15.03; Utah Code Ann. § 76-4-203; Va. Code Ann. § 18.2-29; Wyo. Stat. § 6-1-302.

[4] *See, e.g.*, DRESSLER, *supra* note 45, at § 28.01; LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Ala. Code § 13A-4-1; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-7; Haw. Rev. Stat. § 705-510; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Kan. Stat. Ann. § 21-5303; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y.

One important corollary to this understanding of the conduct requirement of a criminal solicitation is that a solicitation is complete the instant the actor utters the communication—proof that the target of a solicitation was completed is not necessary.[7] In this sense, a criminal solicitation is like the other general inchoate offenses of attempt and conspiracy, neither of which require proof of completion either. Unlike a criminal attempt or conspiracy, however, a criminal solicitation does not require proof that any of the relevant parties (i.e., solicitor or solicitee) performed any conduct (i.e., substantial step/overt act) in furtherance of the proposal.[8]

Another important corollary to this understanding of the conduct requirement of a criminal solicitation is that agreement or acceptance by the solicitee is immaterial for purposes of liability. In contrast to a bilateral understanding of conspiracy, for example, it does not matter that the solicitee rejects the proposal, or verbally agrees but does not actually intend to commit the crime—such as, for example, where the solicitee is an undercover police officer feigning intent.[9] (Note, however, that a "solicitee's

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Penal Law § 100.00; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Tex. Penal Code Ann. § 15.03.

[5] *See, e.g., State v. Carr*, 110 A.3d 829, 835 (N.H. 2015) (quoting Robbins, *supra* note 43, at 29); LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Va. § 18.2-29; Colo. Rev. Stat. § 18-2-301(1); Iowa Code Ann. § 705.1; N.D. Cent. Code § 12.1-06-03; *see also* Me. tit. 17-A, § 153(1) (causing another to commit crime); Ore. § 161.435(1) (same).

[6] More controversial is whether merely "encouraging" another to commit an offense provides an adequate basis for solicitation liability. *See generally* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 343 (1985) ("Encourage suggests giving support to a course of action to which another is already inclined."). The drafters of the Model Penal Code endorsed this approach; under Model Penal Code § 5.02(1) an actor who "commands, *encourages*, or requests" another person to commit a crime may be convicted of solicitation. As the commentary accompanying the Model Penal Code explains:

> "Encourages" is the most expansive of these terms and encompasses actors who bolster the fortitude of those who have already decided to commit crimes, so long as the encouragement is done with the requisite criminal purpose. Encouragement also covers forms of communication designed to lead the recipient to act criminally, even if the message is not as direct as a command or request.

Model Penal Code § 5.02(1) cmt. at 372. In contrast, the drafters of the proposed Federal Criminal Code "rejected" the term "encourages," instead recommending use of the phrase "otherwise attempts to persuade," on the basis that the former could provide for criminal liability in "equivocal situations too close to casual remarks or even to free speech." *See* 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 371 (1970). As a matter of legislative practice, there is support for both positions. *See* Model Penal Code § 5.02(1) cmt. at 372 (collecting authorities).

[7] DRESSLER, *supra* note 45, at § 28.01 (citing *People v. Ruppenthal*, 771 N.E.2d 1002, 1008 (Ill. App. Ct. 2002)). Relatedly, "[a] solicitation that is made subject to a condition is criminal, even if the condition is never fulfilled." *People v. Nelson*, 240 Cal. App. 4th 488, 496–99 (2015) ("Asking a hit man if you can have a two-for-one deal is, in essence, offering to pay him to commit murder, on the condition that he agree to do so for a discount price. The hit man may decline, but the crime of solicitation has nevertheless been committed.").

[8] *See, e.g., People v. Cheathem*, 658 N.Y.S.2d 84, 85 (1997); *People v. Burt*, 288 P.2d 503, 505 (Cal. 1955).

[9] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; DRESSLER, *supra* note 45, at § 28.01. Note that if the party solicited acts on the solicitor's suggestion and goes far enough to incur guilt for a more serious offense, then the solicitor is also guilty of the more serious offense, rather than the solicitation. *See State v. Jones*, 83 N.C. 605, 607 (1881). And if the party solicited goes far enough to incur liability for attempt,

acquiescence to a solicitation, even if lawfully made by an undercover agent, does not make the *solicitee* guilty of solicitation."[10]) In this sense, a criminal solicitation constitutes an "attempted conspiracy,"[11] and, as such, is "the most inchoate of the anticipatory offenses."[12]

One important issue relevant to the conduct requirement of a criminal solicitation relates to the nature of the communication implicated by the defendant's attempted influence. Generally speaking, it is well-established that "solicitation c[an] be committed by speech, writing, or nonverbal conduct," while proof of a "quid pro quo" between the solicitor and the party solicited is not necessary.[13] Less clear, however, is just how specific that communication must be given the free speech interests implicated by solicitation liability.[14]

As a constitutional matter, the U.S. Supreme Court case law surrounding the relationship between the First Amendment and criminalization of solicitation has historically been murky.[15] Most recently, in *United States v. Williams*, the U.S. Supreme

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then the solicitor is also guilty of attempt. *Id.* at 606-07; *Uhl v. Commonwealth*, 47 Va. 706, 709-11 (1849). And if the solicited party consummates the object crime, then both the and the solicitor are guilty of the completed crime. *People v. Harper*, 25 Cal. 2d 862, 877 (1945); *State v. Primus*, 226 N.C. 671, 674-75 (1946).

[10] *Allen v. State*, 91 Md.App. 705, 605 A.2d 960 (1992) (collecting cases from other jurisdictions).

[11] *See, e.g., State v. Jensen*, 195 P.3d 512, 517 (Wash. 2008); *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015); Model Penal Code § 5.02 cmt. at 365-66. For example, if X asks Y to agree to engage in or aid the planning or commission of criminal conduct, and Y agrees, then a criminal conspiracy has been formed. But if Y doesn't agree, then there's no conspiracy between X and Y. Nevertheless, X has solicited Y to commit a criminal offense. DRESSLER, *supra* note 45, at § 28.01.

[12] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Jensen*, 195 P.3d 512, 517 (Wash. 2008); *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015); Model Penal Code § 5.02 cmt. at 365-66; *Gervin v. State*, 371 S.W.2d 449, 451 (Tenn. 1963). Here's a useful practical illustration:

> Assume that *A* wishes to have his enemy *B* killed, and thus—perhaps because he lacks the nerve to do the deed himself—*A* asks *C* to kill *B*. If *C* acts upon *A*'s request and fatally shoots *B*, then both *A* and *C* are guilty of murder. If, again, *C* proceeds with the plan to kill *B*, but he is unsuccessful, then both *A* and *C* are guilty of attempted murder. If *C* agrees to *A*'s plan to kill *B* but the killing is not accomplished or even attempted, *A* and *C* are nonetheless guilty of the crime of conspiracy. But what if *C* immediately rejects *A*'s homicidal scheme, so that there is never even any agreement between *A* and *C* with respect to the intended crime? Quite obviously, *C* has committed no crime at all. *A*, however, because of his bad state of mind in intending that *B* be killed and his bad conduct in importuning *C* to do the killing, is guilty of the crime of solicitation.

LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[13] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Johnson*, 202 Or. App. 478, 483–84 (2005) (rejecting "the proposition that the state must produce the actual words used by the solicitor (or, for that matter, that words must be used)," and "the proposition that the state must prove that the solicitor offered the solicitee a quid pro quo.") (citing *In State ex rel Juv. Dept. v. Krieger*, 177 Or. App. 156, 158–59 (2001)).

[14] DRESSLER, *supra* note 45, at § 28.01 (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645).

[15] *See, e.g., Yates v. United States*, 354 U.S. 298, 318 (1957) (holding that, with respect to violations of the Smith Act, there must be advocacy of action to accomplish the overthrow of the government by force and violence rather than advocacy of the abstract doctrine of violent overthrow), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he

Court clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection."[16] But it also reaffirmed the crucial yet nevertheless ambiguous distinction "between a proposal to engage in illegal activity and the abstract advocacy of illegality," the latter of which is entitled to constitutional protection.[17]

Constitutional considerations aside, there "remains a legislative question" concerning whether and to what extent solicitation liability should be curtailed to avoid chilling speech."[18] "The main problem," as the drafters of the Model Penal Code phrase it, is how to prevent

> [L]egitimate agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime. It would not be difficult to convince a jury that inflammatory rhetoric on behalf of an unpopular cause is in reality an invitation to violate the law rather than an effort to seek its change through legitimate criticism. Minority criticism has to be extreme in order to be politically audible, and if it employs the typical device of lauding a martyr, who is likely to have been a lawbreaker, the eulogy runs the risk of being characterized as a request for emulation.[19]

In light of these constitutional and policy considerations, the contemporary approach to solicitation liability, reflected in both case law and legislation, is to require proof of the utterance of a communication that, when viewed "in the context of the knowledge and position of the intended recipient, [carries] meaning in terms of some concrete course of conduct that it is the actor's object to incite."[20]

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constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). For discussion of these cases and their progeny, see, for example, Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Model Penal Code § 5.02 cmt. at 378-79; *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 248 (4th Cir. 1997).

[16] *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

[17] *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928–929 (1982)).

[18] Model Penal Code § 5.02 cmt. at 375-76.

[19] *Id.*

[20] *Id.*; *see, e.g.*, *Johnson*, 202 Or. App. at 483. This standard is articulated by modern criminal codes in a variety of ways. For example, the Model Penal Code requires that the defendant have solicited "specific conduct." Model Penal Code § 5.02(1). This "specific conduct" approach has been adopted by a number of reform jurisdictions; however, many other modern criminal codes express the same kind of specificity requirement through language requiring the solicitation of conduct constituting a "particular felony" or a "particular crime." *See* Model Penal Code § 5.02 cmt. at 376 n.48 (collecting authorities). Yet another set of statutory formulations adopted by reform jurisdictions require the solicitation of "conduct constituting" a crime, which, in practical effect, "require as great a degree of specificity of the conduct solicited as does the [other approaches]." *Id.*

This standard is relatively broad. For example, it does not require specificity as to "the details (time, place, manner) of the conduct that is the subject of the solicitation."[21] Nor does it require that "the act of solicitation be a personal communication to a particular individual."[22] But it does bring with it a few limitations. For example, "general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently specific . . . to constitute criminal solicitation."[23] Nor does criminal liability extend to "a situation where the defendant makes a general solicitation (however reprehensible) to a large indefinable group to commit a crime."[24] Even still, there can be little question that the conduct requirement of solicitation is broad indeed.

This breadth of coverage is bolstered by two additional principles of liability. First, and perhaps most important, is that "solicit[ing] another to aid and abet the commission of a crime," no less than soliciting that person to directly commit a crime, can provide the basis for solicitation liability.[25] Under this accessorial approach to solicitation, reflected in both contemporary national legislation and case law, it is "sufficient that A requested B to get involved in the scheme to kill C in any way which would establish B's complicity in the killing of C were that to occur."[26]

The second principle of liability addresses the issue of an uncommunicated solicitation, which arises where "the solicitor's message never reaches the person intended to be solicited, as where an intermediary fails to pass on the communication or the solicitor's letter is intercepted before it reaches the addressee."[27] In these kinds of situations, the general rule, reflected in both contemporary national legislation and case

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[21] *Johnson*, 202 Or. App. at 483; *see* Model Penal Code § 5.02 cmt. at 376 ("It is, of course, unnecessary for the actor to go into great detail as to the manner in which the crime solicited is to be committed.").

[22] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Schleifer*, 99 Conn. 432, 121 A. 805 (Dist. Ct. 1923) (information charging one with soliciting from a public platform a number of persons to commit the crimes of murder and robbery is sufficient).

[23] Commentary on Haw. Rev. Stat. Ann. § 705-510.

[24] *People v. Quentin*, 296 N.Y.S.2d 443, 448 (Dist. Ct. 1968); *see Johnson*, 202 Or. App. at 484 (observing that a "general exhortation to 'go out and revolt' does not constitute solicitation).

[25] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. In this sense, solicitation liability runs parallel with conspiracy liability, in which context agreements to aid in the planning or commission of a crime provide a basis for a conspiracy conviction. *See, e.g., Salinas v. United States*, 522 U.S. 52, 65 (1997); Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1134 (1975); Model Penal Code § 5.03(1)(b).

[26] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. The Model Penal Code explicitly addresses this point, clarifying in § 5.02(1) that "[a] person is guilty of solicitation to commit a crime if . . . he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or *would establish his complicity in its commission or attempted commission*." A plurality of modern codes have adopted this "complicity in its commission" approach or something like it. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Haw. Rev. Stat. § 705-510; Idaho Code § 18-2001; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.030; N.D. Cent. Code § 12.1-06-03; Pa. Cons. Stat. Ann. tit. 18, § 902; Wash. Rev. Code § 9A.28.030; Kan. Stat. Ann. § 21-5303; N.D. Cent. Code § 12.1-06-03. For relevant case law, see, for example, *Meyer v. State*, 47 Md.App. 679 (1981); *People v. Nelson*, 240 Cal.App.4th 488 (2015); *Commonwealth v. Wolcott*, 77 Mass.App. 457 (2010); *People v. Bloom*, 133 N.Y.S. 708 (1912); *State v. Furr*, 292 N.C. 711 (1977); *Moss v. State*, 888 P.2d 509 (Okl. Cr. App. 1994); *State v. Yee*, 160 Wis.2d 15 (1990); *Ganesan v. State*, 45 S.W.3d 197, 201 (Tex. App. 2001).

[27] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

law, is that "[t]he act is nonetheless criminal, although it may be that the solicitor must be prosecuted for an attempt to solicit on such facts."[28]

Consistent with national legal trends outlined above, RCC § 302 codifies the following policies relevant to the conduct requirement of solicitation. Subsection (a)(1) requires proof of one of three alternative forms of attempted influence: (1) commanding, (2) requesting, or (3) trying to persuade another person to commit an offense. Thereafter, RCC § 302(a)(2) clarifies that solicitations to aid (i.e., assist), no less than solicitations to directly commit, an offense constitute a sufficient basis for general solicitation liability. And it also establishes that the request, command, or persuasion be to engage in or facilitate "conduct, which, if carried out, will constitute" a criminal offense. Finally, RCC § 302(c) clarifies that actual communication is not necessary to satisfy the conduct requirement of solicitation, provided that the person has done everything he or she plans to do to effect the communication.

RCC §§ 302(a) & (b): Relation to National Legal Trends on Culpable Mental State Requirement. It is often said that the *mens rea* of a criminal solicitation is the intent to cause another to commit a crime.[29] Upon closer analysis, however, this kind of general statement fails to "adequately reflect the mental element" of solicitation[30]—a topic that is "particularly challenging" by any standard.[31] The relevant complexities follow the same pattern as those surrounding the general inchoate offense of conspiracy.

Ordinarily, a clear element analysis of a consummated crime entails consideration of "the actor's state of mind—whether he must act purposely, knowingly, recklessly, or negligently—with respect to" the results and circumstances of an offense.[32] The same is also true of solicitation and conspiracy, which criminalize steps towards completion of a particular crime. At the same time, the inchoate and multi-participant nature of both

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[28] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. The Model Penal Code explicitly addresses this point, clarifying in § 5.02(4) that "[i]t is immaterial . . . that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication." A few codes have adopted this language. *See, e.g.,* Haw. Rev. Stat. § 705-510; Kan. Stat. Ann. § 21-5303; Utah Code Ann. §§ 76-4-203. More common, though, is the adoption of statutory language that would seem to permit a conviction under such circumstances by prohibiting a defendant's "attempt" to engage in one or more forms of influence—e.g., attempts to cause, persuade, induce, promote, or request another to commit a crime. *See, e.g.,* Del. Code Ann. tit. 11, § 501; Ga. Code Ann. § 16-4-7; N.Y. Penal Law § 100.00; Iowa Code Ann. § 705.1; N.D. Cent. Code § 12.1-06-03; Va. Code Ann. § 18.2-29; Me. Rev. Stat. Ann. tit. 17-A, § 153 Tex. Penal Code Ann. § 15.03; N.M. Stat. Ann. § 30-28-3; Tenn. Code Ann. § 39-12-102. For relevant case law interpreting these kinds of statutes, compare *People v. Lubow*, 29 N.Y.2d 58, 66–67 (1971) (reference to "attempts" embraces uncommunicated solicitations); *with State v. Cotton*, 1990-NMCA-025, ¶ 23, 109 N.M. 769, 773 (reference to "attempts" does not embrace uncommunicated solicitations). And for case law indicating that attempted solicitation is the appropriate charge where an uncommunicated solicitation is at issue, see, for example, *Cotton*, 109 N.M. at 773; *People v. Boyce*, 339 Ill.Dec. 585 (2015); *State v. Andujar*, 899 A.2d 1209 (R.I. 2006); *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002); *Ford v. State*, 127 Nev. 608 (2011).

[29] *See, e.g.*, *Kimbrough v. State*, 544 So. 2d 177, 179 (Ala. Crim. App. 1989); *Mizrahi v. Gonzales*, 492 F.3d 156 (2d Cir. 2007).

[30] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[31] Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 967 (1961).

[32] *Id.*

solicitation and conspiracy raises its own set of culpable mental state considerations, namely, the relationship between the actor's mental state and future conduct (committed by someone else) that, if carried out, would consummate the target offense.[33] For this reason, it is often said that offenses such as solicitation and conspiracy incorporate "dual intent" requirements.[34]

In the context of solicitation, the first intent requirement relates to the solicitor's culpable mental state with respect to future conduct: generally speaking, the solicitor must "intend," by his or her request, to promote or facilitate conduct planned to culminate in an offense.[35] The second intent requirement, in contrast, relates to the solicitor's culpable mental state with respect to the results and/or circumstance elements of the target offense: generally speaking, the solicitor must "intend," by his or her request, to bring them about.[36]

Upon closer consideration, each component of this double-barreled recitation of solicitation's culpable mental state requirement encompasses key policy issues. With respect to the first intent requirement, for example, the central policy question is this: may a solicitor be held criminally liable if he or she is *merely aware* (i.e., knows) that, by making a request, he or she is promoting or facilitating conduct planned to culminate in an offense? Or, alternatively, must it proven that the solicitor *desires* (i.e., has the purpose) to promote or facilitate such conduct?

Resolution of these questions is crucial to determining whether and to what extent merchants who sell legal goods in the ordinary course of business which facilitate criminal acts may be subjected to criminal liability.[37] For example, imagine a car dealer who tries to convince a prospective purchaser to buy a car knowing that the vehicle will be used in a bank robbery. Or consider a motel operator who tries to sell a room to a man who is with an underage woman, knowing that it'll be used for sex. In these kinds of situations, "the person furnishing goods or services is aware of the customer's criminal intentions, but may not care whether the crime is committed."[38] What remains to be determined is whether this kind of culpable mental state as to the solicitee's future conduct constitutes a sufficient basis for a solicitation conviction.

There are, generally speaking, two different approaches one could take to the issue. From the perspective of a "true purpose" view, solicitation liability is only appropriate upon proof that the solicitor acted with a *conscious desire* to promote or facilitate criminal conduct by another. From the perspective of a knowledge view, in contrast, *mere awareness* that the solicitor is promoting or facilitating the commission of a crime by another is considered to be sufficient, even absent a true purpose to advance the criminal end. The choice between these two approaches raises conflicting policy

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[33] *See, e.g.*, Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).
[34] For discussion of the dual intent requirement in the context of solicitation, see, for example, DRESSLER, *supra* note 45, at § 28.01; *State v. Garrison*, 40 S.W.3d 426 (Tenn. 2000). For discussion of the dual intent requirement in the context of conspiracy, see, for example, *State v. Maldonado*, 2005-NMCA-072, ¶ 10, 137 N.M. 699, 702; *United States v. Piper*, 35 F.3d 611, 614-15 (1st Cir. 1994).
[35] Robinson, *supra* note 75, at 864.
[36] *Id.*
[37] *See* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1192 (1997).
[38] DRESSLER, *supra* note 45, at § 28.01.

considerations, namely, "that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes."[39]

Solicitation's second intent requirement, in contrast, revolves around a broader set of policy issues, which are a product of the various possibilities presented by an element analysis of the results and/or circumstances of the target of a solicitation. Consider first the relationship between a solicitor's state of mind and the result elements of the target offense. A solicitor may purposely request another to cause a result, as would be the case where D1, a passenger, solicits D2, a driver, to kill V, a nearby driver, by ramming D2's car into V's while on the highway. At the same time, a solicitor may also knowingly, recklessly, or even negligently request another to cause a result.

For example, D1 ask D2 to drive extremely fast through a school zone for the purpose of getting to a sports event on time. If D1 is practically certain that a teacher in the crosswalk will be killed, then D1 has knowingly solicited D2 to kill that teacher. If, in contrast, D1 is merely aware of a substantial risk that the teacher will be killed, then D1 has recklessly solicited D2 to kill that teacher. And if D1 is not aware of a substantial risk that asking D2 to speed will result in the death of the teacher, but nevertheless should have been aware of this possibility, then D1 has negligently solicited D2 to kill that teacher.

An identical analysis applies to circumstances. Imagine, for example, that D1 asks D2, an adult male, to engage in a sexual encounter with V, a minor. If D1 desires D2 to have sex with V *because of V's young age*, then D1 has purposely solicited sex with a minor. If, in contrast, D1 is practically certain that V is underage, then D1 has knowingly solicited D2 to have sex with a minor. And if D1 is aware of a substantial risk that V is underage, then D1 has recklessly solicited D2 to have sex with a minor. Finally, if D1 is not aware, yet should have been aware, of a substantial risk that V is underage then D1 has negligently solicited D2 to have sex with a minor.

That a solicitor can act purposely, knowingly, recklessly, or negligently as to results and circumstances is not to say that all of these culpable mental states provide a justifiable basis for a criminal conviction. Given that solicitation is a general inchoate offense that applies to particular crimes, there is little doubt that the solicitor must possess, at minimum, the culpable mental state requirement applicable to the results and circumstances of the target offense.[40] But what about where the culpable mental state requirement applicable to the results and circumstances of the target offense is comprised of a non-intentional mental state (e.g., recklessness or negligence), or none at all (i.e., strict liability)? In that case, one can ask: is proof of the culpable mental state required by the target offense enough, or, alternatively, must a more demanding, intentional culpable mental state nevertheless be proven?

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[39] Model Penal Code § 5.03 cmt. at 403.

[40] *See, e.g.*, *Mizrahi v. Gonzales*, 492 F.3d 156, 160–61 (2d Cir. 2007) ("T]he specific intent element of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 ("[W]here the prohibited result involves special circumstances as to which a mens rea requirement is imposed, the solicitor cannot be said to have intended that result unless he personally had this added mental state.").

There are, generally speaking, two different approaches one might take to the issue. The first is one of culpable mental state equivocation, which dictates that whatever culpable mental state requirement applies to the results and circumstances of the target offense will also suffice to establish a criminal solicitation. The second, and contrasting approach, is one of culpable mental state elevation, under which proof of either a practically certain belief or conscious desire as to the results and circumstances of the target offense is necessary—even if proof of a non-intentional mental state will suffice to secure a conviction for the completed offense.

Resolution of the above policy issues is unclear under the common law approach to solicitation, which simply viewed the *mens rea* of the offense as one of "specific intent."[41] This kind of monolithic conceptualization, rooted in "offense analysis," is fundamentally ambiguous given that it fails to take "account of both the policy of the inchoate crime and the policies, varying elements, and culpability requirements of all substantive crimes."[42] In contrast, the more recent "element analysis" developed by the drafters of the Model Penal Code provides the basis for applying a clearer and more conceptually sound approach to addressing the culpable mental state requirement of solicitation. Surprisingly, however, the general solicitation provision the Model Penal Code's drafters developed fails to utilize these tools.

More specifically, the Model Penal Code's general solicitation provision, § 5.02(1), codifies a broad purpose requirement—similarly employed in the Code's general definitions of conspiracy[43] and complicity[44]—under which the requisite request must be accompanied by "the purpose of promoting or facilitating the commission of the crime."[45] When viewed in light of the accompanying explanatory note and commentary, it is clear that the drafters intended for this purpose requirement to apply to the "specific conduct that would constitute the crime."[46] Which is to say, the Model Penal Code

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[41] *See, e.g.*, *People v. Cortez*, 18 Cal. 4th 1223, 1232 (1998) ("The mens rea of solicitation is a specific intent to have someone commit a completed crime."); DRESSLER, *supra* note 45, at § 28.01 ("Common law solicitation is a specific-intent crime.").

[42] Wechsler et al., *supra* note 73, at 967.

[43] Model Penal Code § 5.03.

[44] Model Penal Code § 2.06.

[45] Model Penal Code § 5.02(1).

[46] Model Penal Code § 5.02(1): Explanatory Note (stating that "[a] purpose to promote or facilitate the commission of a crime is required, together with a command, encouragement or request to another person that he engage in specific conduct that would constitute the crime . . . "). The accompanying commentary to Model Penal Code § 5.02 states, in relevant part:

> It is not enough for a person to be aware that his words may lead to a criminal act or even to be quite sure they will do so; it must be the actor's purpose that the crime be committed. The language of the section may bar conviction even in some situations in which an actor does hope that his words will lead to commission of a crime. Suppose a young man seeks out a pacifist and asks for advice whether he should violate his registration obligation under the selective service laws. This particular pacifist believes all cooperation with the selective service system to be immoral and he so advises the young man. Although he may hope that the young man will refuse to register, his honest response to a request for advice might not be thought to constitute a purpose of promoting or facilitating commission of the offense. If he were tried it would be a question of fact whether his advice evidenced purpose.

endorses the purpose approach to the first *mens rea* policy issue, discussed above. Less clear, however, is how the Model Penal Code's undifferentiated reference to a "purpose of promoting or facilitating the commission of the *crime*" was intended to translate into culpability principles applicable to the results and circumstances of the target offense. Indeed, the commentary accompanying the relevant provision of the Model Penal Code explicitly states that this "matter"—i.e., whether to apply a principle of culpable mental state equivocation or elevation—"is deliberately left open."[47]

The Model Penal Code's endorsement of a true purpose view with respect to conduct has been widely adopted in reform jurisdictions. Since publication of the Model Penal Code in 1962, "[v]irtually all of the more recently enacted solicitation statutes" appear to have endorsed the position that a conscious desire to promote or facilitate criminal conduct is necessary.[48] At the same time, however, none of these statutes appear to clarify whether and to what extent the results and circumstances of the target offense must be elevated when charged as a solicitation. The underlying policy issues likewise remain unresolved in the courts, where "[c]ase law is almost nonexistent."[49]

Model Penal Code § 5.02 cmt. at 371.

[47] Model Penal Code § 5.03(1) cmt. at 371 n.23. As the drafters observed:

> Note should be made of a question that can arise as to the need for the defendant to have contemplated all of the elements of the crime that he solicits. If, for example, strict liability or negligence will suffice for a circumstance element of the offense being solicited, will the same culpability on the part of the defendant suffice for his conviction of solicitation, or must he actually know of the existence of the circumstance? The point arises also in charges of conspiracy, where it is treated in some detail.

Id. at 371.

[48] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. Modern criminal codes express this point in varying ways. For example, some state that "the solicitor must intend that an offense be committed." LAFAVE, SUPRA NOTE 43, at 2 SUBST. CRIM. L. § 11.1 (citing Cal. Penal Code § 653f; Colo. Rev. Stat. Ann. § 18-2-301; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Iowa Code Ann. § 705.1; Me. Rev. Stat. Ann. tit. 17-A, § 153; Mont. Code Ann. § 45-4-101; Tenn. Code Ann. § 39-12-102; Tex. Penal Code Ann. § 15.03; Utah Code Ann. § 76-4-203; Wis. Stat. Ann. § 939.30; Wyo. Stat. § 6-1-302). Others state that "the solicitor must intend to promote or facilitate [the target offense's] commission." LAFAVE, SUPRA NOTE 43, at 2 SUBST. CRIM. L. § 11.1 (citing Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Haw. Rev. Stat. § 705-510; Idaho Code § 18-2001; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.030; N.D. Cent. Code § 12.1-06-03; Pa. Cons. Stat. Ann. tit. 18, § 902; Wash. Rev. Code § 9A.28.030)). Yet another approach is to state that the solicitor "must intend that the person solicited engage in criminal conduct." LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 (citing Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Del. Code Ann. tit. 11, § 501; Ga. Code Ann. § 16-4-7; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; Or. Rev. Stat. § 161.435). Although there's little case law interpreting these statutes, "the acts of commanding or requesting another to engage in conduct which is criminal would seem of necessity to require an accompanying intent that such conduct occur." LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[49] Alexander & Kessler, *supra* note 79, at 1166; *see, e.g.*, LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. In what is perhaps the only published case directly addressing the relationship between the culpable mental state requirement of a solicitation and that governing the target offense, *Com. v. Hacker*, the Pennsylvania Supreme Court held that solicitation of sex with a minor, like the target offense of sex with a minor, is a matter of strict liability with respect to the circumstance of age—at least where the victim is in the physical presence of the solicitor. 609 Pa. 108, 113, 15 A.3d 333, 336 (2011). This effective principle

Legal commentary on these issues is also sparse, though, to the extent it exists, it appears to favor application of a principle of culpable mental state elevation with respect to both results and circumstances.[50]

In the absence of much legal authority on these issues in the context of solicitation, perhaps the best indicator of national legal trends is the more ample legal authority on these issues in the context of conspiracy liability. There is, after all, very little (if any) difference between the *mens rea* of these two offenses. And the question of whether and to what extent the results and circumstances of the target of a conspiracy should be elevated raises the same policy issues as those raised when the question is asked in the solicitation context. Therefore, these legal authorities can provide meaningful direction.[51] And, as the commentary to the CCRC's general conspiracy provision, RCC § 303(1), explores in significant detail, relevant legislation, case law, and commentary in the conspiracy context support applying dual principles of intent elevation to the results and circumstances.[52]

Consistent with the above analysis of national legal trends, the RCC approach to the culpable mental state requirement governing a criminal solicitation incorporates the same four substantive policies applicable to the RCC approach governing the culpable mental state requirement of a criminal conspiracy.

First, the prefatory clause of RCC § 302(a) establishes that the culpability required for the general inchoate offense of criminal solicitation is, at minimum, that required by the target offense. Second, RCC § 302(a)(1) endorses the purpose view of solicitation, under which proof that the solicitor consciously desired to bring about conduct planned to culminate in the target offense is a necessary component of solicitation liability. Both of these policies are consistent with national legal trends

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of culpable mental state equivocation as to circumstances is to be contrasted, however, with the decisions of at least two other state courts applying a principle of culpable mental state elevation to the circumstance of age in statutory rape where the government proceeds on a complicity theory. *See State v. Bowman*, 188 N.C. App. 635, 650 (2008) ("[W]hen the government proceeds on a complicity theory of liability, it must prove that the defendant "acted with knowledge that the [victims] were under the age of [consent.]") (citing *People v. Wood*, 56 Cal.App. 431 (1922); *see also Robinson v. United States*, 100 A.3d 95, 105 (D.C. 2014) (to hold someone criminally responsible as an accomplice the government must prove "a state of mind extending to the entire crime," i.e., "the intent must go to the specific and entire crime charged") (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)). These cases are particularly relevant because solicitation provides one of two bases (abetting) for holding someone criminally responsible as an accomplice. *See, e.g.*, LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Commentary on N.Y. Penal Law § 100.00.

[50] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. ("[A]s to those crimes which are defined in terms of certain prohibited results, it is necessary that the solicitor intend to achieve that result through the participation of another. If he does not intend such a result, then the crime has not been solicited, and this is true even though the person solicited will have committed the crime if he proceeds with the requested conduct and thereby causes the prohibited result."); Alexander & Kessler, *supra* note 79, at 1166 (arguing that, with respect to circumstances, "there are strong reasons in favor of asymmetry between the target crime and its solicitation," including that: (1) "D1 may lack D2's knowledge base"; and (2) D1 may be "removed in time and space from the target crime").

[51] *See, e.g.*, Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 210 (1981) ("Because of its similarities to conspiracy, solicitation should require the same mental state as conspiracy.").

[52] *See* First Draft of Report No. 12: Recommendations for Chapter 3 of the Revised Criminal Code—Definition of a Criminal Conspiracy, at 32-40 (December 11, 2017).

applicable to the general inchoate crime of solicitation (in addition to those applicable in the context of conspiracy liability).

Third, RCC § 302(b) applies a principle of intent elevation to the results of a solicitation, under which the solicitor must, in making the request, intend to cause any result required by the target offense. Similarly, and fourth, RCC § 302(b) applies the same principle of intent elevation to the circumstances of a solicitation, under which the solicitor must, in making the request, intend to bring about any circumstance required by the target offense. Both of these policies are consistent with national legal trends applicable to the general inchoate crime of conspiracy.

RCC § 302(a)(1): Relation to National Legal Trends on Impossibility. The topic of impossibility revolves around the following question: what is the relevance of the fact that, by virtue of some mistake concerning the conditions the actor believed to exist, the target of the general inchoate offense for which the defendant is being prosecuted could not have been completed?[53] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense, but nevertheless argue that impossibility of completion should by itself preclude the imposition of criminal liability.[54]

The problem of impossibility is most commonly discussed in the context of attempt prosecutions. Illustrative issues include whether the following actors have committed a criminal attempt: (1) a pickpocket who puts her hand in the victim's pocket, believing it to contain valuable items, only to discover that it is empty;[55] (2) an assailant shooting into the bed where the intended victim customarily sleeps, believing the victim to be there, only to discover that he isn't;[56] (3) a participant in a sting operation who receives property believing it to be stolen, only to discover that it isn't;[57] and (4) an actor who believes that he or she is selling a controlled substance, only to discover that the substance is not contraband.[58]

In principle, the precise same issues of impossibility can also arise in the context of prosecutions for any other general inchoate crime, including solicitation.[59] Consider, for example, how slight tweaks to the above fact patterns present the same questions of impossibility for solicitation prosecutions: (1) D1 asks D2 to pickpocket V's jacket, believing it to contain valuable items, when it is actually empty; (2) D1 asks D2 to shoot into the bedroom where V customarily sleeps, believing V to be there, when V is, in fact, on vacation; (3) D1 asks D2 to purchase property on the black market, believing it to be stolen, when, in fact, it isn't stolen but part of a sting operation; and (4) D1 asks D2 to sell what he believes to be a controlled substance, when in fact that substance is innocent.

In addition, solicitation prosecutions also raise the possibility of distinctive forms of impossibility beyond those that arise in the context of attempt prosecutions given the involvement of another party. In one relevant situation, the impossibility is a product of

[53] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 45, at § 27.07.
[54] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 45, at § 27.07.
[55] *See People v. Twiggs*, 223 Cal. App. 2d 455 (Ct. App. 1963).
[56] *See State v. Mitchell*, 71 S.W. 175 (Mo. 1902).
[57] *See People v. Rojas*, 358 P.2d 921 (Cal. 1961).
[58] *See United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978).
[59] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1

the fact that the solicitee is *unable* to engage in the target of the solicitation—such as, for example, when D1 sends a letter to a well-regarded hit man, D2, soliciting the murder of V, only to discover that D2 is in a coma due to a near-fatal car accident. In another situation, the impossibility is a product of the fact that the solicitee is *unwilling* to commit the target offense—such as, for example, when D1 asks D2 to commit a murder for hire, only to discover that D2 is an undercover officer merely posing as a willing participant in a criminal offense.

Conceptually speaking, impossibility issues arising in the solicitation context can be divided into the same four categories that exist in the attempt context.[60] The first is *pure factual impossibility*, which arises when the object of a solicitation cannot be consummated because of circumstances beyond the parties' control (e.g., police interference).[61] The second category of impossibility is *pure legal impossibility*, which arises where the solicitor acts under a mistaken belief that the law criminalizes his or her intended objective (e.g., solicitation of a lawful act).[62] The third category is *hybrid impossibility*, which arises where the object of a solicitation is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense (e.g., soliciting an undercover officer posing as a child to engage in sexual acts).[63] And the fourth category of impossibility is *inherent impossibility*, which arises when "any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought" to be achieved by a solicitation (e.g., soliciting a murder by means of witchraft).[64]

Notwithstanding the factual and conceptual symmetries between impossible attempts and impossible solicitations, the law of impossibility is relatively underdeveloped in the context of solicitation liability.[65] Courts rarely seem to publish opinions addressing impossibility issues outside the attempt context, and, even when they do, those opinions shy away from the "lengthy explorations of the distinction between [different kinds of] impossibility" that characterizes attempt jurisprudence.[66] Rather, courts are more likely to generally state—as the U.S. Supreme Court recently observed in *United States v. Williams*—that "impossibility of completing the crime because the facts were not as the defendant believed is not a defense [to solicitation]" and move on.[67]

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[60] This general framework and breakdown is drawn from DRESSLER, *supra* note 45, at § 27.07.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1099 (1992); Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995).
[65] *See, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2017).
[66] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5.
[67] *United States v. Williams*, 553 U.S. 285, 300 (2008). Or, as it is sometimes phrased by courts, "[i]t is not a defense" to solicitation that "the person solicited *could not commit the crime*, or . . . *would [not] have* committed the crime solicited." *United States v. Devorkin*, 159 F.3d 465, 468 (9th Cir. 1998) (quoting LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1); *see Com. v. Jacobs*, 91 Mass. 274, 275 (1864) (no defense that defendant solicited another, who was physically unfit for military service, to leave state for purpose of entering military service elsewhere); *Benson v. Superior Court of Los Angeles Cty.*, 57 Cal. 2d

The Model Penal Code, in contrast, applies a more nuanced approach to dealing with such issues. By viewing a solicitation to attempt the commission of a crime as a solicitation to commit that crime, it effectively carries over Code's general abolition of impossibility claims in the attempt context to the solicitation context.[68] Here's how this incorporation-based approach operates.

The Model Penal Code's formulation of a criminal attempt, § 5.01(1)(c), establishes that: "[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person "purposely does or omits to do anything that, *under the circumstances as he believes them to be*, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[69] By broadly recognizing that an "actor can be held liable for an attempt to commit the offense he *believed* he was committing, without regard to whether or why the commission of the offense is impossible," the Model Penal Code approach renders most impossibility claims immaterial in the attempt context.[70]

The Model Penal Code drafters intended to apply the same approach to dealing with impossibility in the solicitation context. "It would be awkward, however, to

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240, 243–44 (1962) (no defense that defendant solicited undercover agent to commit perjury in anticipated child custody proceedings). For relevant case law, see *Wright v. Gates*, 240 Ariz. 525 (2016); *Ford v. State*, 127 Nev. 608 (2011); *Saienni v. State*, 346 A.2d 152 (Del. 1975); *Luzarraga v. State*, 575 So.2d 731 (Fla. App. 1991); *People v. Breton*, 237 Ill.App.3d 355 (1992); *Meyer v. State*, 47 Md.App. 679 (1981); *Colbert v. Commonwealth*, 47 Va.App. 390 (2006). *See also People v. Thousand*, 465 Mich. 149, 168 (2001) ("[W]e are unable to locate any authority, and defendant has provided none, for the proposition that "impossibility" is a recognized defense to a charge of solicitation in other jurisdictions.").

[68] Model Penal Code § 5.03 cmt. at 421. Note that the Model Penal Code similarly extends the same treatment of inherent impossibility afforded in attempt prosecutions to solicitation prosecutions by authorizing the court to account for the relevant issues at sentencing. Model Penal Code § 5.01 cmt. at 318. The relevant provision, Model Penal Code § 5.05(2), establishes that "[i]f the particular conduct charged to constitute a criminal attempt, solicitation, or conspiracy, is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense," then the court has two alternatives at its disposal. Model Penal Code § 5.05(2). First, the court may "impose sentence for a crime of lower grade or degree." *Id.* Second, and alternatively, the court may, "in extreme cases, [simply] dismiss the prosecution." *Id.*

Generally speaking, this kind of "safety valve is extremely desirable in the inchoate crime area, which, by definition, involves threats of infinitely varying intensity." Buscemi, *supra* note 67, at 1187. In the solicitation context, however, such a provision will specifically "help avoid the injustice which might be created by the MPC's non-recognition of impossibility as a defense to a [solicitation] indictment." *Id.* at 1187; *see also* Alexander & Kessler, *supra* note 79, at 1193 ("Currently, garden-variety criminal solicitation is arguably subject to the requirement of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that the soliciting speech be directed to inciting and likely to incite the audience to imminent lawless acts").

[69] Model Penal Code § 5.01(1)(c).

[70] PAUL H. ROBINSON & MICHAEL CAHILL, CRIMINAL LAW 514 (2d. 2012). Model Penal Code § 5.01(c) could also be read to abolish the defense of pure legal impossibility. *See id.* However, the Model Penal Code commentary indicates that the drafters intended that pure legal impossibility remain a defense:

> It is of course necessary that the result desired or intended by the actor constitute a crime. If . . . the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.

Model Penal Code § 5.01 cmt. at 318; *see* Wechsler et al., *supra* note 73, at 579.

incorporate the impossibility language of attempt into other inchoate offenses."[71] With that in mind, the Model Penal Code instead "treats [solicitation] to attempt the commission of a crime as a [solicitation] to commit that crime."[72]

More specifically, Model Penal Code § 5.02(1) states that a person is guilty of an offense if he "commands, encourages or requests another person to engage in specific conduct that would constitute such crime *or an attempt to commit such crime . . . .*" Inclusion of the term "attempt" in this formulation addresses the fact that

> in some cases the actor may solicit conduct that he and the party solicited believe would constitute the completed crime, but that, for reasons discussed in connection with the defense of impossibility in attempts, does not in fact constitute the crime. Such conduct by the person solicited would constitute an attempt under Section 5.01, and the actor would therefore be liable under Section 5.02 for having solicited conduct that would constitute an attempt if performed.[73]

In practical effect, then, the Model Penal Code's general solicitation provision, like its general attempt provision, broadly prohibits impossibility claims by "focus[ing] upon the circumstances as the actor believes them to be rather than as they actually exist."[74]

Since completion of the Model Penal Code, a handful of modern criminal codes have imported this legislative solution to impossibility.[75] But while many reform solicitation statutes "do not deal with the point explicitly," most "would undoubtedly be interpreted to reach the same result."[76] Which is to say, they can be read to

> cover one who solicits another to engage in conduct that, because of factors unknown to the defendant or the actor, is factually or legally impossible of being criminal, since it is the ultimate goal of the solicitation that determines the solicitor's liability.[77]

Consistent with the above analysis of national legal trends, the RCC broadly renders impossibility claims irrelevant in the context of solicitation prosecutions. RCC § 302(a)(2) accomplishes this by establishing that a request to bring about conduct that, if carried out, would constitute an "attempt" will also suffice for solicitation liability. The reference to an attempt is intended to incorporate the same approach applicable to

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[71] ROBINSON, *supra* note 107, at 1 CRIM. L. DEF. § 85.
[72] Model Penal Code § 5.03 cmt. at 421.
[73] Model Penal Code § 5.02 cmt. at 373-74.
[74] Model Penal Code § 5.01 cmt. at 297.
[75] *See, e.g.*, Ark. Code § 5-3-301; Or. Rev. Stat. § 161.435; Del. Code Ann. tit. 11, § 501; Ky. Rev. Stat. § 506.030; *see also* Model Penal Code § 5.02 cmt. at 374 n. 31 (collecting citations).
[76] Model Penal Code § 5.02 cmt. at 374 n.31.
[77] *Id.*; *see also* Model Penal Code § 5.04(a)-(b) ("[I]t is immaterial to the liability of a person who solicits or conspires with another to commit a crime that . . . he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic that is an element of such crime, if he believes that one of them does; or . . . the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.").

impossibility in the latter context, which, pursuant to RCC § 301(a)(1), necessarily abolishes factual impossibility and hybrid impossibility defenses by focusing on the situation as the defendant viewed it.[78]

RCC §§ 303(a) & (b) (Generally): Relation to National Legal Trends on Target Offenses. The general inchoate offense of solicitation is a relatively recent development in American criminal law, subject to significant variance insofar as its breadth of coverage is concerned.[79]

Solicitation was first recognized as a common law offense in the United States during the early nineteenth century.[80] In the ensuing years, some, but not all, American judiciaries endorsed general solicitation liability by way of common law.[81] And, among those courts that did opt to judicially recognize the offense, there existed disagreement concerning the target offenses to which general solicitation liability ought to apply.[82] For example, some courts held that general solicitation liability appropriately applies to all forms of criminal conduct, without regard to the nature of the offense solicited.[83] Others, in contrast, resisted this conclusion, curtailing the scope of criminal liability on the basis that the solicitation of some forms of criminal conduct was simply "unworthy of serious censure."[84] Then, during the first half of the twentieth century, some legislatures

[78] RCC § 302(a) likewise imports the same approach to recognizing inherent impossibility employed in RCC § 301(a). More specifically, where the solicitor's perspective of the situation is relied upon, the government must prove that the requested course of conduct was "reasonably adapted to commission of the [target] offense." By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement precludes convictions for inherently impossible solicitations.

One other kind of impossibility addressed by RCC § 302 is "what might be called an impossible solicitation or conspiracy of a possible offense." ROBINSON, *supra* note 107, at 1 CRIM. L. DEF. § 85. In this situation, the impossibility does not arise not from the nature of the ultimate object offense, but rather, from the particular defendant's actions constituting the solicitation. *Id.* For example, the defendant's scheme for the planned killing of the intended victim may be entirely feasible, but nevertheless impossible because he whispers it through a door with no one behind it. *Id.* In such a situation, liability clearly attaches under RCC § 302(a)(1) because the defendant "tr[ied]" to persuade another person to commit a crime. And it also clearly attaches under RCC § 302(c) because the "defendant does everything he or she plans to do to effect the communication."

[79] Robbins, *supra* note 43, at 116.

[80] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. Prior to the nineteenth century, the English common-law courts held indictable two specific forms of solicitation: importuning another to commit either a forgery for use in a trial or perjury, *Rex v. Johnson*, 89 Eng. Rep. 753, 753, 756, 2 Show. K.B. 1, 1, 3-4 (1679), and offering a bribe to a public official. *Rex v. Vaughan*, 98 Eng. Rep. 308, 310-11, 4 Burr. 2494, 2499 (1769). Not until the case of *Rex v. Higgins*, 102 Eng. Rep. 269, 2 East 5 (1801), did the English courts recognize solicitation as a distinct substantive offense. Robbins, *supra* note 43, at 116.

[81] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g.*, Commentary on Ala. Code § 13A-4-1 ("In Alabama, until 1967, there was doubt as to whether the crime of solicitation even existed, as there was no statute nor case law on the subject.").

[82] *See, e.g.*, Robbins, *supra* note 43, at 116; *Meyer v. State*, 425 A.2d 664, 668 n.5 (Md. 1981); Commentary on Ala. Code § 13A-4-1.

[83] Model Penal Code § 5.02 cmt. at 367.

[84] *Id.*; *see, e.g., Com. v. Barsell*, 424 Mass. 737, 738-42 (1997); Robbins, *supra* note 43, at 116.

abrogated general solicitation liability altogether in the course of abolishing common law crimes.[85]

It was with this backdrop in mind that the drafters of the Model Penal Code developed the Code's general solicitation provision, § 5.02, which unequivocally establishes that a person may be held criminally liable for "solicit[ing] to commit a crime."[86] This language serves two basic goals. First, it provides clear legislative recognition that the general inchoate offense of solicitation exists, "thereby remedying the omission that exist[ed] in those jurisdictions where common law crimes have been abolished."[87] Second, it "makes criminal the solicitation to commit *any offense*, thereby closing the gaps in common law coverage."[88]

As it relates to the first goal, general legislative recognition of solicitation liability, Model Penal Code § 5.02 has been quite influential. The contemporary legislative approach, reflected in a strong majority of American criminal codes, is to adopt a general solicitation statute that clearly specifies the target offenses to which solicitation liability applies.[89] Legislative adoption of general solicitation statutes of this nature is also a standard practice in states that have undertaken comprehensive code reform projects,[90] though it should be noted that "[e]ven in those jurisdictions with modern recodifications it is not uncommon for there to be no statute making solicitation a crime."[91] And, in those reform jurisdictions that have declined to adopt a general solicitation statute but abolished all common law crimes, general solicitation liability does not exist at all.[92]

As it relates to the second goal of the Code's drafters, extending general solicitation liability to all crimes, the Model Penal Code approach has been less influential. Generally speaking, there exists "considerable variation" concerning the breadth of coverage reflected in modern solicitation statutes.[93] A slim majority are consistent with Model Penal Code § 5.02(1) in that they criminalize solicitations to commit *any* crime.[94] But a strong plurality are materially narrower. Some state statutes,

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[85] Model Penal Code § 5.02 cmt. at 367.

[86] Model Penal Code § 5.02(1); *see* Model Penal Code § 5.02 cmt. at 367 ("General statutory provisions punishing solicitations were not common before the Model Penal Code.").

[87] Model Penal Code § 5.02 cmt. at 367.

[88] *Id.*

[89] *See* Robbins, *supra* note 43, at 116 ("Thirty-three states and the United States currently catalogue solicitation as a general substantive crime.").

[90] *See, e.g.*, Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Haw. Rev .Stat. § 705-510; Idaho Code § 18-2001; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Ky. Rev. Stat. Ann. § 506.030; Mont. Code Ann. § 45-4-101; N.H. Rev. Stat. Ann. § 629:2; N.Y. Penal Law § 100.00; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Wash. Rev. Code § 9A.28.030; Colo. Rev. Stat. Ann. § 18-2-301; Ga. Code Ann. § 16-4-7; Kan. Stat. Ann. § 21-5303; La. Rev. Stat. Ann. § 14:28; N.M. Stat. Ann. § 30-28-3; N.D. Cent. Code § 12.1-06-03; Utah Code Ann. § 76-4-203; Wyo. Stat. § 6-1-302

[91] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 (listing Conn., Ind., Minn., Mo., Neb., N.J., Ohio and S.D.).

[92] *Id.*

[93] *Id.*

[94] *See* Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Haw. Rev .Stat. § 705-510; Idaho Code § 18-2001; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Ky. Rev. Stat. Ann. § 506.030; Mont. Code Ann. § 45-4-

for example, cover only the solicitation of felonies,[95] or all felonies plus particular classes of misdemeanors.[96] And others only apply to particular classes of felonies,[97] such as, for example, the federal solicitation statute, which limits the scope of general solicitation liability to crimes of violence.[98]

The above disparities in the prevalence and scope of general solicitation liability reflect the controversial nature of the offense.[99] It has been asserted, for example, that "a mere solicitation to commit a crime, not accompanied by agreement or action by the person solicited, presents no significant social danger."[100] The reason? "By placing an independent actor between the potential crime and himself, the solicitor has both reduced the likelihood of success in the ultimate criminal object and manifested an unwillingness to commit the crime himself."[101] On an even more basic level, however, concerns with general solicitation liability revolve around the "extremely inchoate nature of the crime," namely, it allows the penal system to punish conduct far back on the continuum of acts leading to a completed crime (i.e., "mere preparation" by attempt standards).[102] "Viewed solely as an inchoate offense," then, it has been argued that solicitation essentially "punish[es] evil intent alone."[103]

None of which is to say that there aren't sound justifications supporting general solicitation liability. It has been argued, for example, that solicitation liability appropriately accounts for the "special hazards posed by potential concerted criminal activity."[104] Indeed, few take issue with the existence of attempt liability, and "a solicitation is, if anything, more dangerous than a direct attempt, because it may give rise to the special hazard of cooperation among criminals."[105] Furthermore, "the solicitor, working his will through one or more agents, manifests an approach to crime more

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101; N.H. Rev. Stat. Ann. § 629:2; N.Y. Penal Law § 100.00; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Wash. Rev. Code § 9A.28.030.

[95] *See* Colo. Rev. Stat. Ann. § 18-2-301; Ga. Code Ann. § 16-4-7; Kan. Stat. Ann. § 21-5303; La. Rev. Stat. Ann. § 14:28; N.M. Stat. Ann. § 30-28-3; N.D. Cent. Code § 12.1-06-03; R.I. Gen. Laws Ann. § 11-1-9; Utah Code Ann. § 76-4-203; Va. Code Ann. § 18.2-29; Wyo. Stat. § 6-1-302.

[96] Iowa Code Ann. § 705.1; Or. Rev. Stat. § 161.435.

[97] Me. Rev. Stat. tit. 17-A, § 153; Tex. Penal Code Ann. § 15.03; Cal. Penal Code § 653f.

[98] 18 U.S.C.A. § 373 ("Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States . . . ."); *see* S. Rep. No. 98–225, 98th Cong., 2d Sess. 308 (1984), *reprinted in*, 1984 U.S. Code Cong. & Admin. News 3182, 3487 ("The Committee believes that a person who makes a serious effort to induce another person to commit a crime of violence is a clearly dangerous person and that his act deserves criminal sanctions whether or not the crime of violence is actually committed."); *United States v. Korab*, 893 F.2d 212, 215 (9th Cir. 1989).

[99] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 (noting that these variances reflect the absence of "a uniformity of opinion on the necessity of declaring criminal the soliciting of others to commit offenses").

[100] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g.*, *State v. Davis*, 319 Mo. 1222, 1236 (1928) (White, J., concurring); Robbins, *supra* note 43, at 116; WORKING PAPERS, *supra* note 48, at 370.

[101] Robbins, *supra* note 43, at 116; *see, e.g.*, LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11; Commentary on Haw. Rev. Stat. Ann. § 705-510; *People v. Werblow*, 241 N.Y. 55, 64-65 (1925).

[102] Robbins, *supra* note 43, at 116; *see, e.g.*, LAFAVE, *supra* NOTE 43, at 2 SUBST. CRIM. L. § 11.1; Commentary on Haw. Rev. Stat. Ann. § 705-510.

[103] Robbins, *supra* note 43, at 116.

[104] Model Penal Code § 5.02 cmt. at 365-66.

[105] *Id.*

intelligent and masterful than the efforts of his hireling."[106] And, as a matter of practice, "the imposition of liability for criminal solicitation has proved to be an important means by which the leadership of criminal movements may be suppressed."[107]

Efficacy aside, though, even those who support general solicitation liability admit that the basic "risk[s] inherent in the punishment of almost all inchoate crimes"—namely the possibility "that false charges may readily be brought, either out of a misunderstanding as to what the defendant said or for purposes of harassment"—are more pronounced in the solicitation context given that "the crime may be committed merely by speaking."[108] This problem, alongside the other issues raised above, perhaps explains why both the common law and contemporary legislative practice reflect a range of approaches to addressing the target offenses to which general solicitation liability attaches.

In sum, American legal authority supports recognition of general solicitation liability, but it does not provide clear direction concerning appropriate scope of coverage. At the very least, however, it does indicate that the District's current approach, of subjecting only crimes of violence to general solicitation liability, is a reasonable one, which effectively balances the competing policy considerations implicated by the topic. It is, therefore, the approach incorporated into the RCC pursuant to § 302(a)(3), which clarifies that only crimes of violence provide the basis for general solicitation liability.

RCC §§ 302(a), (b), & (c): Relation to National Trends on Codification. There is wide variance between jurisdictions insofar as the codification of a general definition of solicitation is concerned.[109] Generally speaking, though, the Model Penal Code's general provision, § 5.02,[110] provides the basis for most contemporary reform efforts. The

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[106] *Id.*; *see People v. Kauten*, 324 Ill. App. 3d 588, 592 (2001) (relying on similar reasoning to reject claim that punishment of solicitation more severely than conspiracy is unconstitutionally disproportionate).

[107] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[108] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. *See also* WORKING PAPERS, *supra* note 48, at 372 ("[E]ven for persons trained in the art of speech, words do not always perfectly express what is in a man's mind. Thus in cold print or even through misplaced emphasis, a rhetorical question may appear to be a solicitation. The erroneous omission of a word could turn an innocent statement into a criminal one.").

[109] *See, e.g., Com. v. Barsell*, 424 Mass. 737, 740 (1997) ("As increasing numbers of States have chosen to codify their law on solicitation, a great variety of approaches to criminal solicitation have emerged.")

[110] The entirety of this provision reads as follows:

> (1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.
>
> (2) Uncommunicated Solicitation. It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.
>
> (3) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise

general definition of solicitation incorporated into RCC §§ 303(a), (b), and (c) incorporates drafting techniques from the Model Penal Code while, at the same time, utilizing a few techniques, which depart from it. These departures are consistent with the interests of clarity, consistency, and accessibility.

The most noteworthy drafting decision reflected in the Model Penal Code's general definition of solicitation is the manner in which the culpable mental state requirement of solicitation is codified. Notwithstanding the Model Penal Code drafters' general commitment to element analysis, the culpability language utilized in § 5.02(1) reflects offense analysis, and, therefore, leaves the culpable mental state requirements applicable to solicitation ambiguous.[111]

Illustrative is the prefatory clause of Model Penal Code § 5.02(1), which entails proof that the defendant make the requisite request "with the purpose of promoting or facilitating" the commission of the offense that is the object of the solicitation. Viewed from the perspective of element analysis, the import of this language is less than clear. On the one hand, the purpose requirement is framed in terms of commission of the *target offense*. On the other hand, all (target) offenses are comprised of different elements (namely, conduct, results, and circumstances). It is, therefore, unclear to which of the elements of the target offense this purpose requirement should be understood to apply.[112]

That the Model Penal Code fails to clarify the culpable mental state requirement (if any) applicable to each element of a solicitation appears, at least in part, to have been intentional. More specifically, the commentary to Model Penal Code § 5.02 explicitly states that the "matter" of whether the results and circumstances are subject to a principle of culpable mental state equivocation or elevation "is deliberately left open."[113] And this silence is consistent with the Code's approach to conspiracy, reflected in Model Penal Code § 5.03(1), which "does not attempt to [address the culpable mental state requirement of conspiracy] by explicit formulation . . . but affords sufficient flexibility for satisfactory decision as such cases may arise."[114]

While consistent with the Model Penal Code's conspiracy provisions, however, this grant of policy discretion to the courts is no less problematic. The codification virtues of clarity, consistency, and fair notice all point towards providing comprehensive legislative guidance concerning the culpable mental state requirement of solicitation.[115] Indeed, at least one court has observed that the law of solicitation "is an area that *must* be left to comprehensive legislation, rather than the type of ad hoc, fact-specific, case-by-case development that would result from an attempt to solve [related policy issues

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> prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Model Penal Code § 5.02.

[111] *See also* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 756 (1983) (setting forth similar critique of Model Penal Code approach to codifying conspiracy).

[112] *See id.*

[113] Model Penal Code § 5.02(1) cmt. at 371 n.23.

[114] Model Penal Code § 5.03(1) cmt. at 113.

[115] *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 332-366 (2005).

through] continued reliance on common law."[116] Comprehensive solicitation legislation also serves the interests of due process, however: "[c]riminal statutes are," after all, "constitutionally required to be clear in their designation of the elements of crimes, including mental elements."[117]

Since publication of the Model Penal Code, state legislatures have modestly improved upon the Code's treatment of solicitation's culpable mental state requirement. For example, a handful of jurisdictions helpfully clarify by statute that solicitation's purpose requirement (or its substantive equivalent) specifically applies to "conduct constituting a crime."[118] While helpful, however, no state statute has attempted to deal comprehensively with the state of mind required for the circumstance or result elements that comprise the target of a solicitation. Which is to say: there is no American criminal code that fully implements a statutory element analysis of solicitation's culpable mental state requirement.

The RCC approach to codifying the culpable mental state of solicitation, in contrast, strives to provide that clarification, while at the same time avoiding unnecessary complexity to the extent feasible. This is accomplished in three steps.

To start, the prefatory clause of RCC § 302(a) establishes that the culpability requirement applicable to a criminal solicitation necessarily incorporates "the culpability required by [the target] offense." This language is modeled on the prefatory clauses employed in various modern attempt statutes.[119] It effectively communicates that solicitation liability requires, at minimum, proof of the culpable mental states (if any) governing the results and circumstances of the target offense.[120]

Next, RCC § 302(a)(1) clearly and directly articulates that solicitation's distinctive purpose requirement governs the conduct which constitutes the object of the command, request, or efforts at persuasion. This is achieved by expressly applying a

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[116] *Barsell*, 424 Mass. 737 at 741; *see also* Robinson & Grall, *supra* note 153, at 754 ("The ambiguous language of the conspiracy provision coupled with the ambivalent language of the commentary indicates a need for clarification."). As one commentator frames the issue:

> Although the MPC writers apparently believed that the resolution of the question was best left open to subsequent judicial developments, I believe that statutory language should clearly and unequivocally resolve the question. Criminal statutes are constitutionally required to be clear in their designation of the elements of crimes, including mental elements.

Wesson, *supra* note 93, at 209.

[117] Wesson, *supra* note 93, at 209.

[118] *See* Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Del. Code Ann. tit. 11, § 501; Ga. Code Ann. § 16-4-7; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; Or. Rev. Stat. § 161.435.

[119] For example, Model Penal Code § 5.01(1) reads: "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime . . . ." For state statutes employing this language, see, for example, Ky. Rev. Stat. Ann. § 506.010; Tenn. Code Ann. § 39-12-101.

[120] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 201(d) (culpability requirement defined). This clause also addresses broader aspects of culpability such as, for example, premeditation, deliberation, or the absence of any mitigating circumstances, which the target of a conspiracy might likewise require. A conspiracy to commit such an offense would, pursuant to the prefatory clause of § 303(a), require proof of the same.

culpable mental state of purpose to the conduct requirement of solicitation. More specifically, RCC § 302(a)(1) states that the solicitor must, "*[p]urposely" command, request, or try to persuade another to* . . . engage in or aid the planning or commission of [criminal] conduct."

A handful of states have followed a similar approach to codification in the sense that they clarify, by statute, that a purpose requirement applies to the conduct that constitutes the object of the solicitation.[121] Notably, however, these jurisdictions do so through a different clause that, like the Model Penal Code approach to codifying the culpable mental state requirement of solicitation, separates the purpose requirement from the conduct requirement.[122] The latter approach is unnecessarily verbose—whereas the drafting technique employed in the RCC allows for a more succinct general statement of the culpable mental state requirement governing solicitation.

Finally, RCC § 302(b) provides explicit statutory detail, not otherwise afforded by any other American criminal code, concerning the extent to which principles of culpable mental state elevation govern the results and circumstances of the target offense.[123] More specifically, RCC § 302(b) establishes that: "Notwithstanding subsection (a), to be guilty of a solicitation to commit an offense, that person must intend to bring about the results and circumstances required by that offense." This language incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a solicitation is comprised of a result or circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). For these offenses, proof of intent on behalf of the solicitor is required as to the requisite elements under RCC § 302(b).

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the culpable mental state requirement governing a solicitation, which avoids the flaws and ambiguities reflected in Model Penal Code § 5.02(1).

One other drafting flaw reflected in the Model Penal Code approach to codifying solicitation liability, which is likewise addressed by the RCC, is the disposition of uncommunicated solicitations. The relevant general provision, Model Penal Code § 5.02(2), establishes that "[i]t is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication." Generally speaking, this provision clarifies that the intended recipient of a solicitor's communication need not receive it. Left unclear, however, is just how far along the defendant must be in actually effecting the requisite communication.

Consider, for example, that a solicitor may fail to communicate with another person because the intended recipient never receives the message—e.g., the police intercept a murder for hire letter already placed in the mail by the defendant.

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[121] *See supra* note 90 (collecting statutory authorities).

[122] For example, Model Penal Code § 5.02(1) states, first, that a person must act "with the purpose of promoting or facilitating [] commission" of a crime, and, second, that he must "command[], encourage[] or request[] another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission."

[123] *See* RCC § 302(b) ("Notwithstanding subsection (a), to be liable for solicitation, the person must at least intend to bring about any results and circumstances required by the target offense.")

Alternatively, a solicitor may fail to communicate with the intended recipient because the message is never sent—e.g., the police intercept the solicitor holding a murder for hire letter while making his way to the post office. In the first situation, the person has engaged in what might be considered a "complete attempt" at communication, which is to say the person failed to achieve his criminal objective notwithstanding the fact that he was able to carry out the entirety of his criminal plans (i.e., placing the letter in the mail). In the second situation, in contrast, the person has only engaged in what might be considered an "incomplete attempt" at communication since he was unable to carry out the entirety of his criminal plans due to external interference.

With this distinction in mind, the requirement of "conduct [] designed to effect [] communication" stated in Model Penal Code's § 5.02(2) is ambiguous as to whether *only* complete attempts at communication provide the basis for general solicitation liability, or, alternatively, whether incomplete attempts will *also* suffice. (Assuming incomplete attempts suffice, moreover, the Code is furthermore silent on *just how much progress*—e.g., dangerous proximity versus substantial step—must be made in the development of criminal communications.)

Fortunately, the Model Penal Code commentary explicitly addresses this issue, explaining that proof of "the last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground."[124] Pursuant to this clarification, it is clear that the drafters only intended to extend general solicitation liability to *complete* attempts under Model Penal Code § 5.02(2). If true, however, then the preferable approach to doing so would be to explicitly communicate this point by statute, rather than through commentary, particularly given that this statutory language is subject to multiple readings.[125]

This is the approach reflected in the RCC. More specifically, RCC § 302(c) states that "[i]t is immaterial under subsection (a) that the intended recipient of a person's command, request, or efforts at persuasion never received such communication provided that the person has done everything he or she plans to do to effect the communication."[126]

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[124] Model Penal Code § 5.02 cmt. at 381.

[125] Many state solicitation statutes that omit a provision such as Model Penal Code § 5.02(2) instead provide that "attempts" to communicate provide a viable basis for solicitation liability. *See supra* note 70 (collecting statutory citations). Such an approach is equally, if not more, ambiguous, however, for the same reasons just noted. RCC § 302(c) avoids such problems by referencing "trying" to communicate rather than "attempting" to communicate.

[126] Three additional departures from the Model Penal Code approach to codification bear notice. First, RCC § 302(a) references "trying to persuade" in lieu of "encouragement" as utilized in Model Penal Code § 5.02(1). The rationale and legislative authorities in support of this revision are provided *supra* note 48. Second, RCC § 302(a)(3) references "aid[ing] [in] the planning or commission of conduct" to address the relationship between solicitation and accomplice liability in lieu of the Model Penal Code's reference to "complicity in its commission" in § 5.02(1). This revision more clearly expresses the relevant principle of accessorial liability, while also ensuring that the RCC's general definition of solicitation runs parallel with the RCC's general definition of conspiracy, which utilizes the same language. *See* RCC § 303(a) ("Purposely agree 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 . . . ."). Third, RCC § 302(a)(3) references "conduct, which, if carried out, will constitute that offense" in lieu of the phrase "*specific* conduct" as utilized in Model Penal Code § 5.02(1). This revision, it is submitted, more clearly describes the nature of the communication necessary to support solicitation liability. *See also* Model Penal Code § 5.02 cmt. at 376 n.48 (collecting legislative authorities in support).

RCC § 22E-303. Criminal Conspiracy.

Relation to National Legal Trends. RCC §§ 303(a) and (b) are in part consistent with, and in part depart from, national legal trends.

Most of the substantive policies incorporated into RCC §§ 303(a) and (b)—namely, the purpose requirement governing conduct, the principle of intent elevation governing results and circumstances, the agreement requirement, the overt act requirement, and the exclusion of non-criminal objectives—reflect majority or prevailing legal trends governing the law of conspiracy.[1] The most notable exception is the plurality requirement codified by RCC § 303(a), which reflects a minority trend.

Comprehensively codifying the culpable mental state requirement and conduct requirement applicable to criminal conspiracies is in accordance with widespread, modern legislative practice. However, the manner in which RCC §§ 303(a) and (b) codify these requirements departs from modern legislative practice in a few notable ways.

A more detailed analysis of national legal trends and their relationship to RCC §§ 303(a) and (b) is provided below. It is organized according to seven main topics: (1) the plurality requirement; (2) the agreement requirement; (3) the culpable mental state requirement; (4) impossibility; (5) the overt act requirement; (6) conspiracies to achieve non-criminal objectives; and (7) codification practices.

RCC § 303(a) (Prefatory Clause): Relation to National Legal Trends on Plurality Requirement. Within American criminal law, it is well established that the general inchoate offense of conspiracy is comprised of an intentional agreement to commit a criminal offense.[2] One fundamental issue at the heart of what this formulation actually means, however, is whether conspiracy is a *bilateral* or *unilateral* offense.

The bilateral approach to conspiracy incorporates a plurality principle under which proof of a subjective agreement between at least two parties who share a particular criminal objective is a necessary ingredient of conspiracy liability.[3] The unilateral

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[1] *But see infra* notes 207-14 and accompanying text (discussing the difference between purpose and intent elevation for results).

[2] *See, e.g., Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Braverman v. United States*, 317 U.S. 49, 53 (1942). By way of historical background:

> [T]he crime of conspiracy itself is of relatively modern origins. The notion that one may be punished merely for agreeing to engage in criminal conduct was unknown to the early common law . . . Until the late seventeenth century, the only recognized form of criminal conspiracy was an agreement to make false accusations or otherwise to misuse the judicial process . . . And it was not until the nineteenth century that courts in the United States began to view conspiracies as distinct evils . . . .

State v. Pond, 108 A.3d 1083, 1096-97 (Conn. 2015) (internal citations and quotations omitted). It is commonly recognized that "the crime of conspiracy serves two important but different functions: (1) as with solicitation and attempt, it is a means for preventive intervention against persons who manifest a disposition to criminality; and (2) it is also a means of striking against the special danger incident to group activity." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.

[3] *See, e.g., People v. Justice*, 562 N.W.2d 652, 658 (Mich. 1997). This means that a conspiracy prosecution "must fail in the absence of proof that at least two persons possessed the requisite *mens rea* of a conspiracy, i.e., the intent to agree and the specific intent that the object of their agreement be achieved." DRESSLER,

approach to conspiracy, in contrast, rejects this kind of plurality principle, instead allowing for conspiracy liability to be applied to a person who him or herself agrees to commit a crime, provided that he or she believes another person has entered into that agreement.[4]

The difference between these two views of conspiracy liability is most significant in cases in which one person, committed to furthering a criminal enterprise, approaches another seeking to enlist his or her cooperation.[5] If the other party *seems* to agree, but secretly withholds agreement (perhaps even resolving to notify the authorities), the initiating person is guilty of conspiracy under a unilateral approach, but not under a bilateral approach.[6] The bilateral approach also rejects conspiracy liability where the only other party to an alleged conspiracy is mentally incapable of agreeing—whereas the unilateral approach would not.[7]

Historically speaking, conspiracy emerged as a bilateral offense.[8] In the eyes of the common law, the gist of a conspiracy is an agreement, and an agreement is generally understood to be a group act.[9] So unless two or more people are parties to an agreement, it does not make sense to speak of a conspiracy.[10] Typical older conspiracy statutes codified this bilateral approach by framing the offense in terms of an agreement between "two or more persons."[11]

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supra note 61, at § 29.06. It does not mean, however, that two persons must be prosecuted and convicted of conspiracy to support a conviction for any one person. *See id.* (citing *Commonwealth v. Byrd*, 417 A.2d 173, 176–77 (Pa. 1980); *State v. Colon*, 778 A.2d 875, 883 (Conn. 2001); *State v. Johnson*, 788 A.2d 628, 632–33 (Md. 2002)). Where, however, "all other alleged coconspirators are acquitted, the conviction of one person for conspiracy will not be upheld." *United States v. Bell*, 651 F.2d 1255, 1258 (8th Cir. 1981); *see* Michelle Migdal Gee, *Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators*, 19 A.L.R.4th 192 (Westlaw 2017). For a discussion of the extent to which this "traditional rule" appears to be "breaking down," see DRESSLER, *supra* note 61, at § 29.06 n.117. And for conflicting case law on the impact of a *nolle prosequi*, compare *United States v. Fox*, 130 F.2d 56 (3d Cir. 1942) with *Regle v. State*, 9 Md. App. 346 (1970).

[4] *See, e.g., State v. Rambousek*, 479 N.W.2d 832, 833–34 (N.D. 1992). In practical effect, this means that although the prosecution may not convict a person of conspiracy in the absence of proof of an agreement, it is no defense that the person with whom the actor agreed: (1) has not been or cannot be convicted; or (2) is acquitted in the same or subsequent trial on the ground that she did not have the intent to go forward with the criminal plan (e.g., she feigned agreement in an effort to frustrate the endeavor, or is insane). DRESSLER, *supra* note 61, at § 29.06; *see State v. Kihnel*, 488 So.2d 1238, 1240 (La. App. 4 Cir. 1986) (under the unilateral approach, "the trier-of-fact assesses the subjective individual behavior of a defendant, rendering irrelevant in determining criminal liability the conviction, acquittal, irresponsibility, or immunity of other co-conspirators.").

[5] *See* Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 220 (1981).

[6] *See e.g., State v. Pacheco*, 882 P.2d 183, 186 (Wash. 1994); *Palato v. State*, 988 P.2d 512, 515–16 (Wyo. 1999); *United States v. Escobar de Bright*, 742 F.2d 1196, 1199–200 (9th Cir. 1984); *Archbold v. State*, 397 N.E.2d 1071 (1979); *Moore v. State*, 290 So.2d 603 (Miss. 1974).

[7] *See Regle*, 264 A.2d at 119. More generally, under the bilateral approach, "any defense of a co-conspirator that undercuts his intention to agree or the validity of his agreement, would serve to prevent proof of the required element of 'agreement' in a prosecution of the defendant-co-conspirator." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 82 (Westlaw 2017).

[8] *See, e.g., Pettibone v. United States*, 148 U.S. 197 (1893); *Morrison v. California*, 291 U.S. 82, 92 (1934).

[9] DRESSLER, *supra* note 61, at § 29.06.

[10] *Id.*

[11] *See, e.g.,* D.C. Code § 22-1805a; Cal. Penal Code § 182.

In recent years, the trend among reform jurisdictions has been to replace the common law's bilateral approach with a unilateral approach. Rather than require that "two or more persons" agree, contemporary conspiracy provisions more frequently focus on whether one person "agrees with [another] person."[12] Which is to say: these provisions "focus inquiry on the culpability of the actor whose liability is in issue, rather than on that of the group of which [she] is alleged to be a part."[13] The basis for this shift is rooted in the Model Penal Code.

More specifically, the Model Penal Code's general conspiracy provision, § 5.03(1)(a), establishes that "[a] person is guilty of conspiracy *with another person or persons* to commit a crime if . . . *he* . . . *agrees with such other person or persons* that they or one or more of them will engage in conduct that constitutes such crime . . . ."[14] Under this approach, "[g]uilt as a conspirator is measured by the situation as the actor views it."[15] Which is to say: so long as the defendant "believe[s] that he is agreeing with another that they will engage in the criminal offense," that person may be subjected to conspiracy liability under Model Penal Code § 5.03(1)(a).[16]

Since completion of the Model Penal Code, many jurisdictions have opted to abandon the common law's plurality principle. It now appears, for example, that a "majority of states [] apply[] the unilateral theory to the crime of conspiracy."[17] However, the general conspiracy statutes in some jurisdictions continue to retain the classic bilateral phraseology ("two or more persons").[18] Other jurisdictions appear to

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[12] *See, e.g., Miller v. State*, 955 P.2d 892, 897 (Wyo. 1998).
[13] Model Penal Code § 5.03 cmt. at 393, 398–402.
[14] Model Penal Code § 5.03.
[15] Model Penal Code § 5.03 (explanatory note).
[16] *Id.* Under the foregoing approach, [a]n actor may be found guilty of conspiracy even if the person with whom he conspires objectively agrees but intends to and actually does inform the police of the agreement, or if the co-conspirator renounces his criminal intent." ROBINSON, *supra* note 123, at 1 CRIM. L. DEF. § 82. Indeed, "[t]his unilateral culpability standard is accepted even in instances where the co-conspirator is not apprehended, is not indicted, is acquitted, or is not prosecuted." *Id.*; *see* Model Penal Code § 5.04(1)(b) (Generally speaking, "it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that . . . the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.")
[17] *Miller*, 955 P.2d at 894. For criminal codes that incorporate a unilateral statutory formulation, *see* Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ariz. Rev. Stat. Ann. § 13-1003; Ark. Code Ann. § 5-3-401; Colo. Rev. Stat. Ann. § 18-2-201; Del. Code Ann. tit. 11, § 511; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-8; Haw. Rev. Stat. § 705-520; Ind. Code Ann. § 35-41-5-2; Kan. Stat. Ann. § 21-5302; Ky. Rev. Stat. Ann. § 506.040; Me. Rev. Stat. Ann. tit. 17-A, § 151; Minn. Stat. Ann. § 609.175; Mo. Ann. Stat. § 564.016; Mont. Code Ann. § 45-4-102; Neb. Rev. Stat. § 28-202; Nev. Rev. Stat. Ann. § 175.251; N.H. Rev. Stat. Ann. § 629:3; N.J. Stat. Ann. § 2C:5-2; N.M. Stat. Ann. § 30-28-2; N.Y. Penal Law § 105.00; N.D. Cent. Code § 12.1-06-04; Ohio Rev. Code Ann. § 2923.01; Or. Rev. Stat. § 161.450; Pa. Cons. Stat. Ann. tit. 18, § 903; Tex. Penal Code Ann. § 15.02; Utah Code Ann. § 76-4-201; Va. Code Ann. § 18.2-22; Wis. Stat. Ann. § 939.31; Wyo. Stat. § 6-1-303; Conn. Gen. Stat. Ann. § 53a-48; Ill. Comp. Stat. Ann. ch. 720, § 5/8-2; Wash. Rev. Code § 9A.28.040. Such language is typically interpreted to yield a unilateral approach. *See, e.g., Miller*, 955 P.2d at 894; *People v. Schwimmer*, 66 A.D.2d 91 (N.Y. App. Div. 1978), aff'd, 47 N.Y.2d 1004 (1979); *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *but see infra* note 135 and accompanying text.
[18] *See, e.g.*, 18 U.S.C.A. § 371; D.C. Code § 22-1805a; La. Stat. Ann. § 14:26; Cal. Penal Code § 182. It's worth noting that while the general conspiracy statute in a particular jurisdiction may be unilateral, that

adopt the Model Penal Code's unilateral phrasing ("one person agrees with another person"), yet their state appellate courts have nevertheless construed them to yield a bilateral approach.[19]

Driving this disparity of treatment are the competing considerations respectively implicated by the bilateral and unilateral approaches. As a matter of plain English, for example, the plurality principle has strong intuitive appeal. As noted above, early proponents of the bilateral approach to conspiracy emphasized the common sense notion of agreement, under which it is simply "impossible for a man to conspire with himself."[20] Even today, however, legal authorities point towards "dictionary definitions" of agreement as providing a relevant basis for preserving a bilateral approach.[21]

Those who support a unilateral approach to conspiracy, in contrast, argue that considerations of social policy ought to outweigh concerns of linguistic usage. For example, proponents of the unilateral approach argue that it is the policy that best serves the "subjectivist" goal of incapacitating dangerous offenders.[22] As one court phrases it: an actor "who fails to conspire because her 'partner in crime' is an undercover officer feigning agreement is no less personally dangerous or culpable than one whose colleague in fact possesses the specific intent to go through with the criminal plan."[23]

Proponents of the unilateral approach additionally argue that recognition of a plurality principle undermines the law enforcement purpose of conspiracy laws.[24] Illustrative is the situation of an undercover police officer who feigns willingness to agree with an unsuspecting criminal.[25] Under a bilateral approach, that officer might have to wait until the criminal engages in sufficient conduct in furtherance of the agreed-upon criminal objective to meet the standard for attempt liability in order to ensure the existence of a prosecutable offense.[26]

Contemporary proponents of a bilateral approach tend to find the above lines of reasoning to be less than entirely persuasive, however.[27] For one thing, the extent to which the bilateral approach specifically undermines the law enforcement purpose of conspiracy laws may be overstated since a defendant who encourages, requests, or commands an undercover officer to commit a crime may—even absent true agreement on that officer's part—be found guilty of solicitation.[28]

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same jurisdiction may also have other special conspiracy statutes that are not. *See, e.g., Palato v. State*, 988 P.2d 512 (Wyo. 1999).

[19] *See, e.g., State v. Colon*, 778 A.2d 875 (Conn. 2001) (construing Conn. Gen. Stat. Ann. § 53a-48); *People v. Foster*, 457 N.E.2d 405 (Ill. 1983) (construing Ill. Comp. Stat. Ann. ch. 720, § 5/8-2); *State v. Pacheco*, 125 Wash.2d 150 (1994) (construing Wash. Rev. Code § 9A.28.040); ROBINSON, *supra* note 123, at 1 CRIM. L. DEF. § 82.

[20] *Morrison v. California*, 291 U.S. 82, 92 (1934).

[21] *Pacheco*, 125 Wash. 2d at 154-55; *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965); *United States v. Derrick*, 778 F. Supp. 260, 265 (D.S.C. 1991).

[22] *See, e.g.*, Model Penal Code § 5.03 cmt. at 393.

[23] *Miller*, 955 P.2d at 897.

[24] *See* DRESSLER, *supra* note 61, at § 29.06.

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] *Id.* at n.122; *see, e.g., Pacheco*, 125 Wash. 2d at 156–58.

More broadly, those who today support a plurality principle argue that it directly accords with the objectivist "special dangers in group criminality" rationale at the heart of conspiracy liability.[29] Here, for example, is how both state and federal courts have phrased it:

> The primary reason for making conspiracy a separate offense from the substantive crime is the increased danger to society posed by group criminal activity . . . However, the increased danger is nonexistent when a person "conspires" with a government agent who pretends agreement. In the feigned conspiracy there is no increased chance the criminal enterprise will succeed, no continuing criminal enterprise, no educating in criminal practices, and no greater difficulty of detection.[30]

In sum, while the unilateral approach reflects the majority practice in American criminal law, there exists a significant minority of jurisdictions that appear to apply the bilateral approach currently recognized in District law. Because the plurality principle falls within the boundaries of longstanding American legal practice, is justifiable, and represents current District law, it is the approach incorporated into the RCC.

RCC § 303(a)(1): Relation to National Legal Trends on Agreement Requirement. The "essence"[31] of a conspiracy is the agreement.[32] It constitutes a necessary *actus reus* of the offense,[33] which is comprised of a "communion with a mind and will . . . on the

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[29] DRESSLER, *supra* note 61, at § 29.06. On the flipside, proponents of a bilateral approach argue that absent real agreement, conspiracy liability merely punishes bad intentions. Here's how one court has phrased it:

> When one party merely pretends to agree, the other party, whatever he or she may believe about the pretender, is in fact not conspiring with anyone. Although the deluded party has the requisite criminal intent, there has been no criminal act.

Pacheco, 125 Wash. 2d at 157 (citing *United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984) and Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 926 (1959)); *see, e.g.*, Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 929–30 (1977); Dierdre A. Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DEPAUL L. REV. 75, 93 (1979).

[30] *Pacheco*, 125 Wash. 2d at 157; *see, e.g., State v. Dent*, 123 Wash. 2d 467, 476 (1994); *Escobar de Bright*, 742 F.2d at 1199–1200; *United States v. Rabinowich*, 238 U.S. 78, 88, 35 S.Ct. 682, 684–85 (1915). One other concern highlighted by supporters of a bilateral approach is the "potential for abuse" in a unilateral regime. *Pacheco*, 125 Wash. 2d at 157. That is, "[i]n a unilateral conspiracy, the State not only plays an active role in creating the offense, but also becomes the chief witness in proving the crime at trial." *Id.* This state of affairs, in turn, "has the potential to put the State in the improper position of manufacturing crime." *Id.*

[31] *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

[32] *See, e.g., Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Braverman v. United States*, 317 U.S. 49, 53 (1942); *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999); *United States v. Roberts*, 14 F.3d 502, 511 (10th Cir. 1993); *Cuellar v. State*, 13 S.W.3d 449, 453 (Tex. App. 2000).

[33] *United States v. Shabani*, 513 U.S. 10, 16 (1994).

part of each conspirator."[34] It also provides externalized evidence that the parties intended for a crime to be committed.[35]

In practice, the agreement requirement is viewed quite broadly by American legal authorities. For example, it is well established that the agreement at the heart of conspiracy liability need not be express.[36] Nor is "a physical act of communication of an agreement (e.g., a nod of the head or some verbal exchange) required."[37] Rather, proof of a mere tacit understanding can be sufficient to establish conspiracy liability.[38] And the requisite "agreement can exist although not all of the parties to it have knowledge of every detail of the arrangement, as long as each party is aware of its essential nature."[39]

One particularly important aspect of the agreement requirement reflected in American criminal law on conspiracy is its relationship with accessory liability. It is well established, for example, that the parties to a conspiracy need not themselves agree "to undertake all of the acts necessary for the crime's completion," let alone directly participate in the commission of an offense.[40] Rather, "[o]ne can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense."[41]

The following examples, recently highlighted by the U.S. Supreme Court recently in *Ocasio v. United States*, illustrate the relevance of this principle:

> Entering a dwelling is historically an element of burglary . . . but a person may conspire to commit burglary without agreeing to set foot inside the targeted home. It is enough if the conspirator agrees to help the person who will actually enter the dwelling, perhaps by serving as a lookout or driving the getaway car. Likewise, a specific intent to distribute drugs oneself is not required to secure a conviction for participating in a drug-

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[34] DRESSLER, *supra* note 61, at § 29.04.

[35] Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 695 (2011) ("[T]he agreement takes the law beyond the individual mental states of the parties, in which each person separately intends to participate in the commission of an unlawful act, to a shared intent and mutual goal, to a spoken or unspoken understanding by the parties that they will proceed in unity toward their shared goal.").

[36] *See* DRESSLER, *supra* note 61, at § 29.04.

[37] *Id*.; *see United States v. James*, 528 F.2d 999, 1011 (5th Cir. 1976). Which is to say that "[t]here need not be an explicit offer and acceptance to engage in a criminal conspiracy; the agreement may be inferred from evidence of concert of action among people who work together to achieve a common end." Steven R. Morrison, *The System of Modern Criminal Conspiracy*, 63 CATH. U. L. REV. 371, 405 (2014); *see, e.g., Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *United States v. Lopez*, 979 F.2d 1024, 1029 (5th Cir. 1992); *United States v. Hegwood*, 977 F.2d 492, 497 (9th Cir. 1992); *United States v. Simon*, 839 F.2d 1461, 1469 (11th Cir. 1988)).

[38] *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *United States v. Rea*, 958 F.2d 1206, 1213-14 (2d Cir. 1992); *United States v. Concemi*, 957 F.2d 942, 950 (1st Cir. 1991).

[39] *Blumenthal v. United States*, 332 U.S. 539, 557–58 (1947); *see People v. Mass*, 628 N.W.2d 540, 549 n.19 (Mich. 2001).

[40] *Salinas v. United States*, 522 U.S. 52, 65 (1997).

[41] *Id.* at 64-65 ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.").

> trafficking conspiracy. Agreeing to store drugs at one's house in support of the conspiracy may be sufficient.[42]

That planned participation as an accessory will provide the basis for conspiracy liability "if the requisite consensus is involved" is not only an established common law principle.[43] It also reflects the "contemporary understanding" of conspiracy liability.[44] The basis for the modern approach to the issue is rooted in the provisions of the Model Penal Code and the proposed Federal Criminal Code.[45]

The relevant Model Penal Code provision, § 5.03(1)(b), permits a person to be convicted of conspiracy if he or she "agrees to aid such other person or persons in the planning or commission of such crime . . ."[46] The commentary to this provision emphasizes that, pursuant to such language, the "actor need not agree 'to commit' the crime."[47] Rather, "so long as the purpose of the agreement is to facilitate commission of a crime," conspiracy liability is appropriate under circumstances where the planned participation is of an accessorial nature.[48]

The proposed Federal Criminal Code employs a similar approach, albeit articulated through different language. Under the relevant provision, § 1004(1), "[a] person is guilty of conspiracy if he agrees with one or more persons *to engage in or cause the performance of conduct* which, in fact, constitutes a crime or crimes . . . ."[49] By enabling conspiracy liability to rest upon causing another person to engage in conduct that constitutes a crime, this proposed Federal Criminal Code provision would explicitly enable planned accessorial participation to provide the basis for conspiracy liability.[50]

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[42] 136 S. Ct. 1423, 1430 (2016). Likewise, where "D1 agrees to provide D2 with a gun to be used to kill V, D1 is guilty of conspiracy to commit murder, although she did not agree to commit the offense herself." DRESSLER, *supra* note 61, at § 29.04 n.77

[43] *United States v. Barnes*, 158 F.3d 662, 671 (2d Cir. 1998) (quoting Model Penal Code § 5.03 cmt. at 421). *See, e.g., United States v. Holte*, 236 U.S. 140, 144 (1915); *see United States v. Rabinowich*, 238 U.S. 78, 86 (1915); *Direct Sales Co. v. United States*, 319 U.S. 703, 712 (1943).

[44] *Salinas*, 522 U.S. at 64–65; *see, e.g., United States v. Barnes*, 158 F.3d 662, 671 (2d Cir. 1998); *United States v. Perry*, 643 F.2d 38, 46-47 (2d Cir. 1981); *United States v. Middlebrooks*, 618 F.2d 273, 278-79 (5th Cir.), *modified in part*, 624 F.2d 36 (5th Cir. 1980).

[45] Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1134 (1975).

[46] Model Penal Code § 5.03(1)(b).

[47] Model Penal Code § 5.03(1)(b) cmt. at 409.

[48] *Id.*

[49] Proposed Federal Criminal Code § 1004(1).

[50] *Id.*; *see* Buscemi, *supra* note 161, at 1134. Here's an example:

> [S]uppose A and B agree to solicit C to murder X. If C consents and successfully implements the plan, A and B would surely be liable not only for solicitation, but also, under a complicity theory, for murder. Completely apart from C's reaction, though, A and B would probably be liable for conspiracy to commit murder under a statute which defined that inchoate offense as an agreement to engage in or *cause the performance of conduct constituting the substantive crime.*

Id. (emphasis added).

Numerous modern criminal codes explicitly codify one of these two formulations.[51] However, "[e]ven under statutes defining conspiracy simply as an agreement *to commit* a crime," courts routinely conclude that planned participation as an accessory provides an appropriate basis for conspiracy liability—notwithstanding the absence of an explicit legislative hook.[52]

Consistent with national legal trends outlined above, agreements to aid in the planning or commission of criminal conduct, no less than agreements to directly perpetrate criminal conduct, fall within the boundaries of conspiracy liability under § 303(a)(1) of the RCC.

RCC §§ 303(a) & (b): Relation to National Legal Trends on Culpable Mental State Requirement. Understanding conspiracy's culpable mental state requirement is particularly crucial to denoting the contours of criminal liability given that this frequently charged offense is "predominantly mental in composition."[53] Complicating this understanding, however, is the fact that there has "always existed considerable confusion and uncertainty about precisely what mental state is required for this crime."[54] That American legal authorities have long struggled to address the culpable mental state requirement governing conspiracy is not surprising, however: it is a "particularly challenging" topic by any standard.[55]

Historically speaking, the treatment of the culpable mental state requirement of conspiracy in American criminal law has evolved in a manner similar to that of the culpable mental state requirement governing complicity. At common law, for example, both conspiracy and complicity were viewed through the lens of offense analysis, under which each was understood to entail proof of a "specific intent." That is, whereas conspiracy liability entailed proof of a "specific intent" to commit an agreed-upon offense,[56] complicity required proof of a "specific intent" to aid another in the commission of an offense.[57] More recently, however, American legal authorities have come to realize that both of these *mens rea* formulations are fundamentally ambiguous. The reason? They fail to take "account of both the policy of the inchoate crime and the policies, varying elements, and culpability requirements of all substantive crimes."[58]

Ordinarily, a clear element analysis of a consummated crime entails a consideration of "the actor's state of mind—whether he must act purposely, knowingly, recklessly, or negligently—with respect to" the results and circumstances of an offense.[59] The same is also true of complicity and conspiracy, which respectively criminalize steps

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[51] *Compare, e.g.*, N.J. Stat. Ann. § 2C:5-2; 18 Pa. Stat. and Cons. Stat. Ann. § 903 *with* N.D. Cent. Code Ann. § 12.1-06-04; Wash. Rev. Code Ann. § 9A.28.040; N.Y. Penal Law § 105.17; Ala. Code § 13A-4-3 Or. Rev. Stat. Ann. § 161.450 ; Me. Rev. Stat. tit. 17-A, § 151.
[52] Buscemi, *supra* note 161, at 1134; *see supra* notes 155-60.
[53] Albert Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 632 (1941).
[54] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.
[55] Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 967 (1961).
[56] *See, e.g.*, LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2; *People v. Swain*, 12 Cal. 4th 593, 600 (1996).
[57] *Swain*, 12 Cal.4th at 602; *People v. Cortez*, 18 Cal. 4th 1223, 1232 (1998).
[58] Wechsler et al., *supra* note 171, at 967.
[59] *Id.*

towards completion of a particular crime (respectively, aiding or agreeing to commit/aid an offense). At the same time, the inchoate and multi-participant nature of both complicity and conspiracy raises its own set of culpable mental state considerations, namely, the relationship between the actor's mental state and future conduct (often committed by someone else) that, if carried out, would consummate the target offense.[60]

For this reason, it is frequently said that both complicity and conspiracy incorporate "dual intent[]" requirements.[61] In the context of conspiracy, for example, the first intent requirement relates to the parties' culpable mental state with respect to future conduct: generally speaking, the parties must "intend," by their agreement, to promote or facilitate conduct planned to culminate in an offense.[62] The second intent requirement, in contrast, relates to the parties' culpable mental state with respect to the results and/or circumstance elements of the target offense: generally speaking, the parties must "intend," by their agreement, to bring them about.[63]

Upon closer consideration, each component of this double-barreled recitation of conspiracy's culpable mental state requirement encompasses key policy issues. With respect to the first intent requirement, for example, the central policy question is this: may a party to an agreement be convicted of conspiracy if he or she is *merely aware* (i.e., knows) that, by such agreement, he or she is promoting or facilitating conduct planned to culminate in an offense? Or, alternatively, must it proven that the accused *desires* (i.e., has the purpose) to promote or facilitate such conduct?

Resolution of this question is "crucial to the resolution of the difficult problems presented when a charge of conspiracy is leveled against a person whose relationship to a criminal plan is essentially peripheral."[64] Illustrative situations include: (1) whether the operator of a telephone answering service may be convicted of conspiracy for agreeing to provide telephone messages to known prostitutes;[65] or (2) whether a drug wholesaler may be convicted of conspiracy for agreeing to sell large quantities of legal drugs to a buyer who the wholesaler knows will use them for unlawful purposes.[66]

In these kinds of cases, "the person furnishing goods or services is aware of the customer's criminal intentions, but may not care whether the crime is committed."[67]

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[60] *See, e.g.,* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).

[61] For discussion of the dual intent requirement in the context of complicity, see *State v. Foster*, 202 Conn. 520, 526 (1987). For discussion of the dual intent requirement in the context of conspiracy, see, for example, *State v. Maldonado*, 2005-NMCA-072, ¶ 10, 137 N.M. 699, 702; *see also* Harno, *supra* note 169, at 631; *United States v. Alvarez*, 610 F.2d 1250, 1255 (5th Cir. 1980); *United States v. Piper*, 35 F.3d 611, 614-15 (1st Cir. 1994).

[62] Robinson, *supra* note 176, at 864.

[63] *Id.*

[64] Model Penal Code § 5.03 cmt. at 403.

[65] *See People v. Lauria*, 251 Cal. App. 2d 471 (Ct. App. 1967).

[66] *See Direct Sales Co. v. United States*, 319 U.S. 703 (1943).

[67] DRESSLER, *supra* note 61, at § 27.07. Typical also "is the case of the person who sells sugar to the producers of illicit whiskey," since he or she "may have little interest in the success of the distilling operation and be motivated mainly by the desire to make the normal profit from an otherwise lawful sale." Wechsler et al., *supra* note 171, at 1030. "To be criminally liable, of course," this actor "must at least have knowledge of the use to which the materials are being put"; however, "the difficult issue presented is whether knowingly facilitating the commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end." *Id.*

What remains to be determined is whether this culpable mental state provides a sufficient basis for a conspiracy conviction. Conflicting policy considerations are implicated in the resolution of this question, namely, "that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes."[68]

A "true purpose" view holds that the culpable mental state requirement governing conspiracy can only be satisfied by proof of a *conscious desire* to promote or facilitate criminal conduct by such agreement. As a matter of policy, it reflects the position that:

> [C]onspiracy laws should be reserved for those with criminal motivations, rather than seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders . . . [T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner. Indeed, in extending liability to merchants who know harm will occur from their activities, there is a risk that merchants who only suspect their customers' criminal intentions (thus, are merely reckless in regard to their customers' plans) will also be prosecuted, thereby seriously undermining lawful commerce.[69]

The knowledge view, in contrast, holds that *mere awareness* that one is promoting or facilitating the commission of a crime is considered to be sufficient, even absent a true purpose to advance the criminal end. As a matter of policy, it reflects the position that:

> [S]ociety has a compelling interest in deterring people from furnishing their wares and skills to those whom they know are practically certain to use them unlawfully. Free enterprise should not immunize an actor from criminal responsibility in such circumstances; unmitigated desire for profits or simple moral indifference should not be rewarded at the expense of crime prevention.[70]

Although case law from the mid-twentieth century appears to reflect both some disagreement[71] and ambiguity[72] on the choice between these two positions, it appears that

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[68] Model Penal Code § 5.03 cmt. at 403.

[69] *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940) (Hand, J.).

[70] DRESSLER, *supra* note 61, at § 27.07.

[71] *Compare Falcone*, 109 F.2d at 581; *Jacobs v. Danciger*, 328 Mo. 458, 41 S.W.2d 389 (1931) *with Quirk v. United States*, 250 F.2d 909, 911 (1st Cir. 1957); *United States v. Tramaglino*, 197 F.2d 928, 932 (2d Cir. 1952).

[72] This ambiguity is primarily a product of two U.S. Supreme Court decisions from the 1940s. The first decision, *United States v. Falcone*, held that proof of knowledge of a purchaser's illegal use of a product is insufficient to establish an inference of intent to facilitate a conspiracy. 311 U.S. 205, 208-10 (1940). Thereafter, in *Direct Sales Co. v. United States*, the U.S. Supreme Court held that proof of the sale of large quantities of controlled substances for profit with knowledge of the illicit distribution of those substances was sufficient to establish the intent required for conspiracy. 319 U.S. 703, 711-13 (1943). There is disagreement over whether and to what extent *Direct Sales* contradicts *Falcone*. *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2; *Maldonado*, 137 N.M. at 699. However, given that *Direct Sales* reaffirms

contemporary American criminal law has embraced the true purpose view.[73] The basis for this resolution of the issue is the work of the Model Penal Code.

Having considered the consequences of holding criminally liable those who knowingly provide goods or services to criminal schemes—whether under a conspiracy theory (based on agreement) or a complicity theory (based on assistance)—the Model Penal Code drafters ultimately opted against it, siding "in the complicity provisions of the Code[] in favor of requiring a purpose to advance the criminal end."[74] The Model Penal Code drafters thereafter deemed "the case" for this resolution to be an "even stronger one" in the context of conspiracy, thereby making "the same purpose requirement that governs complicity essential for conspiracy."[75]

More specifically, the Model Penal Code's general definition of conspiracy, § 5.03(1), like its general definition of complicity, § 2.06(3), requires proof that the requisite agreement was accompanied by "the purpose of promoting or facilitating the commission of the crime."[76] The relevant explanatory note to this provision states that "[t]he purpose requirement is meant to extend to [the] conduct elements of the offense that is the object of the conspiracy."[77] And the accompanying commentary explicitly states that this general requirement of purpose is intended to clarify that, among other issues, "[a] conspiracy does not exist if a provider of goods or services is aware of, but fails to share, another person's criminal purpose."[78]

Since publication of the Model Penal Code in 1962, the drafters' recommended embrace of the true purpose view appears to have been widely accepted. For example, "most of the modern codes specifically state that [a conscious desire] to commit a crime is required" by their general conspiracy offense.[79] Even outside of reform jurisdictions, however, "all the states which have demonstrated their intention to enact a relatively

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that the "inten[t] to further, promote and cooperate in" criminal activity "is the gist of conspiracy," which "is not identical with mere knowledge that another purposes unlawful action," 319 U.S. at 711-13, it seems that *Direct Sales* is not inconsistent with a true purpose view, see Model Penal Code § 5.03 cmt. at 404.

[73] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.

[74] Model Penal Code § 5.03 cmt. at 406.

[75] *Id.*

[76] Model Penal Code § 5.03(1).

[77] Model Penal Code § 5.03(1) (explanatory note)

[78] Model Penal Code § 5.03(1) cmt. at 404. *See also id.* (noting that this formulation "should also dispel the ambiguity inherent in many judicial formulations that predicate conspiracy on merely 'joining' or 'adhering' to a criminal organization or speak of an 'implied agreement' with the conspirators by aiding them 'knowing in a general way their purpose to break the law'").

[79] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 n.111. *See, e.g.*, Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ariz. Rev. Stat. Ann. § 13-1003; Ark. Code Ann. § 5-3-401; Colo. Rev. Stat. Ann. § 18-2-201; Conn. Gen. Stat. Ann. § 53a-48; Del. Code Ann. tit. 11, § 511; Fla. Stat. Ann. § 777.04; Haw. Rev. Stat. § 705-520; Ill. Comp. Stat. Ann. ch. 720, § 5/8-2; Ind. Code Ann. § 35-41-5-2; Ky. Rev. Stat. Ann. § 506.040; Me. Rev. Stat. Ann. tit. 17-A, § 151; Mo. Ann. Stat. § 564.016; Mont. Code Ann. § 45-4-102; Neb. Rev. Stat. § 28-202; N.H Rev. Stat. Ann. § 629:3; N.J. Stat. Ann. § 2C:5-2; N.M. Stat. Ann. § 30-28-2; N.Y. Penal Law § 105.00; Ohio Rev. Code Ann. § 2923.01; Or. Rev. Stat. § 161.450; Pa. Cons. Stat. Ann. tit. 18, § 903; Tenn. Code Ann. § 39-12-103; Tex. Penal Code Ann. § 15.02; Utah Code Ann. § 76-4-201; Wash. Rev. Code § 9A.28.040; W. Va. Code § 61-10-31; Wis. Stat. Ann. § 939.31. Note, however, that "at least two states have adopted criminal facilitation statutes that clearly and unequivocally eliminate the requirement that the defendant share the co-conspirator's [purpose] to commit a crime." *State v. Maldonado*, 137 N.M. 699, 703 n.2 (citing Ky. Rev. Stat. Ann. § 506.080; N.Y. Penal Law, §§ 115.00 to 115.08).

thorough codification of the conspiracy offense" seem to endorse the true purpose view.[80] The true purpose view also finds support in contemporary case law, which establishes that "knowing aid is not [a] sufficient" basis for liability.[81] Likewise, legal commentary similarly appears to support the true purpose view in the context of conspiracy liability.[82]

Whereas conspiracy's first intent requirement implicates a relatively narrow and bifurcated policy choice between purpose and knowledge as to conduct, conspiracy's second intent requirement implicates broader and more wide-ranging policy issues. At the heart of these issues are the various possibilities presented by an element analysis of the results and/or circumstances of a conspiracy.

Consider first the relationship between a would-be conspirator's state of mind and the result elements of the target offense. The parties to an agreement may purposely agree to cause a result, as would be the case where two gang members explicitly agree to assassinate a rival gang member. At the same time, the parties to an agreement may also agree to cause a result, acting knowingly, recklessly, or even negligently as to the particulars of that result. Illustrative is the situation of two gang members who agree to commit the daytime arson of a rival gang member's home, during which time the gang member's newborn daughter is normally sleeping. If the parties to the agreement are practically certain that the child will be home and trapped inside at the time of the arson, then they've knowingly agreed to kill the child. If, in contrast, the parties to the agreement are merely aware of a substantial risk that the child will be home and trapped inside at the time of the arson, then they've recklessly agreed to kill. And if the parties are not aware of a substantial risk that the child will be home and trapped inside during the time of the arson, but nevertheless should have been aware of this possibility, then they've negligently agreed to kill.

This analysis of results is similarly applicable to circumstances. Imagine, for example, that two friends agree to set up a sexual encounter between one of the friends and an underage female. If the friends desire to facilitate sex with the victim *because of her young age*, then they've purposely agreed to facilitate sex with a minor. If, in contrast, the friends are practically certain that the victim is underage, then they've knowingly agreed to facilitate sex with a minor. And if the friends are aware of a substantial risk that the victim is underage, then they've recklessly agreed to facilitate sex with a minor. But if the friends are not aware, yet should have been aware, of a substantial risk that the victim is underage then they've negligently agreed to facilitate sex with a minor.

Insofar as the above issues are concerned, American legal authorities uniformly support two general principles. First, a "conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent" applicable to the

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[80] Buscemi, *supra* note 161, at 1145–48; *see, e.g.*, W. Va. Code § 61-10-31; La. Rev. Stat. Ann. § 14:26

[81] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 n. 144. *See, e.g., United States v. Alvarez*, 610 F.2d 1250 (5th Cir. 1980), *on rehearing* 625 F.2d 1196 (5th Cir. 1980) (unloading illegal cargo of plane does not make one a member of the known conspiracy); *Maldonado*, 137 N.M. at 703 (selling pseudoephedrine to another, knowing it to be used to manufacture methamphetamine, no conspiracy); *Com. v. Nee*, 458 Mass. 174, 181, 935 N.E.2d 1276, 1282 (2010) ("[M]ere knowledge of an unlawful conspiracy is not sufficient to make one a member of it.") (quoting *Commonwealth v. Beal*, 314 Mass. 210, 222 (1943)).

[82] Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 53 COLUM. L. REV. 228, 239 (1953); DRESSLER, *supra* note 61, at § 29.05.

objective elements of "the substantive offense itself."[83] And second, "the culpability required for conviction of conspiracy at times must be greater than is required for conviction of the object of the agreement."[84] What remains to be determined, however, is the scope of the latter principle. For example, *when* must the culpable mental state requirement governing conspiracy be greater than that of the target offense, and, to the extent that this kind of elevation is appropriate, *which* culpable mental states will satisfy it? On these questions, American criminal law has generally not been a model of clarity.

The most well-established rule in this area of law is as follows: "[T]here is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result."[85] In practice, this rule does not preclude the government from charging conspiracies to commit target offenses comprised of results subject to a non-intentional culpable mental state. However, where "recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime, as, for example, when homicide through negligence is made criminal," proof of a higher culpable mental state is necessary to secure a conspiracy conviction.[86]

This rejection of reckless or negligent conspiracies (insofar as results are concerned) is deeply rooted, finding support in a broad range of common law and modern legal authorities. It seems implicit, for example, in the general statutory requirement of purpose—discussed *supra*—applicable to conspiracy liability originally proposed by the Model Penal Code and thereafter adopted by "most of the modern codes."[87] And indeed, state courts in reform jurisdictions routinely (but not always[88]) hold that a defendant cannot be charged with "conspir[ing] to commit a crime where the culpability is based upon the result of reckless [or negligent] conduct."[89] Outside reform jurisdictions the

[83] *Ingram v. United States*, 360 U.S. 672, 678 (1959); G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under Rico*, 33 AM. CRIM. L. REV. 1345, 1535 (1996). Note also that other culpability requirements governing the target offense are imported into a conspiracy charge. *See, e.g.*, *United States v. Chagra*, 807 F.2d 398 (5th Cir. 1986) (conspiracy to commit second degree murder legally possible, as where prosecution proves that at the moment of conspiratorial agreement, the intent "was impulsive and with malice aforethought"); *United States v. Croft*, 124 F.3d 1109 (9th Cir. 1997) (discussing *id.*).

[84] DRESSLER, *supra* note 61, at § 29.05.

[85] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.

[86] *State v. Donohue*, 150 N.H. 180, 183 (2003) (quoting Model Penal Code § 5.03 cmt. at 408); *see* DRESSLER, *supra* note 61, at § 29.05.

[87] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 n.111; *see* sources cited *supra* note 195.

[88] For example, Pennsylvania appellate courts appear to recognize reckless and negligent conspiracies. *See Commonwealth v. Johnson*, 719 A.2d 778, 785-86 (Pa. Super. 1998) (*en banc*) (defendant can be charged with conspiracy to commit third degree murder, which requires malice, not purpose); *see also Com. v. Weimer*, 602 Pa. 33, 38 (2009) ("If appellant conspired to intentionally, knowingly, recklessly, or negligently cause the death of [the victim], she may be found guilty regardless of which of those adverbs are found or not found by the jury.").

[89] *Donohue*, 150 N.H. at 185-86; *see, e.g., Palmer v. People*, 964 P.2d 524, 528-30 (Colo. 1998) (conspiracy to commit reckless manslaughter not a crime); *State v. Beccia*, 199 Conn. 1, 505 A.2d 683, 684-85 (1986) (conspiracy to commit reckless arson not a crime).

situation is much the same: "[n]umerous state courts" have exercised their common law authority to hold "that one cannot conspire to accomplish an unintended result."[90]

As for whether only a true purpose to cause a result—or, alternatively, a conscious desire *or* awareness/belief—will suffice, American legal authorities are less clear. Writing at the turn of the twentieth century, for example, one frequently cited law review article observes that "a person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees, when that action is unreasonable in view of that consequence; and thus his agreement to perform the unreasonable action is equivalent to an agreement to help accomplish its consequence."[91] This seems to indicate that either purpose or knowledge/intent as to a result is an appropriate basis to ground a conspiracy conviction.

More contemporary legal authorities seem to indicate, in contrast, that only a true purpose to cause a result will suffice. For example, the Model Penal Code drafters understood their general purpose requirement—"the purpose of promoting or facilitating" the commission of the crime—to entail a principle of culpable mental state elevation applicable to results under which "it would not be sufficient, as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it."[92]

The commentary to one modern criminal code, Hawaii, appears to endorse this principle of purpose elevation.[93] And it is also occasionally referenced by the courts in

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[90] *Donohue*, 150 N.H. at 184. *See People v. Swain*, 12 Cal.4th 593 997-1001 (1996) (conspiracy to commit reckless murder not a crime); *People v. Hammond*, 466 N.W.2d 335, 336-37 (Mich. 1991) (conspiracy to commit second-degree murder not a crime); *Evanchyk v. Stewart*, 340 F.3d 933, 939–40 (9th Cir. 2003) (holding conspiracy to commit murder requires an intent to kill and, therefore, felony murder may not be the predicate offense for a conspiracy conviction); *State v. Wilson*, 43 P.3d 851, 853–54 (Kan. 2002) (same); *United States v. Croft*, 124 F.3d 1109, 1121–22 (9th Cir. 1997) (noting an "intent to kill" is an essential element of conspiracy to commit second-degree murder); *United States v. Chagra*, 807 F.2d 398, 401 (5th Cir. 1986) (noting an "intent to kill" is an essential element of conspiracy to commit second-degree murder).

[91] *See* Note, *supra* note 145, at 923.

[92] Model Penal Code § 5.03 cmt. at 408-09; *see id.* ("[I]n relation to those elements of substantive crimes that consist of . . . undesirable results of conduct, the Code requires purposeful behavior for guilt of conspiracy, regardless of the state of mind required by the definition of the substantive crime."). So, for example:

> [S]uppose that D1 and D2 agree to set fire to an occupied structure in order to claim the insurance proceeds. If the resulting fire kills occupants, they may be convicted of murder on the ground that the deaths, although unintentional, were recklessly caused. They are not guilty of conspiracy to commit murder, however, because their objective was to destroy the building, rather than to kill someone.

DRESSLER, *supra* note 61, at § 29.06. However, D1 and D2 may be convicted of conspiracy to recklessly endanger the occupants of the building. *See* Model Penal Code § 211.2. This result is possible because their purpose, in the language of § 5.03(1)(a), was to "engage in conduct [setting fire to the building] that constitutes such crime [placing another person in danger of death or serious bodily injury, the actus reus of reckless endangerment]." DRESSLER, *supra* note 61, at § 29.06; *see also United States v. Mitlof*, 165 F. Supp. 2d 558, 565–66 (S.D.N.Y. 2001) ("[O]ne can be guilty of conspiring to violate a federal substantive statute that criminalizes negligent conduct.")

[93] Commentary to Haw. Rev. Stat. Ann. § 705-520.

reform jurisdictions, though it should be noted that these references all seem to occur in the context of cases involving prosecutions involving recklessness or negligence, not knowledge.[94] Indeed, there appears to be a dearth of case law directly addressing the purpose vs. knowledge issue head-on in the context of results, i.e., decisions overturning a conspiracy conviction where the parties formed an agreement with the *conscious desire* of facilitating planned conduct, *believing* it would result it some prohibited harm, on the rationale that the parties *did not consciously desire* that harm to occur.

Were such a case to arise, moreover, it's unclear why a principle of purpose elevation would be appropriate under the circumstances. Application of such a principle would mean, for example, that:

> [I]f two persons plan to destroy a building by detonating a bomb, though they know and believe that there are inhabitants in the building who will be killed by the explosion, they are nevertheless guilty only of a conspiracy to destroy the building and not of a conspiracy to kill the inhabitants.[95]

This "restrictive" outcome, some have argued, "is necessitated by the extremely preparatory behavior that may be involved in conspiracy."[96] Where, however, the actors' culpable knowledge or belief can be proven beyond a reasonable doubt, these mental states would seem to provide a legitimate basis for imposing liability for conspiracy to kill—just as they provide a legitimate basis for imposing liability for an attempt to kill.[97] Consistent with this perspective, others have argued in favor of allowing non-purposeful mental states (as to results) to ground both attempt and conspiracy convictions.[98]

It is therefore unclear, in the final analysis, whether a principle of purpose elevation or a principle of intent elevation best reflects national legal trends governing the results of the offense that is the target of a conspiracy.

With respect to the culpable mental state requirement governing the circumstances of the target of a conspiracy, in contrast, national legal trends seem to more clearly support a principle of intent elevation, though, again, the picture is relatively complex.

Part of this complexity is a product of the fact that the relevant legal authorities are nearly all contained in case law. For example, whereas the commentary to Model Penal Code § 5.03(1) clarifies that the drafters intended for the relevant purpose requirement to apply to conduct and results, the commentary explicitly deems the relationship between a would-be conspirator's state of mind and the circumstances of the target offense to be an issue "best left to judicial resolution."[99] And since publication of

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[94] *See State v. Mariano R.*, 123 N.M. 121 (1997); *State v. Borner*, 836 N.W.2d 383 (N.D. 2013).
[95] Model Penal Code § 5.03 cmt. at 408.
[96] Commentary to Haw. Rev. Stat. Ann. § 705-520.
[97] *But see id.* ("While this result may seem unduly restrictive from the viewpoint of the completed crime, it is necessitated by the extremely preparatory behavior that may be involved in conspiracy.").
[98] *See* Robinson & Grall, *supra* note 44, at 755–57 (intent elevation for both); Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1174–75 (1997) (reckless elevation for both).
[99] Model Penal Code § 5.01 cmt. at 414.

the Model Penal Code, only one reform jurisdiction, Hawaii, appears to have legislatively addressed the issue, and even then the relevant principle—one of intent elevation—is communicated through commentary.[100] (English statutory law more explicitly codifies a principle of intent elevation for circumstances.[101])

Another part of this complexity, however, is distinguishing between and understanding relevant state and federal case law, the latter of which tends to revolve around a distinctive kind of circumstance element, namely, those that are jurisdictional.[102]

More specifically, under federal law, culpable mental state issues concerning the circumstances of conspiracy most often present themselves in cases "in which some circumstance that affords a basis for federal jurisdiction, such as use of the mails or crossing state lines, is made an element of the crime."[103] Accordingly, the issue presented in these cases is whether a principle of culpable mental state elevation applies to a strict liability jurisdictional circumstance element of the target of a conspiracy.

The federal judicial response to this issue has been mixed. During the mid-twentieth century most of the relevant decisions "h[e]ld that, although knowledge of such circumstances is unnecessary for guilt of the substantive crime, it is necessary for guilt of conspiracy to commit that crime."[104] Since then, however, some (though not all)

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[100] The relevant commentary entry to Haw. Rev. Stat. § 705-520 reads:

> The Model Penal Code commentary leaves open the question of whether a defendant can be guilty of criminal conspiracy if the defendant is not aware of the existence of attendant circumstances specified by the definition of the substantive offense which is the object of the conspiracy. This is of obvious importance in those crimes, which do not require that the defendant act intentionally or knowingly with respect to attendant circumstances. It does not seem wise to leave this question to resolution by future interpretation . . . . *It seems clear, and it is the position of the [Hawaii Criminal] Code, that, because of the preparatory nature of conspiracy, intention to promote or facilitate the commission of the offense requires an awareness on the part of the conspirator that the circumstances exist.*

(emphasis added).

[101] More specifically, Section 1(2) of chapter 45 of the Criminal Law Act, 1977, provides:

> Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence . . . unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

See State v. Pond, 315 Conn. 451, 484 (2015) (noting that the foregoing "statutory language has since been amended in ways not relevant to the [*mens rea* of conspiracy]") (discussing Armed Forces Act, 2006, c. 52, § 45 (U.K.)); *see also* LAW COMM'N, WORKING PAPER NO. 50, *Inchoate Offenses: Conspiracy, Attempt and Incitement*, at 33 (1970).

[102] *See, e.g.*, *Pond*, 315 Conn. at 485.

[103] Wechsler et al., *supra* note 171, at 972.

[104] *Id.*; *see, e.g.*, *United States v. Tannuzzo*, 174 F.2d 177 (2d Cir. 1949) (causing stolen goods to be transported in interstate commerce); *United States v. Sherman*, 171 F.2d 619, 623 (2d Cir. 1948) (receiving goods stolen from interstate commerce); *Mansfield v. United States*, 155 F.2d 952 (5th Cir. 1946) (mail

subsequent federal cases appear to hold that when "knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense."[105]

The precise contours of federal case law on the culpable mental state requirement governing the circumstance element(s) of a conspiracy is much discussed; however, two basic points are relevant here. First, to the extent such case law supports a principle of culpable mental state equivocation, that principle only applies to "the attendant circumstance element of a crime" whose "primary purpose" is to "confer federal jurisdiction."[106] Second, none of the relevant federal cases are constitutionally based.[107] As a result, states remain free to determine the relationship between the culpable mental state requirement governing a conspiracy and that applicable to the circumstance(s) of the target offense themselves.[108]

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fraud); *Blue v. United States*, 138 F.2d 351, 360 (6th Cir. 1943) (same); *Guardalibini v. United States*, 128 F.2d 984 (5th Cir. 1942) (same).

Most significant is the U.S. Court of Appeals for the Second Circuit's decision in *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941). At issue in *Crimmins* was the defendant's conviction for conspiracy to transport stolen securities in interstate commerce where he did not know the relevant securities were, in fact, connected to interstate commerce—the touchstone of federal jurisdiction. *Id.* at 273. Although such absence of knowledge would have been immaterial had the offense been completed, the Second Circuit regarded it as quite material to the conspiracy charge. To understand why, Judge Learned Hand, writing for the court, gave his famous traffic light analogy: "While one may . . . be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." *Id.* From this, the *Crimmins* court ultimately concluded "that there can be no conspiracy to transport stolen securities in interstate commerce "unless it is understood to be a part of the project that they shall cross state lines." *Id.* at 273-74.

[105] *United States v. Feola*, 420 U.S. 671, 696 (1975); *see, e.g.*, *United States v. Eisenberg*, 596 F.2d 522, 525 (2d Cir. 1979); *United States v. Rosa*, 17 F.3d 1531, 1544–45 (2d Cir. 1994); *United States v. Gurary*, 860 F.2d 521, 524 (2d Cir.1988); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976), *United States v. Green*, 523 F.2d 229, 233–34 (2d Cir. 1975). Most significant is the U.S. Supreme Court's decision in *United States v. Feola*, 420 U.S. 671 (1975). At issue in *Feola* was whether, under federal conspiracy law, proof of knowledge as to the strict liability circumstance element of the offense of assault of a federal officer—namely, whether the victim was a federal officer—is necessary. *See id.* The U.S. Supreme Court concluded that it was not, deeming conspiracy to commit assault against a federal officer to incorporate a principle of culpable mental state equivocation, under which the government need not prove that the parties to a conspiracy *understand* or are in any way *aware* that the victim of the intended assault is a federal officer. *Id.* Rather, the same strict liability rule applicable to the circumstance of assaulting a federal officer applies to a conspiracy to commit the same. *Id.*

[106] *Pond*, 315 Conn. at 486–87 (discussing *Feola*, 420 U.S. at 685, 687, 692–94). Indeed, even this may be an overstatement given subsequent federal conspiracy cases applying a principle of intent elevation to strict liability circumstantial elements of other federal offenses *that are primarily jurisdictional*. *See United States v. Salgado*, 519 F.3d 411, 415 (7th Cir.), *on reh'g in part sub nom. United States v. Pacheco-Gonzales*, 273 F. App'x 556 (7th Cir. 2008) (applying a principle of intent elevation to a charge of conspiracy to steal money from the United States, 18 U.S.C. § 371, on the basis that, notwithstanding the *Feola* decision, "the elements of a conspiracy offense *do* include knowing what makes the planned activity criminal" under federal criminal law).

[107] DRESSLER, *supra* note 61, at § 29.05.

[108] *Id.*

There is not a lot of state case law on this issue; however, to the extent it exists, it supports a principle of intent elevation. Historically speaking, for example, a principle of intent elevation of this nature appears to have been implicit in the early state case law on the corrupt motive doctrine.[109] More recently, however, this principle appears to have been explicitly endorsed by a handful of state appellate decisions.[110]

The most illustrative, and comprehensively reasoned, of these decisions is the Connecticut Supreme Court's recent opinion in *State v. Pond*.[111] The specific issue presented in *Pond* was whether an individual who plans and agrees to participate in "a simple, unarmed robbery," may thereafter be held criminally liable for "planning or agreeing to an armed robbery, or one in which a purported weapon is displayed or its use threatened, when he had no such intention and agreed to no such plan."[112] The Connecticut Supreme Court ultimately answered this question in the negative, holding that "to be convicted of conspiracy, a defendant must specifically intend that every element of the planned offense be accomplished, even an element that itself carries no specific intent requirement."[113]

In support of employing this "higher *mens rea* requirement for conspiracies than for the underlying substantive offense," [114] the *Pond* court provides three different policy rationales:

> First, it stands to reason that the legislature would have imposed a higher intent requirement for conspiracy than for some substantive crimes because conspiracy, by its very nature, is predominantly mental in composition . . . . [J]ust as the legislature has imposed more stringent *actus reus* requirements for substantive offenses that are defined principally with respect to their conduct elements, so may it reasonably demand a greater showing of wrongful intent for an anticipatory, inchoate crime such as conspiracy, which predominantly criminalizes the wrongful scheme.
>
> Second, on the most basic level, it makes sense to impose a specific intent requirement for conspiracy to commit robbery in the second degree, but not for robbery in the second degree, because one crime actually involves the display or threatened use of a purported weapon and the other does not . . . .
>
> It makes little sense . . . to say that, if an individual plans and agrees to participate in a simple, unarmed robbery, he then may be held criminally liable for planning or agreeing to an armed robbery, or one in

[109] *See* Alexander & Kessler, *supra* note 214, at 1160 (1997) (discussing *People v. Powell*, 63 N.Y. 88, 88 (1875); *Commonwealth v. Benesch*, 194 N.E. 905 (Mass. 1905); *Commonwealth v. Gormley*, 77 Pa. Super. 298 (1921)).
[110] *See infra* notes 232-35 and accompanying text.
[111] 315 Conn. at 468–89.
[112] *Id.* at 477.
[113] *Id.* at 453.
[114] *Id.* at 475.

> which a purported weapon is displayed or its use threatened, when he had no such intention and agreed to no such plan . . . .
>
> [To hold otherwise] could lead to unintended and undesirable consequences . . . . The reason the law punishes conspiracies to commit armed robberies more severely is to discourage would-be felons from planning this more dangerous class of crime. [However, applying a principle of culpable mental state equivocation] would eliminate any such disincentive.
>
> Third, [failure to endorse a principle of intent elevation] would create the potential for abuse . . . . To require less would permit the state to prosecute a person who conspires with a would-be pickpocket, shoplifter or library book bandit for conspiracy to commit an armed felony without proving that that person either intended to or did in fact engage in such a crime.[115]

Policy considerations aside, the *Pond* court likewise observes that a principle of intent elevation finds support in the case law of all other state courts to explicitly address it, namely, decisions from New York,[116] New Hampshire,[117] Michigan,[118] and North Carolina.[119]

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[115] *Id.* at 476-79. In supporting adoption of a principle of intent elevation, the *Pond* court also addressed "the state's argument that it would have been irrational for the legislature to adopt a legislative scheme in which offenders face broad vicarious liability for their roles in first and second degree robberies—whether as participants, accessories or, under a Pinkerton theory, coconspirators—and yet to stop short of extending that same vicarious liability to the crime of conspiracy itself." *Id.* at 487. In response, the *Pond* court highlighted that, "[f]irst, there is a fundamental difference between holding a person liable for his role in an actual crime, whatever that role might be, as opposed to punishing him solely for agreeing to commit a crime," such that there are "sound historical, practical and theoretical reasons for imposing stricter liability in the latter case than in the former." *Id.* (citing *Krulewitch v. United States*, 336 U.S. 440, 450 (1949) ("[T]he conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory, for those charges . . . . lie [only] when an act which is a crime has actually been committed.") (Jackson, J., concurring)). "Second, under *Pinkerton*, coconspirators are already held vicariously liable for crimes in which their coconspirators' use of weapons or purported weapons is reasonably foreseeable." *Id.* at 488. In this sense, "*Pinkerton* liability is forward looking, holding conspirators liable as principals for crimes that predictably result from an already formed and clearly defined conspiracy." *Id.* Applying a principle of culpable mental state equivocation to conspiracies, in contrast, "would create a legal anachronism: it turns back the clock and rewrites the terms of the conspirators' original criminal agreement to reflect conduct that coconspirators are alleged to have subsequently performed." *Id.*

[116] *People v. Joyce*, 474 N.Y.S.2d 337, 347 (1984) ("Not only was there no proof that the defendant agreed to the display, but there was no proof that he was even aware that his coconspirators planned to possess what would appear to be firearms in the course of the burglary.")

[117] *State v. Rodriguez*, 164 N.H. 800, 812 (2013) ("[T]o affirm the defendant's convictions for conspiracy to commit first degree assault and accomplice to first degree assault, we must be able to conclude that the properly-admitted evidence overwhelmingly established that he had at least a tacit understanding that deadly weapons would be used in the commission of the assault.")

[118] *People v. Mass*, 464 Mich. 615, 629-30 (2001) ("[T]o be convicted of conspiracy to possess with intent to deliver a controlled substance, the prosecution had to prove that (1) the defendant possessed the specific

The principle of intent elevation reflected in state case law also appears to accord with legal commentary: the scholarly literature on this issue, to the extent it exists, generally weighs against applying a principle of culpable mental state equivocation to the circumstances of a conspiracy.[120]

Consistent with the above analysis of national legal trends relevant to the culpable mental state requirement governing a criminal conspiracy, the RCC incorporates four substantive policies, each of which is broadly consistent with current District law.

First, the prefatory clause of RCC § 303(a) establishes that the culpability required for the general inchoate offense of criminal conspiracy is, at minimum, that required by the target offense. Thereafter, and second, RCC § 303(a)(1) endorses the purpose approach to conspiracy, under which proof that the parties to an agreement consciously desired to bring about conduct planned to culminate in the target offense is a necessary component of conspiracy liability. Both of these positions are supported by both majority legal practice and compelling policy considerations.

Third, RCC § 303(b) applies a principle of intent elevation to the results of a conspiracy. Under this principle, the parties must, by forming their agreement, intend to cause any result required by the target offense. The exclusion of conspiracy liability for reckless and negligence as to results is deeply rooted in American criminal law. The acceptance of knowledge/belief as to results, in contrast, may depart from some national legal trends. To the extent it does, however, it is justified by the same policy considerations that support applying a principle of intent elevation (and not purpose elevation) to the results of an attempt.

Fourth, RCC § 303(b) also applies a principle of intent elevation to the circumstances of a conspiracy. Under this principle, the parties must, by forming their agreement, have acted with intent as to the circumstances required by the target offense. This principle is supported by state practice (to the extent it exists) as well as compelling policy considerations.

RCC § 303(a)(1): Relation National Legal Trends on Impossibility. The topic of impossibility revolves around the following question: what is the relevance of the fact that, by virtue of some mistake concerning the conditions the actor believed to exist, the target offense for which the defendant is being prosecuted could not have been completed?[121] The defendant in this kind of situation may admit that he or she possessed

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intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person.")

[119] *State v. Suggs*, 117 N.C.App. 654, 661–62 (1995) ("To hold a defendant liable for the substantive crime of conspiracy, the State must prove an agreement to perform every element of the crime . . . . [Therefore, the conspiracy to assault with a dangerous weapon charge] required that the State produce substantial evidence, which considered in the light most favorable to the State, would allow a jury to find beyond a reasonable doubt that the defendant and [the co-conspirator] contemplated the use of a deadly weapon in carrying out the assault . . . .")

[120] For a discussion and collection of the relevant authorities, see Alexander & Kessler, *supra* note 214, at 1162. For an opposing view, see Robinson & Grall, *supra* note 44, at 740-43.

[121] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 61, at § 27.07.

the requisite intent to commit that target offense, but nevertheless argue that impossibility of completion should by itself preclude the imposition of criminal liability.[122]

The problem of impossibility is most commonly discussed in the context of attempt prosecutions. Illustrative issues include whether the following actors have committed a criminal attempt: (1) a pickpocket who puts her hand in the victim's pocket, believing it to contain valuable items, only to discover that it is empty;[123] (2) an assailant shooting into the bed where the intended victim customarily sleeps, believing the victim to be there, only to discover that he isn't;[124] (3) a participant in a sting operation who receives property believing it to be stolen, only to discover that it isn't;[125] and (4) an actor who believes that he or she is selling a controlled substance, only to discover that the substance is innocent.[126]

In principle, the precise same issues of impossibility can also arise in the context of prosecutions for any other general inchoate crime, including conspiracy.[127] Consider, for example, how slight tweaks to the above fact patterns present the same questions of impossibility for conspiracy prosecutions: (1) two thieves agree to jointly work towards the pickpocketing of a victim's jacket, believing it to contain valuable items, only to discover that it is empty; (2) two assailants plan to shoot into a bed where the intended victim customarily sleeps, believing the victim to be there, only to discover that he isn't; (3) two participants in a sting operation agree to traffic in stolen property with an undercover agent, believing it to be stolen, only to discover that it isn't; and (4) two actors agree to jointly sell a controlled substance, only to discover that the substance is innocent.

Notwithstanding these factual symmetries, in practice, impossibility issues arise less frequently in the context of conspiracy prosecutions.[128] Furthermore, when they do arise, courts tend to shy away from the "lengthy explorations of the distinction between [different kinds of] impossibility" that characterizes attempt jurisprudence.[129] Instead, "the conspiracy cases have usually gone the simple route of holding that impossibility is not a defense."[130] That being said, the same distinctions exist in this area of law, and it's important to recognize them in order to appreciate the boundaries of conspiracy liability.

There are four different categories of impossibility that might be recognized in the context of conspiracy.[131] The first is *pure factual impossibility*, which arises when the object of an agreement cannot be consummated because of circumstances beyond the parties' control.[132] The second category of impossibility is *pure legal impossibility*, which arises where the parties to an agreement act under a mistaken belief that the law

[122] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 61, at § 27.07.
[123] *See People v. Twiggs*, 223 Cal. App. 2d 455 (Ct. App. 1963).
[124] *See State v. Mitchell*, 71 S.W. 175 (Mo. 1902).
[125] *See People v. Rojas*, 358 P.2d 921 (Cal. 1961).
[126] *See United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978).
[127] DRESSLER, *supra* note 61, at § 27.07.
[128] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4.
[129] *Id.*
[130] *Id.*
[131] This general framework and breakdown is drawn from DRESSLER, *supra* note 61, at § 27.07.
[132] *Id.*

criminalizes their intended objective.[133] The third category is *hybrid impossibility*, which arises where the object of an agreement is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense.[134] And the fourth category of impossibility is *inherent impossibility*, which arises when "any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought" to be achieved by a criminal agreement.[135]

Illustrative of these distinctions are the following variations on a hypothetical involving an agreement to engage in sexual activity with a minor.

Pure Factual Impossibility: X and Y, adult males, agree to arrange a sexual encounter with Z, a young child, at a specified time/location. Unbeknownst to X and Y, the police have been alerted to the arrangement and are awaiting the arrival of X and Y. If charged with conspiracy to commit statutory rape, this situation presents an issue of pure factual impossibility because the object of the conspiracy, sexual activity with a minor, cannot be consummated because of circumstances beyond the parties' control, namely, police intervention.

Pure Legal Impossibility. X and Y, adult males, agree to arrange a sexual encounter with Z, a 20 year-old woman. X and Y know Z is 20; however, they believe that the age of consent is 21 (when, in fact, it is 18). Therefore, X and Y believe themselves to be conspiring to commit statutory rape. If charged with conspiracy to commit statutory rape, this situation presents an issue of pure legal impossibility because X and Y have acted under a mistaken belief that the law criminalizes their intended objective, sexual activity with a 20 year-old woman.

Hybrid Impossibility. X and Y, adult males, agree to arrange a sexual encounter with Z, an undercover police officer posing as a young child. X and Y believe that Z is a young child. If charged with conspiracy to commit statutory rape, this situation presents an issue of hybrid impossibility because the object of X and Y's agreement, sexual activity with a minor, is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense, namely, whether Z is, in fact, a minor.

Inherent Impossibility. X and Y, adult males, agree to arrange a sexual encounter with Z, a child-like manikin sitting in a shop window. X and Y believe that Z is an actual child, a mistake that is patently unreasonable under the circumstances. If charged with conspiracy to commit statutory rape, this situation presents an issue of inherent

[133] *Id.*
[134] *Id.*
[135] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1099 (1992); Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995).

impossibility because any reasonable person would have known that the manikin was not a child.

Viewed through the lens of this framework, national legal trends can be summarized as follows. First, pure factual impossibility is not a defense to a conspiracy charge.[136] Illustrative decisions rejecting factual impossibility claims in the context of conspiracy prosecutions include the following holdings: (1) there may be a conspiracy to defraud the United States although the government was aware of the scheme (and thus would have stopped it);[137] (2) there may be a conspiracy to murder although the person whom the other co-conspirators believe will carry out the deed is actually a government agent;[138] (3) there may be a conspiracy to obstruct justice even if the scheme of having certain individuals called as jurors could not have been accomplished by the conspirators;[139] and (4) there may be a conspiracy to import controlled substances although a boat needed for the importation had already been seized by government agents.[140]

Second, hybrid impossibility is not a defense to a conspiracy charge.[141] Illustrative decisions rejecting hybrid impossibility claims in the context of conspiracy prosecutions include the following holdings: (1) there may be a conspiracy to commit rape on a woman believed to be unconscious although she was in fact dead;[142] (2) there may be a conspiracy to perform an abortion on a woman (during a historical era when abortion was criminal) although the woman is not pregnant;[143] (2) there may be a conspiracy to murder or rape a person who doesn't actually exist;[144] (3) there may be a conspiracy to receive stolen property although the property is not stolen;[145] and (4) there may be a conspiracy to steal trade secrets although the object of the conspiracy is not a trade secret.[146]

Factual and hybrid impossibility are by far the most common species of impossibility. The "stated majority rule" governing both of them is clear: "neither . . . is a defense to a criminal conspiracy."[147] Less clear are the legal trends governing pure

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[136] DRESSLER, *supra* note 61, at § 29.09.
[137] *United States v. Everett*, 692 F.2d 596 (9th Cir. 1982).
[138] *People v. Liu*, 46 Cal.App.4th 1119, 54 Cal.Rptr.2d 578 (1996).
[139] *Gallagher v. People*, 211 Ill. 158, 71 N.E. 842 (1904).
[140] *United States v. Belardo-Quinones*, 71 F.3d 941 (1st Cir.1995),
[141] DRESSLER, *supra* note 61, at § 29.09.
[142] *United States v. Thomas*, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962).
[143] *See People v. Tinskey*, 228 N.W.2d 782 (Mich. 1975).
[144] *See State v. Houchin*, 765 P.2d 178 (Mont. 1988); *United States v. Roeseler*, 55 M.J. 286, 291 (C.A.A.F. 2001); *State v. Heitman*, 629 N.W.2d 542 (Neb. 2001).
[145] *See United States v. Petit*, 841 F.2d 1546 (11th Cir. 1988).
[146] *See United States v. Yang*, 281 F.3d 534 (6th Cir. 2002); *United States v. Hsu*, 155 F.3d 189 (3d Cir. 1998).
[147] DRESSLER, *supra* note 61, at § 29.09. That "[i]mpossibility of success is not a defense" to conspiracy generally reflects the common law view that "criminal combinations are dangerous apart from the danger of attaining the particular objective." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4. To the extent that there are special dangers inherent in group criminality, the factual or legal impossibility of committing a particular offense arguably does not negate the dangerousness of the conspiratorial agreement. *See* DRESSLER, *supra* note 61, at § 29.09. The foregoing perspectives on impossibility are endorsed by the U.S. Supreme Court in *United States v. Jimenez Recio*, 537 U.S. 270, 274–76 (2003).

legal impossibility and inherent impossibility in the conspiracy context since prosecutions implicating them rarely (if ever) arise. Nevertheless, to the extent they do, it appears that both forms of impossibility may provide a viable defense to a conspiracy charge.

That pure legal impossibility constitutes a viable defense to a conspiracy charge is not particularly surprising since, in such situations, "the requisite conspiratorial objective is lacking."[148] For example, just as "[a] hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place," so too "a charge of conspiracy to shoot a deer would be equally untenable" although the parties themselves believed deer hunting to be criminally prohibited.[149]

Inherent impossibility may also constitute a viable defense to a conspiracy charge. In the attempt context, courts generally seem reluctant to impose liability "where the means chosen are totally ineffective to bring about the desired result."[150] This also appears to be the case in the conspiracy context, where the "inherently impossible" nature of an agreed-upon plan can preclude liability.[151] "For instance, an attack on a wooden Indian cannot be an assault and battery (though it might constitute malicious destruction of property), and hence a combination and agreement to do so cannot be a conspiracy to commit assault and battery, although the defendants, before acting, thought the 'victim' a living person."[152] So too with "an attempt or conspiracy to pick the pocket of what is merely a wooden dummy."[153]

These principles of conspiracy liability are mostly rooted in case law. However, some criminal codes address the relationship between impossibility and conspiracy. The basis for this modern legislative approach is the Model Penal Code's general definition of conspiracy, which effectively carries over Code's general abolition of impossibility claims in the attempt context to the conspiracy context.[154] Here's how this incorporation-based approach operates.

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[148] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4; *see United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013).

[149] *In re Sealed Cases*, 223 F.3d 775 (D.C. Cir. 2000).

[150] *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973); *see, e.g.*, *Dahlberg v. People*, 225 Ill. 485, 490 (1907); *Attorney General v. Sillen*, 159 Eng. Rep. 178, 221 (1863); *United States v. Lincoln*, 589 F.2d 379, 381 (8th Cir. 1979); *United States v. Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973); *Parham v. Commonwealth*, 347 S.E.2d 172, 174-75 (Va. Ct. App. 1986); *State v. Logan*, 656 P.2d 777, 779-80 (Kan. 1983); *People v. Elmore*, 261 N.E.2d 736, 737 (Ill. App. Ct. 1970); *People v. Richardson*, 207 N.E.2d 453, 456 (Ill. 1965).

[151] *State v. Moretti*, 97 N.J. Super. 418, 420–21 (App. Div. 1967), aff'd, 52 N.J. 182, 244 A.2d 499 (1968).

[152] *Ventimiglia v. United States*, 242 F.2d 620, 622 (4th Cir. 1957); Note, *supra* note 145, at 944-45.

[153] *Ventimiglia*, 242 F.2d at 622.

[154] Model Penal Code § 5.03 cmt. at 421. Note that the Model Penal Code similarly extends the same treatment of inherent impossibility afforded in attempt prosecutions to conspiracy prosecutions by authorizing the court to account for the relevant issues at sentencing. Model Penal Code § 5.01 cmt. at 318. The relevant provision, Model Penal Code § 5.05(2), establishes that "[i]f the particular conduct charged to constitute a criminal attempt, solicitation, or conspiracy, is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense," then the court has two alternatives at its disposal. Model Penal Code § 5.05(2). First, the court may "impose sentence for a crime of lower grade or degree." *Id.* Second, and alternatively, the court may, "in extreme cases, [simply] dismiss the prosecution." *Id.* Generally speaking, this kind of "safety valve is extremely desirable in the inchoate crime area, which, by definition, involves threats of infinitely varying intensity." Buscemi, *supra* note 161, at 1187. In the conspiracy context, however, such

The Model Penal Code's formulation of a criminal attempt, § 5.01(1)(c), establishes that: "[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person "purposely does or omits to do anything that, *under the circumstances as he believes them to be*, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[155] By broadly recognizing that an "actor can be held liable for an attempt to commit the offense he *believed* he was committing, without regard to whether or why the commission of the offense is impossible," the Model Penal Code approach renders most impossibility claims immaterial in the attempt context.[156]

The Model Penal Code drafters intended to apply the same approach to dealing with impossibility in the conspiracy context. "It would be awkward, however, to incorporate the impossibility language of attempt into other inchoate offenses."[157] With that in mind, the Model Penal Code instead "treats conspiracy to attempt the commission of a crime as a conspiracy to commit that crime."[158]

More specifically, Model Penal Code § 5.03(1) states that a person is guilty of an offense if she agrees with another person that "they or one of them will engage in conduct that constitutes . . . an *attempt* … to commit such crime," or if he or she "agrees to aid such other person or persons . . . in *an attempt* . . . to commit such crime." Inclusion of the term "attempt" in this formulation dictates that:

> [if an] actor agrees that he or another will engage in conduct that he believes to constitute the elements of the offense, but that fortuitously does not in fact involve those elements, he would under this section be guilty of an agreement to attempt the offense, since attempt liability could be made out under Section 5.01 if the contemplated conduct had occurred.[159]

In practical effect, this statutory approach ensures that the Model Penal Code's general conspiracy provision, like its general attempt provision, broadly prohibits impossibility claims by "focus[ing] upon the circumstances as the actor believes them to be rather than as they actually exist."[160] So, for example, as the Model Penal Code commentary illustrates: if D1 and D2 agree to rob a bank believing, incorrectly, that it is

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a provision will specifically "help avoid the injustice which might be created by the MPC's non-recognition of impossibility as a defense to a conspiracy indictment." *Id.* at 1187.

[155] Model Penal Code § 5.01(1)(c).

[156] PAUL H. ROBINSON & MICHAEL CAHILL, CRIMINAL LAW 514 (2d. 2012). Model Penal Code § 5.01(c) could also be read to abolish the defense of pure legal impossibility. *See id.* However, the Model Penal Code commentary indicates that the drafters intended that pure legal impossibility remain a defense:

> It is of course necessary that the result desired or intended by the actor constitute a crime. If . . . the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.

Model Penal Code § 5.01 cmt. at 318; *see* Wechsler et al., *supra* note 171, at 579.

[157] ROBINSON, *supra* note 123, at 1 CRIM. L. DEF. § 85.

[158] Model Penal Code § 5.03 cmt. at 421.

[159] Model Penal Code § 5.03 cmt. at 421

[160] Model Penal Code § 5.01 cmt. at 297.

federally insured, they may be convicted of conspiracy to rob *a federally insured bank*, based upon their view of the situation.[161]

Since completion of the Model Penal Code, a relatively small number of modern criminal codes have imported this legislative solution to impossibility.[162] However, "the fact a code is silent on this issue, while expressly declaring impossibility is no defense to an attempt charge, is not to be taken to mean that impossibility is a defense to conspiracy."[163] Instead, and as illustrated by the case law referenced above, just the opposite is true: in nearly all instances (i.e., factual and hybrid) impossibility is not a defense to conspiracy. [164]

Consistent with the above analysis of national legal trends, the RCC broadly renders impossibility claims irrelevant in the context of conspiracy prosecutions. RCC § 303(a) accomplishes this by establishing that an agreement to engage in or bring about conduct that, if carried out, would constitute an "attempt" will also suffice for conspiracy liability. The reference to an attempt is intended to incorporate the same approach applicable to impossibility in the latter context, which, pursuant to RCC § 301(a)(1), necessarily abolishes factual impossibility and hybrid impossibility defenses by focusing on the situation as the defendant viewed it.[165]

RCC § 303(a)(2): Relation to National Legal Trends on Overt Act Requirement. American criminal law generally recognizes that the general inchoate offense of conspiracy is "predominantly ideational [in] nature."[166] One relevant policy question this raises, however, is whether and to what extent *any conduct at all*, above and beyond the agreement at heart of conspiracy liability, is a necessary component of the offense.

Historically, conduct in furtherance of a criminal agreement was not understood to be required for a conspiracy conviction. At early common law, for example, a conspiracy was deemed complete upon formation of the unlawful agreement, such that no

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[161] *See* DRESSLER, *supra* note 61, at § 29.09.

[162] *See* Colo. Rev. Stat. Ann. § 18-2-201; Ky. Rev. Stat. Ann. § 506.040; Del. Code Ann. tit. 11, § 511; N.J. Stat. Ann. § 2C:5-2; Pa. Cons. Stat. Ann. tit. 18, § 903. Other jurisdictions simply state by statute that impossibility is not a defense to a conspiracy charge. *See* Ohio Rev. Code Ann. § 2923.01(D) ("It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the conspiracy was impossible under the circumstances.") For reform jurisdictions that have adopted the Model Penal Code approach to inherent impossibility, see Ark. Code Ann. § 5-3-101; Colo. Rev. Stat. Ann. § 18-2-206; N.J. Stat. Ann. § 2C:5-4;18 Pa. Stat. and Cons. Stat. Ann. § 905.

[163] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4 (citing *State v. Bird*, 285 N.W.2d 481 (Minn. 1979)).

[164] For other cases, see *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984); *United States v. Giordano*, 693 F.2d 245 (2d Cir. 1982); *United States v. Thomas*, 13 C.M.A. 278 (1962); *Thompson v. State*, 106 Ala. 67 (1895); *People v. Tinskey*, 212 N.W.2d 263 (Mich. Ct. App. 1973).

[165] RCC § 303(a) likewise imports the same approach to recognizing inherent impossibility employed in RCC § 301(a). More specifically, where the parties' perspective of the situation is relied upon, the government must prove that their agreed-upon plan was "reasonably adapted to commission of the [target] offense." By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement precludes convictions for inherently impossible conspiracies.

[166] *State v. Pond*, 315 Conn. 451, 475 (2015); *see, e.g.*, DRESSLER, *supra* note 61, at § 29.04; *see* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

additional conduct needed to be proved.[167] More recently, however, American legal authorities have diverged from this early common law approach.[168] Rather than allowing proof of an agreement to constitute the sole *actus reus* of a conspiracy, modern conspiracy statutes frequently require proof of an overt act in furtherance of the conspiracy.[169] The basis for this shift is rooted in the Model Penal Code.

The Model Penal Code's general conspiracy provision, § 5.03(5), establishes that a person may not be convicted of conspiracy to commit a misdemeanor or a felony of the third degree[170] unless she or a fellow conspirator performs an overt act in furtherance of the conspiracy.[171] The relevant language reads: "[n]o person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired."[172]

The Model Penal Code's embrace of the overt act requirement is premised on the drafters view "that it affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists."[173] At the same time, however, it should be noted that the drafters did not wholly embrace this rationale—after all, Model Penal Code § 5.03(5) also exempts conspiracies to commit felonies of the first or second degree from the overt act requirement. For these offenses, the drafters believed that "the importance of preventive intervention is *pro tanto* greater than in dealing with less serious offenses," such that the requirement of an overt act should not be applied.[174]

Since publication of the Model Penal Code, the overt act requirement has gained "wide acceptance" among the states.[175] In fact, "[m]ost penal code revisions" actually *exceed* the recommendation of the Model Penal Code.[176] For example, whereas Model Penal Code § 5.03(5) would exclude first and second-degree felonies from the overt act

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[167] DRESSLER, *supra* note 61, at § 29.04; *see, e.g.*, *State v. Merrill*, 530 S.E.2d 608, 611 (N.C. Ct. App. 2000); *Commonwealth v. Nee*, 935 N.E.2d 1276, 1282 (Mass. 2010).

[168] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

[169] *See* DRESSLER, *supra* note 61, at § 29.04.

[170] Note that all felonies under the Model Penal Code are of the third degree unless another degree is specified. *See* Model Penal Code § 6.01(1).

[171] Model Penal Code § 5.03(5).

[172] *Id.*

[173] Model Penal Code § 5.03(5) cmt. at 453.

[174] *Id.*

[175] DRESSLER, *supra* note 61, at § 29.04; *see* Model Penal Code § 5.03 cmt. at 455–56.

[176] DRESSLER, *supra* note 61, at § 29.04. Like the Model Code, most modern conspiracy "statutes [also] uniformly require an overt act by only one of the conspirators." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 (collecting citations). This means that proof of a single overt act by any party to a conspiracy is a sufficient basis to prosecute every member of the conspiracy, including those who may have joined in the agreement after the act was committed. *See, e.g.*, *Bannon v. United States*, 156 U.S. 464 (1895); *People v. Adams*, 766 N.Y.S.2d 765 (County Ct. 2003); *Blumenthal v. United States*, 332 U.S. 539 (1947); *United States v. Rabinowich*, 238 U.S. 78 (1915); *United States v. Reyes*, 302 F.3d 48 (2d Cir. 2002); *State v. Gonzalez*, 69 Conn.App. 649 (2002); *People v. McGee*, 49 N.Y.2d 48 (1979); *United States v. Isaacson*, 752 F.3d 1291 (11th Cir. 2014); *State v. Millan*, 290 Conn. 816 (2009); *Broomer v. State*, 126 A.3d 1110 (Del. 2015); *State v. Keller*, 2005 ND 86 (2005). Note that Model Penal Code § 5.03(5) requires both *allegation* and *proof* of an overt act. To that end, "[f]ifteen states have incorporated similar language into their conspiracy provisions, but most jurisdictions have not confronted, in their substantive law, the issue of what must be alleged in a conspiracy indictment." Buscemi, *supra* note 161, at 1157–58.

requirement, modern criminal codes typically apply the overt-act rule to all crimes.[177] Even outside reform jurisdictions, moreover, application of a broad overt act requirement is a common feature of conspiracy legislation.[178]

Common law authorities have also frequently endorsed the overt act requirement, highlighting a range of virtues associated with it. For example, courts have observed that the overt act requirement, by requiring "that a conspiracy has moved beyond the talk stage and is being carried out,"[179] appropriately ensures "that society does not intervene prematurely"[180] while, at the same time, helping "to separate truly dangerous agreements from banter and other exchanges that pose less risk."[181] And on an even more basic level, courts have championed the fact that the overt act requirement, by prohibiting liability for "a project still resting solely in the minds of the conspirators,"[182] appropriately respects the admonition that "evil thoughts alone cannot constitute a criminal offense."[183]

As a matter of practice, the overt act requirement is, in those jurisdictions that recognize it, not particularly demanding.[184] Generally speaking, any act, no matter how trivial, is sufficient to satisfy the overt act requirement if performed in furtherance of the conspiracy.[185] In practical effect, this means that the act need not even constitute a "substantial step" towards completion of the criminal objective.[186] Nor, for that matter, must the act be illegal.[187] Indeed, otherwise innocent conduct such as writing a letter,

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[177] DRESSLER, *supra* note 61, at § 29.04. *See* Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ark. Code Ann. § 5-3-401; Colo. Rev. Stat. Ann. § 18-2-201; Conn. Gen. Stat. Ann. § 53a-48; Ga. Code Ann. § 16-4-8; Haw. Rev Stat. § 705-520;; Ill. Comp. Stat. Ann. ch. 720, § 5/8-2; Ind. Code Ann. § 35-41-5-2; Kan. Stat. Ann. § 21-5302; Ky. Rev. Stat. Ann. § 506.050;; Me. Rev. Stat. Ann. tit. 17-A, § 151; Minn. Stat. Ann. § 609.175; Mo. Ann. Stat. § 564.016; Mont. Code Ann. § 45-4-102; N.H. Rev. Stat. Ann. § 629:3; N.Y. Penal Law § 105.20; Ohio Rev. Code Ann. § 2923.01; Okla. Stat. Ann. tit. 21, § 423; Pa. Cons. Stat. Ann. tit. 18, § 903; S.D. Cod. Laws § 22-3-8; Tenn. Code Ann. § 39-12-103; Tex. Penal Code Ann. § 15.02; Vt. Stat. Ann. tit. 13, § 1404; Wash. Rev. Code § 9A.28.040; Wis. Stat. Ann. § 939.31; Wyo. Stat. § 6-1-303.

[178] *See* Cal. Penal Code § 184; Idaho Code § 18-1701; Iowa Code Ann. § 706.1; La. Rev. Stat. Ann. § 14:26; Neb. Rev. Stat. § 28-202; W. Va. Code § 61-10-31. Likewise, "Congress has included an express overt-act requirement in at least [23] current conspiracy statutes." *Whitfield v. United States*, 543 U.S. 209, 216 (2005).

[179] *People v. Abedi*, 595 N.Y.S.2d. 1011, 1020 (Sup. Ct. 1993).

[180] *People v. Mass*, 628 N.W.2d 540, 559 (Mich. 2001) (Markman, J., concurring).

[181] *United States v. Sassi*, 966 F.2d 283, 284 (7th Cir. 1992).

[182] *Yates v. United States*, 354 U.S. 298 (1957); *see, e.g.*, *People v. Arroyo*, 93 N.Y.2d 990 (1999); *State v. Miller*, 677 P.2d 1129 (Utah 1984); *Burk v. State*, 848 P.2d 225 (Wyo. 1993); *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820 (2001).

[183] *People v. Russo*, 25 P.3d 641, 645 (Cal. 2001) (collecting cases).

[184] *Heitman*, 629 N.W.2d at 553. In some jurisdictions, an overt act, although required to convict, is not a formal element of the offense." DRESSLER, *supra* note 61, at § 29.04. Instead, the act "merely affords a *locus penitentia*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." *United States v. Britton*, 108 U.S. 199, 205 (1883). In other words, the overt-act requirement in such jurisdictions gives a conspirator, before that act occurs, "an opportunity to repent." *Russo*, 25 P.3d at 645.

[185] *Commonwealth v. Weimer*, 977 A.2d 1103, 1106 (Pa. 2009).

[186] *But see* LaFave, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 ("In a few states, this overt act must be a 'substantial step' toward commission of the crime.")

[187] *Heitman*, 629 N.W.2d at 553.

making a telephone call, lawfully purchasing of an instrument to commit the offense, or attending a lawful meeting can, when made pursuant to an unlawful agreement, satisfy the overt act requirement.[188]

In accordance with both the above national legal trends and well-established District law, RCC § 303(b) incorporates a broadly applicable overt act requirement into the general conspiracy statute.

RCC §§ 303(a) & (b) (Generally): Relation to National Legal Trends on Agreements to Achieve Non-Criminal Objectives. The recognition of conspiracy liability "reflects the fact that joint criminal plots pose risks to society that, if not unique, are undoubtedly greater than those posed by lone-wolf, would-be felons."[189] The members of a joint criminal plot "may benefit from the division of labor in the execution of criminal schemes," which in turn "may lead to the commission of additional crimes beyond those initially envisioned."[190]

Consistent with this criminogenic rationale, there is, and has historically been, a broad consensus that the general inchoate offense of conspiracy ought to be broadly construed, applying to all (or most) crimes in the special part of a criminal code.[191] But what about where two or more parties agree to engage in or bring about conduct that is generally immoral, but not itself criminal? Treatment of this issue—namely, of whether and to what extent the general inchoate crime of conspiracy ought to encompass non-criminal objectives—by American legal authorities has undergone a robust transformation over the course of the last century.[192]

Historically speaking, the law of conspiracy frequently encompassed non-criminal objectives. For example, the early common law definition of this general inchoate offense "views conspiracy as a combination formed to do either an unlawful act or a lawful act by unlawful means."[193] Under this formulation, it "is not essential . . . to criminal liability that the acts contemplated should constitute a criminal offense for which, without the elements of conspiracy, one alone could be indicted."[194] Rather, "it will be enough if the acts contemplated are corrupt, dishonest, fraudulent, or immoral, and in that sense illegal."[195]

Illustrative of this early common law trend are mid-twentieth century American conspiracy statutes, which extend to "any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the

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[188] DRESSLER, *supra* note 61, at § 29.04 (citing *Yates v. United States*, 354 U.S. 298, 333–34 (1957), overruled on other grounds in *Burks v. United States*, 437 U.S. 1 (1978))).
[189] *Pond*, 315 Conn. at 474.
[190] *Id.* (citations omitted); *see, e.g.*, *Payan*, 992 F.2d at 1390 (collective criminal activity "increases the chances that the criminal objective will be attained, decreases the chances that the involved individuals will abandon the criminal path, makes larger criminal objective attainable, and increases the probability that crimes unrelated to the original purpose for which the group was formed will be committed") (citing *Iannelli*, 420 U.S. at 778).
[191] *See, e.g.*, DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[192] *See, e.g.*, DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[193] Wechsler et al., *supra* note 171, at 963.
[194] *E.g.*, *State v. Kemp*, 126 Conn. 60, 78 (1939) (quoting *State v. Parker*, 114 Conn. 354, 158 (1932)).
[195] *See id.*

laws."[196] Other illustrative statutory provisions include those criminalizing "conspiracies to cheat and defraud, and to oppress individuals or prevent them from exercising a lawful trade or from doing any other lawful act."[197] Viewed collectively,

> [t]hese broad formulations may be considered as being of two types, though they are not mutually exclusive: (1) those reaching behavior that the law does not regard as sufficiently undesirable to punish criminally when pursued by an individual, but which is considered immoral, oppressive to individual rights, or prejudicial to the public; and (2) those dealing with categories of behavior that the criminal law traditionally reaches, such as fraud and obstruction of justice, but which define such behavior far more broadly than does the law governing the related substantive crimes.[198]

More recently, however, American legal authorities have diverged from the common law approach.[199] Rather than allowing for conspiracy liability to extend to non-criminal objectives, most modern criminal codes limit the reach of the general inchoate crime of conspiracy to specific offenses.[200] And rather than address particular kinds of criminal objectives through vague conspiracy formulations, modern criminal codes typically rely upon the application of general conspiracy provisions to more comprehensively defined specific offenses.[201] The impetus for these changes is the Model Penal Code.

In what the drafters recognized to be a "significant departure[]" from the common law, the Model Penal Code's general definition of conspiracy, § 5.03(1), is framed in terms of conspiring to commit "a crime."[202] In practical effect, this excludes non-criminal objectives from scope of general conspiracy liability. The rationale provided for this change is rooted in the need for clarity and consistency, namely, the Model Penal Code drafters believed that the "over-broad conspiracy provisions" employed in common law statutes "fail to provide a sufficiently definite standard of conduct to have any place in a penal code."[203]

An illustrative example of these problems, highlighted by the drafters of the Model Penal Code, is the federal conspiracy to defraud provision, 18 U.S.C. § 371.[204] That provision renders any conspiracy to "defraud the United States in any manner or for any purpose" a felony.[205] Over the years, this statute "has grown through judicial interpretation to cover 'virtually any impairment of the Government's operating

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[196] Model Penal Code § 5.03 cmt. at 395 (collecting statutes).
[197] *Id.* (collecting statutes).
[198] *Id.* at 395-96.
[199] *See* DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[200] *See* DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[201] *See* DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[202] Model Penal Code § 5.03 cmt. at 394.
[203] *Id.* at 396.
[204] *See id.* at 395.
[205] 18 U.S.C. § 371.

efficiency,'"[206] including much conduct that would not otherwise be an offense at all.[207] The breadth of the federal conspiracy statute is a function of the vagueness of the language it employs; as is often observed, the phrase "defraud the United States" lacks any fixed meaning.[208]

Notwithstanding their critique of common law conspiracy statutes, the Model Penal Code drafters were not wholly against extending conspiracy liability beyond criminal objectives.[209]Indeed, the Model Penal Code commentary explicitly acknowledges "that there are some activities that should be criminal only if engaged in by a group."[210] Where this expansion of liability is appropriate, however, the drafters "believe[d] [it] should be dealt with by special conspiracy provisions in the legislation governing the general class of conduct in question, and they should be no less precise than penal provisions generally in defining the conduct they proscribe."[211]

Modern American criminal law has since followed suit, embracing both the prescriptions and accompanying rationale of the Model Penal Code.[212] On the legislative level, for example, the current legal trend is to limit general conspiracy liability to the achievement of criminal objectives, such that "[a]ll but three state penal code revisions since the adoption of the final draft of the Code in 1962 have agreed with the American Law Institute."[213] Among these jurisdictions, a "majority" apply general conspiracy liability to *all* criminal objectives. [214] However, a strong plurality go a step further and

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[206] Model Penal Code § 5.03 cmt. at 396 (quoting Goldstein, *supra* note 103, at, 461). This includes, for example, fraud in defense contracts, medicare fraud, or virtually any fraudulent taking or misappropriation involving a federally-funded institution or program. *See e.g., Glasser v. U.S.*, 315 U.S. 60, 80, (1942); *U.S. v. Bordelon*, 871 F.2d 491 (5th Cir. 1989) (HUD official involved in private commercial venture); *U.S. v. Abushi*, 682 F.2d 1289, 1293 (9th Cir. 1982) (food stamp fraud); *U.S. v. Hodges*, 770 F.2d 1475, 1478 (9th Cir. 1985) (fraud on federally insured savings and loan associations).

[207] Model Penal Code § 5.03 cmt. at 394; *see, e.g., United States v. Johnson*, 383 U.S. 169, 172 (1966). As a historical matter, "[s]chemes to defraud individuals or corporations at common law generally [were] held to be criminal conspiracies, and were punishable as conspiracies before the fraud became a substantive crime." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

[208] Model Penal Code § 5.03 cmt. at 394; *see* Goldstein, *supra* note 103, at 408; John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?*: *Reflections on the Disappearing Tort/crime Distinction in American Law*, 71 B.U. L. REV. 193, 246 (1991); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 750 (1999).

[209] Model Penal Code § 5.03 cmt. at 396.

[210] *Id.*

[211] *Id.* For illustrative examples of specific offenses that explicitly cover prohibited agreements, see Model Penal Code §§ 240.1 (bribery in official and political matters), 240.7(1)(selling political endorsement), and 240.7(2) (special influence). Likewise, to the extent that common law "provisions aimed at corruption of morals, obstruction of justice, cheating and defrauding" were simply an inartful way of encompassing criminal objectives, the "approach of the Model Penal Code . . . is to define the substantive crimes in these areas more specifically and comprehensively than do many present systems, with the result that there is no need to strike at the problems through over-broad conspiracy provisions." Model Penal Code § 5.03 cmt. at 396.

[212] DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

[213] Model Penal Code § 5.03, cmt. at 397; *but see* Mich. Comp. Laws Ann. § 750.157a; Miss. Code Ann. § 97-1-1; S.C. Code § 16-17-410.

[214] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3; *see* Ala. Code § 13A-4-3; Ariz. Rev. Stat. Ann. § 13-1003; Ark. Code Ann. § 5-3-401; Colo. Rev. Stat. Ann. § 18-2-201; Conn. Gen. Stat. Ann. § 53a-48; Del. Code Ann. tit. 11, § 511; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-8; Haw. Rev. Stat. § 705-520; Idaho Code § 18-1701; Ill. Comp. Stat. Ann. ch. 720, § 5/8-2; Iowa Code Ann. § 706.1; Kan. Stat. Ann. § 21-5302; Ky. Rev. Stat. Ann. § 506.040; La. Rev. Stat. Ann. § 14:26; Me. Rev. Stat. Ann. tit. 17-A,

only apply conspiracy liability to *some* criminal objectives. For example, "a few of the modern recodifications" limit conspiracy liability to agreements to commit *a felony*.[215] Other conspiracy statutes are limited in other ways, "such as by specifying the crimes which will suffice as objectives,"[216] or "by including [only] felonies and higher misdemeanors."[217]

Contemporary American legal commentators are also strongly supportive of the Model Penal Code approach, highlighting, among other considerations,[218] the importance of fair notice[219] and the concomitant risk of "prosecutorial and judicial abuse" created by conspiracy statutes of uncertain scope.[220] As one commentator phrases it:

> People are entitled to fair notice that their planned conduct is subject to criminal sanction. In an age in which legislatures rather than courts define criminal conduct, people should be able to turn to a written code for reasonable guidance in the conduct of their lives. If the legislature has not made a specified act criminal it is unfair to surprise people by punishing the agreement to commit the noncriminal act.[221]

Relevant scholarly literature similarly highlights the fact that "[f]air notice is [] a constitutional requirement."[222] For example, "[a]lthough the Supreme Court has never ruled on the validity of this feature of conspiracy law, it once hinted that the breadth of the 'unlawfulness' element violates due process."[223] And on the state level, broad conspiracy statutes from the early common law era have been the subject of much constitutional litigation, though only rarely have they been struck down as unconstitutional.[224]

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§ 151 Minn. Stat. Ann. § 609.175; Mo. Ann. Stat. § 564.016; Mont. Code Ann. § 45-4-102; N.H. Rev. Stat. Ann. § 629:3; N.J. Stat. Ann. § 2C:5-2; N.Y. Penal Law § 105.00; N.D. Cent. Code § 12.1-06-04; Pa. Cons. Stat. Ann. tit. 18, § 903; Utah Code Ann. § 76-4-201; Wash. Rev. Code § 9A.28.040; Wis. Stat. Ann. § 939.31; Wyo. Stat. § 6-1-303. A few states, however, do retain conspiracy to defraud general provisions, though nearly all are more limited than the federal statute. *See* Ga. Code Ann. § 16-10-21 (but limited to property fraud); Iowa Code Ann. § 425.13 (limited to fraud in obtaining homestead tax credits); Mich. Comp. Laws. Ann. § 752.1005 (limited to health care benefit fraud); Miss. Code Ann. §§ 43-13-211 (same); Utah Code Ann. § 26-20-6 (same).

[215] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3; *see* Ind. Code Ann. § 35-41-5-2; Neb. Rev. Stat. § 28-202; Nev. Rev. Stat. Ann. § 175.251; N.M. Stat. Ann. § 30-28-2; Tex. Penal Code Ann. § 15.02; Va. Code Ann. § 18.2-22.

[216] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3; *see* Alaska Stat. § 11.31.120; Ohio Rev. Code Ann. § 29.23.01; Vt. Stat. Ann. tit 13, § 1404

[217] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3; *see* Or. Rev. Stat. § 161.450; Tenn. Code Ann. § 39-12-107.

[218] *See* Francis Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 397 (1922) (noting that the common law rule was likely "based on what is probably an incorrect reading of the early cases").

[219] *See, e.g, Commonwealth v. Bessette*, 217 N.E.2d 893, 896 n.5 (Mass. 1966).

[220] *E.g.*, LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

[221] DRESSLER, *supra* note 61, at § 29.04.

[222] *Id.*

[223] *Id.* (discussing *Musser v. Utah*, 333 U.S. 95, 96–97 (1948)).

[224] *See* DRESSLER, *supra* note 61, at § 29.04; *compare, e.g., State v. Bowling*, 427 P.2d 928, 932 (Ariz. Ct. App. 1967) *with People v. Sullivan*, 248 P.2d 520, 526 (Cal. Ct. App. 1952).

Whatever their constitutional status, however, the general consensus among contemporary common law authorities is that "[i]t is far better," as a policy matter, "to limit the general conspiracy statute to objectives which are themselves criminal, as has been done in the most recent recodifications."[225]

In accordance with the national legal trends described above, RCC § 303(a) limits general conspiracy liability to agreements to commit specific offenses. To the extent that conspiracy liability ought to extend to agreements to engage in conduct that would not otherwise be criminal if engaged in by an individual, the RCC will codify special conspiracy provisions that specifically clarify the elements of the requisite offenses.

RCC §§ 303(a) and (b): Relation to National Trends on Codification. There is wide variance between jurisdictions insofar as the codification of a general definition of conspiracy is concerned.[226] Generally speaking, though, the Model Penal Code's general definition of conspiracy, § 5.03(1),[227] provides the basis for most contemporary reform efforts.[228] The general definition of conspiracy incorporated into RCC §§ 303(a) and (b) incorporates drafting techniques from the MPC, while, at the same time, utilizing a few techniques, which depart from it. These departures are consistent with the interests of clarity, consistency, and accessibility.

The most noteworthy, and frequently criticized, drafting decision reflected in the Model Penal Code's general definition of conspiracy is the manner in which the culpable

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[225] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3. Which is not to say that conspiracy liability always needs to track the offenses in the Special Part. However, to the extent that "there are some activities which should be criminal only if engaged in by groups," commentators seem to agree with the Model Penal Code's prescription that they be "specifically identified in special conspiracy provisions no less precise than penal provisions generally." *Id.*

[226] This variance relates to both the "detail and nuance" of general conspiracy provision. Buscemi, *supra* note 161, at 1126 (providing a detailed overview of codification trends).

[227] The entirety of this provision reads as follows:

> (1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Model Penal Code § 5.03(1).

[228] *See* Buscemi, *supra* note 161, at 1126 (distinguishing between "laws clearly derived from the MPC," those that "borrow[] at least some of the [MPC] recommendations," and those that "precisely follow[] the MPC language"). As noted *supra* notes 161-68 and accompanying text, the general definition of conspiracy incorporated into the proposed Federal Criminal Code has also been influential. *See* FCC § 1004(1) ("A person is guilty of conspiracy if he agrees with one or more persons to engage in or cause the performance of conduct which, in fact, constitutes a crime or crimes, and any one or more of such persons does an act to effect an objective of the conspiracy.") For a more comprehensive discussion of the latter approach to codification, as well as its adoption on the state level, see Buscemi, *supra* note 161, at 1127.

mental state requirement of conspiracy is codified. Notwithstanding the Model Penal Code drafters' general commitment to element analysis, the culpability language utilized in § 5.03(1) reflects offense analysis, and, therefore, leaves the culpable mental state requirements applicable to conspiracy ambiguous.[229]

Illustrative is the prefatory clause of Model Penal Code § 5.03(1), which entails proof that the defendant enter the requisite agreement "with the purpose of promoting or facilitating" the commission of the offense that is the object of the conspiracy. Viewed from the perspective of element analysis, the import of this language is less than clear. On the one hand, the purpose requirement is framed in terms of commission of the *target offense*. On the other hand, all (target) offenses are comprised of different elements (namely, conduct, results, and circumstances). It is, therefore, unclear to which of the elements of the target offense this purpose requirement should be understood to apply.[230]

That the Model Penal Code's offense-level framing of the culpable mental state requirement of conspiracy fails to clarify the culpable mental state requirement (if any) applicable to each element of a conspiracy appears, at least in part, to have been intentional. For example, the commentary to the Model Penal Code's general conspiracy provision explicitly states that § 5.03(1) "does not attempt to [address the culpable mental state requirement of conspiracy] by explicit formulation . . . but affords sufficient flexibility for satisfactory decision as such cases may arise."[231]

This grant of policy discretion to the courts is problematic. The codification virtues of clarity, consistency, and fair notice all point towards providing comprehensive legislative guidance concerning the culpable mental state requirement of conspiracy.[232] So too do the interests of due process: "[c]riminal statutes are," after all, "constitutionally required to be clear in their designation of the elements of crimes, including mental elements."[233] As a result, "[t]he ambiguous language of the conspiracy provision coupled with the ambivalent language of the commentary indicates a need for clarification."[234]

Since publication of the Model Penal Code, a few state legislatures have modestly improved upon the Code's treatment of conspiracy's culpable mental state requirement. For example, a handful of jurisdictions helpfully clarify by statute that conspiracy's purpose requirement (or its substantive equivalent) specifically applies to "conduct constituting an offense."[235] While helpful, however, no "state statute has attempted to

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[229] *See, e.g.*, Robinson & Grall, *supra* note 44, at 756.
[230] *See id.*
[231] Model Penal Code § 5.03(1) cmt. at 113.
[232] *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 332-366 (2005)
[233] Wesson, *supra* note 121, at 209.
[234] Robinson & Grall, *supra* note 44, at 754. As one commentator frames the issue:

> Although the MPC writers apparently believed that the resolution of the question was best left open to subsequent judicial developments, I believe that statutory language should clearly and unequivocally resolve the question. Criminal statutes are constitutionally required to be clear in their designation of the elements of crimes, including mental elements.

Wesson, *supra* note 121, at 209.
[235] Ala. Code § 13A-4-3(a); *see* sources cited *infra* note 357.

deal comprehensively with the state of mind required for circumstance elements of the conspiracy offense."[236] (Note, though, that English statutory law explicitly codifies the culpable mental state requirement governing the circumstances of a conspiracy.[237]) And the same also appears to be true with respect to the culpable mental state requirement applicable to the results of a conspiracy, at least insofar as explicit statutory formulations are concerned.[238]

There is, then, no American criminal code that fully implements a statutory element analysis of conspiracy's culpable mental state requirement.

The RCC approach to codifying the culpable mental state of conspiracy, in contrast, strives to provide that clarification, while at the same time avoiding unnecessary complexity to the extent feasible. This is accomplished in three steps.

To start, the prefatory clause of RCC § 303(a) establishes that the culpability requirement applicable to a criminal conspiracy necessarily incorporates "the culpability required by [the target] offense." This language is modeled on the prefatory clauses employed in various modern attempt statutes.[239] It effectively communicates that conspiracy liability requires, at minimum, proof of the culpable mental states (if any) governing the results and circumstances of the target offense.[240]

Next, RCC § 303(a)(1) clearly and directly articulates that conspiracy's distinctive purpose requirement governs the conduct which constitutes the object of the agreement. This is achieved by expressly applying a culpable mental state of purpose to the agreement clause. More specifically, RCC § 301(a)(1) states that the parties must, *inter alia*, "[p]urposely agree to engage in or aid the planning or commission of [criminal] conduct."

A handful of states have followed a similar approach to codification in the sense that they clarify, by statute, that a purpose requirement applies to the conduct that constitutes the object of the agreement.[241] Notably, however, these jurisdictions do so through a different clause that, like the Model Penal Code approach to codifying the culpable mental state requirement of conspiracy, separates the purpose requirement from the agreement requirement.[242] The latter approach is unnecessarily verbose—whereas the

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[236] *See* Buscemi, *supra* note 161, at 1149. Also worth noting is that the proposed Federal Criminal Code does an even worse job of addressing the *mens rea* of conspiracy. *See id.* (discussing FCC § 1004(1)).

[237] *See supra* note 217 (presenting relevant statutory text).

[238] *See supra* notes 208-09 and accompanying text (discussing statutory treatment of results).

[239] For example, Model Penal Code § 5.01(1) reads: "A person is guilty of an attempt to commit a crime if, *acting with the kind of culpability otherwise required for commission of the crime* . . . ." For state statutes employing this language, see, for example, Ky. Rev. Stat. Ann. § 506.010; Tenn. Code Ann. § 39-12-101.

[240] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 201(d) (culpability requirement defined). This clause also addresses broader aspects of culpability such as, for example, premeditation, deliberation, or the absence of any mitigating circumstances, which the target of a conspiracy might likewise require. A conspiracy to commit such an offense would, pursuant to the prefatory clause of § 303(a), require proof of the same.

[241] For example, Ala. Code § 13A-4-3(a) reads: "A person is guilty of criminal conspiracy if, *with the intent that conduct constituting an offense be performed*, he agrees with one or more persons to engage in or cause the performance of such conduct . . . ." For similar formulations, see, for example, N.Y. Penal Law § 105.10; Me. Rev. Stat. tit. 17-A, § 151; Or. Rev. Stat. Ann. § 161.450.

[242] For example, Model Penal Code § 5.03(1) states, first, that a person must act "with the purpose of promoting or facilitating [] commission" of a crime, and, second, that he must:

drafting technique employed in the RCC allows for a more succinct general statement of the culpable mental state requirement governing conspiracy.[243]

Finally, RCC § 303(b) provides explicit statutory detail, not otherwise afforded by any other American criminal code, concerning the extent to which principles of culpable mental state elevation govern the results and circumstances of the target offense.[244] More specifically, RCC § 303(b) establishes that: "Notwithstanding subsection (a), to be guilty of a conspiracy to commit an offense, the defendant and at least one other person must intend to bring about any result or circumstance required by that offense." This language incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a conspiracy is comprised of a result or circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). For these offenses, proof of intent on behalf of two or more parties is required as to the requisite elements under RCC § 303(b).

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the culpable mental state requirement governing a conspiracy, which avoids the flaws and ambiguities reflected in Model Penal Code § 5.03(1).

Another drafting flaw reflected in the Model Penal Code approach to codifying conspiracy liability, which is addressed by the RCC, is that the Model Penal Code's definition of a conspiracy, § 5.03(1), omits reference to the overt act requirement. That requirement is instead articulated through a separate provision, Model Penal Code § 5.03(5), which states that "[n]o person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired."

It seems clear that the drafters of the Model Penal Code intended to establish that an overt act is indeed an element of (relevant) conspiracy offenses.[245] If true, however, the preferable approach is to incorporate the overt act requirement into the definition of conspiracy itself, rather than through a separate stand-alone provision. This is the approach that various reform jurisdictions have taken,[246] and it is likewise the approach

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> (a) agree[] with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agree[] to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

[243] *Cf. United States v. Piper*, 35 F.3d 611, 614–15 (1st Cir. 1994) (describing conspiracy as, *inter alia*, "intentionally agree[ing] to undertake activities that facilitate commission of a substantive offense"); *Com. v. Weimer*, 602 Pa. 33, 38 1105–06 (2009) ("To sustain a criminal conspiracy conviction, the Commonwealth must establish a defendant entered into an agreement to commit or aid in an unlawful act with another person or persons, with a shared criminal intent.").

[244] *See* RCC § 303(b) ("Notwithstanding subsection (a), to be liable for conspiracy, the parties to the agreement must at least intend to bring about any result or circumstance required by the target offense.")

[245] *See* Model Penal Code § 5.03(5) cmt. at 452-56; *see also People v. Russo*, 25 Cal. 4th 1124, 1131–34, (2001); *People v. Swain*, 12 Cal.4th 593, 600 & fn.1 (1996).

[246] For example, Haw. Rev. Stat. Ann. § 705-520 reads:

reflected in the RCC. More specifically, RCC § 303(a)(2) states as an element of the offense that "[o]ne of the parties to the conspiracy engages in an overt act in furtherance of the agreement."

One final codification point concerning the general definition of conspiracy incorporated into the RCC worth noting is that it clearly codifies the bilateral approach to conspiracy—in contrast to the Model Penal Code's problematic attempt at codifying a unilateral approach to conspiracy.[247] In most jurisdictions that retain a bilateral approach, the common law "two or more persons" formulation is employed as the basis for statutorily articulating a plurality requirement.[248] The general definition of conspiracy incorporated into the RCC, in contrast, more clearly communicates the bilateral nature of the offense alongside RCC § 303(a)'s articulation of each of the offense's particular elements. Specifically, the prefatory clause of RCC § 303(a) establishes that: "[a] person is guilty of a conspiracy to commit an offense when . . . *that person and at least one other person*" meet the elements of a criminal conspiracy.[249]

> A person is guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a crime:
>
> (1) He agrees with one or more persons that they or one or more of them will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and
>
> (2) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

For similar statutory approaches, see, for example, Ark. Code Ann. § 5-3-401; Ala. Code § 13A-4-3; Delaware Reform Code § 703(a)(4).

[247] As one commentator observes:

> The language chosen by the MPC's authors is not entirely unambiguous in its choice of a unilateral theory of conspiracy; it could be argued that the term "agrees" implies the subjective assent of two or more parties to a common plan or scheme.

Wesson, *supra* note 121, at 206; *see also supra* notes 134-35 (authorities interpreting Model Penal Code language in conflicting ways).

[248] *See, e.g.*, D.C. Code § 22-1805a; Cal. Penal Code § 182.

[249] This language is drawn directly from DCCA case law. *See In re T.M.*, 155 A.3d 400, 411 (D.C. 2017). For a legislative proposal that employs similar language, see Wesson, *supra* note 121, at 220 (A conspiracy exists where, *inter alia*, the defendant and "another person each agree that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime").

RCC § 22E-304. Exceptions to General Inchoate Liability.

Relation to National Legal Trends. Within American criminal law, there are a range of situations where "an actor may technically satisfy the requirements of an offense definition, yet be of a class of persons that was not in fact intended to be included within the scope of the offense."[859] Two such situations arise in the context of the general inchoate crimes of solicitation and conspiracy where: (1) the would-be solicitor/conspirator is also a victim of the target offense; and (2) the criminal objective of the would-be solicitor/conspirator is inevitably incident to commission of the target offense.[860]

With respect to the first situation, the common law rule is that—absent legislative intent to the contrary—a person may not be held criminally liable for soliciting or conspiring to commit acts that would also victimize that person.[861] This rule *exempts* from general inchoate liability those who might otherwise satisfy the general requirements of solicitation or conspiracy in relation to the commission of the offense perpetrated against themselves.[862]

The paradigm case is presented by a minor who engages in a sexual relationship with an adult that is considered by law to constitute statutory rape.[863] If the minor initiates the relationship, then the minor may technically satisfy the requirements of soliciting the commission of a statutory rape in the sense of having purposefully requested its perpetration.[864] And where the adult accepts the invitation, the minor may also technically satisfy the requirements of conspiring to commit statutory rape in the sense of having purposefully agreed to facilitate its perpetration.[865] Nevertheless, in the absence of express legislative authority to the contrary, the minor may not be convicted for soliciting or conspiring in the commission of her own victimization.[866]

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[859] ROBINSON, *supra* note 23, at § 83.

[860] *See, e.g.*, WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4 (3d ed., Westlaw 2017) ("[O]ne who is in a legislatively protected class and thus could not even be guilty as an accessory of the crime which is the objective is likewise not guilty of conspiracy to commit that crime."); *In re Meagan R.*, 42 Cal. App. 4th 17, 24, 49 Cal. Rptr. 2d 325, 329–30 (1996) (same); LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1(d) ("[I]t is a defense to a charge of solicitation to commit a crime that if the criminal object were achieved, the solicitor would not be guilty of a crime under the law defining the offense or the law concerning accomplice liability."); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) (same).

[861] *See, e.g.*, DRESSLER, *supra* note 2, at § 29.09[D]; Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551, 562 (2004); *In re Meagan R.*, 42 Cal. App. 4th at 24–25; ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[862] *See* Ky. Rev. Stat. § 502.040 cmt. (noting victim "exemption[] to the general doctrine of imputed liability for conduct which aids in the perpetration of crime"); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83 (same in context of solicitation and conspiracy).

[863] *See, e.g.*, DRESSLER, *supra* note 2, at § 29.09[D]; *Queen v. Tyrrell*, [1894] 1 Q.B. 710; *Regina v. Tyrell*, 17 Cox Crim.Cas. 716 (1893).

[864] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1(d); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[865] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 12.4(c); DRESSLER, *supra* note 2, at § 29.09[D].

[866] DRESSLER, *supra* note 2, at § 29.09[D]; *see, e.g., In re Meagan R.*, 42 Cal. App. 4th 17, 21–22, 49 Cal. Rptr. 2d 325 (1996) (minor "cannot be liable as either an aider or abettor or coconspirator to the crime of her own statutory rape," and, as such, cannot be guilty of burglary based on a building entry for the purpose of engaging in consensual sexual intercourse"); *Application of Balucan*, 44 Haw. 271, 353 P.2d 631, 632 (1960) ("A girl under sixteen years of age, the victim of []sexual intercourse with a female under sixteen, a felony, cannot be charged as a principal aiding in the commission of, or as an accessory to, the felony."). *See also* Commentary on Proposed Del. Crim. Code § 705 (2017) (noting that this exception would also apply to "people who are victims of the underlying offense—such

With respect to the second situation, the common law rule is that—again, absent legislative intent to the contrary—general solicitation or conspiracy liability does not apply where the nature of the target offense is such that the solicitor or conspirator's criminal objective is inevitably incident to its commission.[867] This rule *exempts* from general solicitation and conspiracy liability those who might otherwise satisfy the requirements for these general inchoate crimes in relation to the commission of an offense for which their planned participation was logically required as a matter of law.[868]

The paradigm case is a two-party transaction involving the purchase of controlled substances, which the buyer initiates for purposes of acquiring an individual supply.[869] Under these circumstances, the buyer may technically satisfy the requirements of general solicitation liability as applied to the distribution of controlled substances in the sense of having purposefully requested the seller to distribute a controlled substance.[870] And if the seller accepts the solicitation, the buyer may technically satisfy the requirements of general conspiracy liability as applied to the distribution of controlled substances in the sense of having purposefully agreed with the seller to perpetrate the distribution of a controlled substance.[871] That said, it is well established that the buyer's conduct, without more, cannot not provide the basis for establishing general solicitation or conspiracy liability.[872] The reason? Because "the existence of a willing buyer is a prerequisite to the commission of the completed crime," the purchaser's conduct is "necessarily incident" to commission of the target offense of distribution.[873]

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as, for example, a person who agrees to pay money to an extortionist, thereby technically entering into a 'conspiracy' with the extortionist.").

[867] *See, e.g., Com. v. Fisher*, 426 Pa. Super. 391, 395–96, 627 A.2d 732, 734 (1993) (quoting LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1); *Commonwealth v. Jennings*, 490 S.W.3d 339, 343–44 (Ky. 2016).

[868] *See, e.g.*, Commentary on Ky. Rev. Stat. Ann. § 502.040; Commentary on Ala. Code § 13A-4-3.

[869] *See, e.g.*, LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 13.3(e); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991).

[870] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1(d); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[871] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 12.4(c); DRESSLER, *supra* note 2, at § 29.09[D].

[872] *United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998). For solicitation case law, see, for example, *People v. Allen*, 92 N.Y.2d 378, 681 N.Y.S.2d 216, 703 N.E.2d 1229 (1998) (solicitation of marijuana sale not criminal, as "the existence of a willing buyer is a prerequisite to the commission of the completed crime" and thus is "necessarily incident" to crime); *Com. v. Fisher*, 426 Pa. Super. 391, 394, 627 A.2d 732, 733 (1993) ("[A]ppellant as the buyer of drugs is "inevitably incident" to the delivery of drugs and his conduct cannot be considered that of an accomplice. [Therefore, he cannot be convicted of solicitation]."); *Tyler*, 587 So. 2d at 1241–43 ("[W]here A solicits B only to sell drugs to A, and A does not receive any controlled substance, A is not guilty as an accomplice to the offense of distribution and is not guilty of solicitation to commit the offense of distribution of a controlled substance.").

For conspiracy case law, see, for example, *United States v. Parker*, 554 F.3d 230 (2d Cir. 2009) ("the objective to transfer the drugs from the seller to the buyer cannot serve as the basis for a charge of conspiracy to transfer drugs"); *United States v. Hawkins*, 547 F.3d 66, 71-72 (2d Cir. 2008) (simple drug transaction is not sufficient, by itself, to support a conspiracy conviction); *compare Ex parte Parker*, 136 So. 3d 1092, 1095 (Ala. 2013) (assuming that simple drug transaction is sufficient to support conspiracy to distribute conviction against *seller*); *Tyler*, 587 So. 2d at 1241–43 (observing that: (1) "[i]n a prosecution against the seller, where the statutorily proscribed conduct is the sale of the controlled substance, the buyer's conduct would be 'inevitably or necessarily incidental' to the sale"; and (2) "in a prosecution against the buyer, where the proscribed conduct is the possession of the controlled substance, the seller's conduct would be 'inevitably or necessarily incidental' to that possession"); *see also People v. Moses*, 291 A.D.2d 814, 814, 737 N.Y.S.2d 748, 749 (2002); *United States v. Parker*, 554 F.3d 230, 235 (2d Cir. 2009) ("The buyer-seller exception [exists to protect] a buyer or transferee from the severe liabilities intended only for transferors.").

[873] *People v. Allen*, 92 N.Y.2d 378, 681 N.Y.S.2d 216, 703 N.E.2d 1229 (1998); *Tyler*, 587 So. 2d at 1241–43.

It's important to point out that, in applying the conduct inevitably incident exception, "the question is whether the crime charged is so defined that the crime could not have been committed without a third party's involvement, not whether the crime 'as charged actually involved a third party whose 'conduct was useful or conducive to' the crime."[874] To take just one example, consider a situation where X persuades Y to join in a tightly coordinated two-person plan to perpetrate an armed robbery against V.[875] Although, on these facts, consummation of an "armed robbery" is clearly "*easier* with the assistance of others," X and Y's teamwork "is not *necessary* to commit the offense" against V (i.e., the statutory elements of "[a]rmed robbery do[] not require proof that there was more than the one actor."[876]) As such, the conduct inevitably incident exception would not bar convicting X for soliciting or conspiring with Y to commit armed robbery.[877]

Both of these exceptions to the general rules of general inchoate liability are typically justified on the basis of legislative intent.[878] For example, with respect to the victim exception, the standard justification is that, "[w]here the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose [general inchoate] liability upon such a person."[879] And, with

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[874] LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 13.3 (citing *State v. Duffy*, 8 S.W.3d 197 (Mo. App. 1999).

[875] *See Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002).

[876] *Id.*

[877] *See, e.g.*, LAFAVE, *supra* note 51, at § 12.4(c)(4) (observing that a conspiracy exists where "*D* and *E* agreed to bribe *F*") (citing *United States v. Burke*, 221 F. 1014 (D.N.Y. 1915)); *Tyler v. State*, 587 So. 2d 1238, 1243 (Ala. Crim. App. 1991) ("The crime of solicitation to commit the offense of distribution of a controlled substance is committed where A solicits B to distribute drugs to C. If the solicited crime were consummated, both A and B would be guilty of the distribution."); *Commonwealth v. Jennings*, 490 S.W.3d 339, 345 (Ky. 2016) (holding that, "as a matter of law," defendant's conduct was not "inevitably incident" to the crime of assault" because that offense "does not as defined require one person to identify the victim and another to strike the blow").

[878] *See, e.g.*, ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 23 ("There is a single principle behind these [victims and conduct inevitably incident] modifications of an offense definition [for conspiracy and solicitation]: while the actor has apparently satisfied all elements of the offense charged, he has not in fact caused the harm or evil sought to be prevented by the statute defining the offense.").

[879] LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 13.3; *id.* at § 11.1(d) ("Were the [exemptions for solicitation liability] otherwise, the law of criminal solicitation would conflict with the policies expressed in the definitions of the substantive criminal law."); Michaels, *supra* note 52, at 571 ("This rule is often cast in the form of not permitting a conviction for conspiracy to commit an offense when doing so would undermine the legislative purpose in creating the offense."); DRESSLER, *supra* note 52, at § 29.09 n.195 ("The prevailing rationale is that the offense of statutory rape is meant to protect a very young person (traditionally, females) from her less-than-fully informed decision to have sexual contact with an older individual (traditionally, a male). It would frustrate legislative intent, therefore, if the underage party . . . were subject to prosecution for conspiracy in her own victimization.")

As the U.S. Supreme Court observed in *Gebardi v. United States:*

> [W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished. We think it a necessary implication of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers.

respect to the conduct inevitably incident exception, the standard justification is that "the legislature, by specifying the kind of individual who was guilty when involved in a transaction necessarily involving two or more parties, must have intended to leave the participation by the others unpunished."[880]

In this way, the victim and conduct inevitably incident exceptions to the general rules of general inchoate liability are congruent with—and ultimately derived from—comparable exceptions that arise in the context of accomplice liability. For example, one commentator summarizes the relationship in the conspiracy context as follows:

> [I]n the absence of express legislative authority to the contrary, if a male and an underage female have sexual intercourse, the female may not be convicted as an accomplice in her own "victimization." Similarly, in the absence of contrary legislative intent, a pregnant woman may not be convicted as an accomplice in a criminal abortion of her own fetus, because her conduct is "inevitably incident" to the commission of the crime. And, because underage females and pregnant women cannot be convicted as accomplices in these offenses, they are also immune from prosecution for conspiracy to commit these offenses upon themselves.[881]

Because these exceptions are understood to be an outgrowth of legislative intent, it is also understood that they should not apply when the legislature clearly manifests a desire to

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287 U.S. 112, 123, 53 S.Ct. 35, 77 L.Ed. 206 (1932).

[880] *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 n.4 (Ky. 2016) (quotations and citations omitted); *see Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) ("The traditional law is that where a statute treats one side of a bilateral transaction more leniently . . . adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature."); *see also Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) ("Under the State's argument, a purchaser convicted of soliciting the sale of a controlled substance (a Class B felony) would be punished more harshly then either a seller convicted of soliciting the purchase of a controlled substance (a Class C felony) or a purchaser who actually received the controlled substance (a Class C felony). Such an interpretation is unreasonable.")

For example, in *United States v. Parker*, the U.S. Court of Appeals for the Second Circuit justified the buyer-seller exemption to conspiracy liability by reference to:

> [A] policy judgment that persons who acquire or possess illegal drugs for their own consumption because they are addicted are less reprehensible and should not be punished with the severity directed against those who distribute drugs . . . .
>
> [I]f an addicted purchaser, who acquired drugs for his own use and without intent to distribute it to others, were deemed to have joined in a conspiracy with his seller for the illegal transfer of the drugs from the seller to himself, the purchaser would be guilty of substantially the same crime, and liable for the same punishment, as the seller. The policy to distinguish between transfer of an illegal drug and the acquisition or possession of the drug would be frustrated. The buyer-seller exception thus protects a buyer or transferee from the severe liabilities intended only for transferors.

554 F.3d 230, 235 (2d Cir. 2009).

[881] DRESSLER, *supra* note 2, at § 29.09[D].

criminalize the relevant conduct.[882] This is to say: where the legislature has made an offense-specific determination regarding liability for victims or conduct inevitably incident, it is generally agreed that the courts should implement it.[883] In practice, then, these exceptions from general principles of inchoate liability constitute default rules of construction, to be applied in the absence of an offense-by-offense specification of liability.[884]

The Model Penal Code provides the basis for most legislative efforts at codifying the victim and conduct inevitably incident exceptions.[885] The relevant code language is contained in Model Penal Code § 5.04(2), which establishes that:

> It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under . . . 2.06(6)(a) or (6)(b).[886]

And the relevant complicity provisions incorporated by reference, Model Penal Code § 2.06(6)(a) and (6)(b), establish that:

> Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> (a) he is a victim of that offense; or
>
> (b) the offense is so defined that his conduct is inevitably incident to its commission . . . .

The latter complicity provisions, as the explanatory note highlights, were intended to codify two different "special defenses to a charge that one is an accomplice."[887] The first is applicable "when the actor is himself a victim of the offense."[888] And the second is applicable "when the offense is so defined that the actor's conduct is inevitably incident to the commission

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[882] *See, e.g.*, ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83 ("The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction.").

[883] *See, e.g.* Ala. Code § 13A-4-1(c) ("When the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the offense solicited, defendant is guilty of such related offense only and not of criminal solicitation."); N.Y. Penal Law § 100.20 ("When under such circumstances the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the crime solicited, the actor is guilty of such related and separate offense only and not of criminal solicitation.").

[884] *See, e.g.*, *United States v. Previte*, 648 F.2d 73 (1st Cir. 1981); *United States v. Langford*, 647 F.3d 1309, 1331–32 (11th Cir. 2011); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[885] *See generally* Model Penal Code § 5.04(2) cmt. at 481.

[886] Model Penal Code § 5.04(2) also references "Section 2.06(5)" of the Code's complicity provisions. That subsection provides that "[a] person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity." However, the RCC approach to complicity does not incorporate a similar provision. *See generally* Commentary on RCC § 210. Therefore, the relevance of this provision to general inchoate liability is not addressed here.

[887] Model Penal Code § 2.06(6): Explanatory Note.

[888] *Id.*

of the offense."[889] With those exceptions in mind, Model Penal Code § 5.04(2) subsequently establishes that—as the explanatory note phrases it—"[i]n cases where the actor would not be guilty of the substantive offense as an accessory because of some special policy of the criminal law, [that actor is not] liable for solicitation of or conspiracy to commit the same offense."[890] In this way, Model Penal Code § 5.04(2) "make[s] the scope of liability for conspiracy and solicitation congruent with the provisions of Section 2.06 on the liability of accessories."[891]

In support of this parallel approach, the Model Penal Code drafters point to the same justifications "embodied in the complicity provisions of the Model Code."[892] As the accompanying Model Penal Code commentary observes:

> The commentary to Section 2.06 explains that to hold the victim of a crime guilty of conspiring to commit it would confound legislative purpose. Concerning crimes as to which the behavior of more than one person is "inevitably incident," such as unlawful intercourse, bribery, or unlawful sales, it is pointed out that varying and conflicting policies are often involved—for example, ambivalence in public attitudes toward the crime and the requirement of corroboration of accomplice testimony. The position taken in the complicity provision, and now adopted for conspiracy and solicitation, is to leave to the legislature in defining each particular offense the selective judgment that must be made as to whether more than one participant ought to be subject to liability. Since the exception is confined to behavior "inevitably incident" to the commission of the crime, the problem inescapably presents itself in defining the crime.[893]

The Model Penal Code drafters are also careful to distinguish this approach to general inchoate liability from the approach reflected in the common law doctrine known as Wharton's Rule. As accompanying Model Penal Code commentary proceeds to observe:

> As formulated by the author whose name it bears, th[is] doctrine holds that when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents cannot be maintained. The classic Wharton's rule cases involve crimes such as dueling, bigamy, adultery, and incest, but it has also been said to apply to gambling, the giving and receiving of bribes, and the buying and selling of contraband goods.[894]

While acknowledging that Wharton's Rule "has been unevenly applied and has been subject to a number of exceptions and limitations," the Model Penal Code drafters believed that the basic idea of barring conspiracy liability for any target offense that requires joint agreement

[889] *Id.*
[890] Model Penal Code § 5.04(2): Explanatory Note.
[891] *Id.*
[892] Model Penal Code § 5.04(2) cmt. at 481.
[893] *Id.*
[894] *Id.*

was flawed as a matter of policy:

> Wharton's Rule as generally stated . . . completely overlooks the functions of conspiracy as an inchoate crime. That an offense inevitably requires concert is no reason to immunize criminal preparation to commit it. Further, the rule operates to immunize from a conspiracy prosecution both parties to any offense that inevitably requires concert, thus disregarding the legislative judgment that at least one should be punishable and taking no account of the varying policies that ought to determine whether the other should be. The rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime, for it is clear that the legislature would have taken the factor of concert into account in grading a crime that inevitably requires concert.[895]

With that in mind, Model Penal Code § 5.04(2) "goes no further than to provide that a person who may not be convicted of the substantive offense under the complicity provision may not be convicted of the inchoate crime under the general conspiracy and solicitation sections."[896] This approach, as the drafters conclude, appropriately ensures that "the party who would be guilty of the substantive offense if it should be committed, may equally be convicted of soliciting or conspiring for its commission . . . ."[897]

Since completion of the Model Penal Code, the drafters' recommendations regarding adoption of parallel victim and conduct inevitably incident exceptions to general solicitation and conspiracy liability have been quite influential. For example, as a legislative matter, "many state codes follow [the] example" set by Model Penal Code § 5.04(2).[898] This includes about half of the criminal codes in jurisdictions that have undertaken comprehensive modernization efforts.[899]

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[895] *Id.*; *see* Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 1048 (1961).

[896] Model Penal Code § 5.04(2) cmt. at 481.

[897] *Id.*

[898] Michaels, *supra* note 52, at 562.

[899] *See* Ala. Code § 13A-4-1(c) ("A conspirator is not liable under this section if, had the criminal conduct contemplated by the conspiracy actually been performed, he would be immune from liability under the law defining the offense or as an accomplice under Section 13A-2-24"); Ark. Code Ann. § 5-3-103(a) ("It is a defense to a prosecution for solicitation or conspiracy to commit an offense that . . . [t]he offense is defined so that the defendant's conduct is inevitably incident to the commission of the offense); Me. Rev. Stat. tit. 17-A, § 153 ("It is a defense to prosecution under this section that, if the criminal object were achieved, the person would not be guilty of a crime under the law defining the crime or as an accomplice under section 57."); Or. Rev. Stat. Ann. § 161.475(2) ("It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under ORS 161.150 to 161.165."); N.Y. Penal Law § 100.20 ("A person is not guilty of criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the crime solicited."); Colo. Rev. Stat. Ann. § 18-2-301 ("It is a defense to a prosecution under this section that, if the criminal object were achieved . . . the offense is so defined that his conduct would be inevitably incident to its commission."); N.D. Cent. Code § 12.1-06-03 ("It is a defense to a prosecution under this section that, if the criminal object were achieved . . . the offense is so defined that his conduct would be inevitably incident to its commission, or he otherwise would not be guilty under the statute defining the offense or as an accomplice under section 12.1-03-01."); Ill. Comp. Stat. Ann. ch. 720, § 5/8-3 ("It is a defense to a charge of solicitation or conspiracy that if the criminal object were achieved the accused would not be guilty of an offense."); N.J. Stat. Ann. § 2C:5-3(b) ("It is a defense to a charge of conspiracy to commit a crime that if the object of the conspiracy were achieved, the person charged would not be guilty of a crime under the law defining the crime or as an accomplice under section 2C:2-6e. (1) or (2)"); Pa. Cons. Stat. Ann.

However, "[e]ven in jurisdictions without an express statutory limitation" based on Model Penal Code § 5.04(2), courts have adopted a "legislative-exemption rule" of comparable scope.[900]

While the exceptions reflected in the Model Penal Code § 5.04(2) have had a broad influence on modern criminal codes, it's also important to note that legislatures in reform jurisdictions frequently modify them.[901] One particularly useful revision is the replacement of the Model Penal Code's incorporation-by-reference approach to codifying the victim and conduct inevitably incident exceptions in the general inchoate context with an explicit statement of those exceptions. Section 5-3-103(a) of the Arkansas Criminal Code is illustrative. The relevant provision provides:

> It is a defense to a prosecution for solicitation or conspiracy to commit an offense that: (1) The defendant is a victim of the offense; or (2) The offense is defined so that the defendant's conduct is inevitably incident to the commission of the offense.[902]

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tit. 18, § 904 ("It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under section 306(e) of this title (relating to status of actor) or section 306(f)(1) or (2) of this title (relating to exceptions)"); Haw. Rev. Stat. Ann. § 705-523(1) ("A person shall not be liable . . . for criminal conspiracy if under sections 702-224(1) and (2) and 702-225(1) he would not be legally accountable for the conduct of the other person."); and § 511(1) ("A person shall not be liable under section 705-510 for criminal solicitation of another if under sections 702-224(1) and (2) and 702-225(1) he would not be legally accountable for the conduct of the other person."); Tenn. Code Ann. § 39-12-105(c) ("It is a defense to a charge of attempt, solicitation or conspiracy to commit an offense that if the criminal object were achieved, the person would not be guilty of an offense under the law defining the offense or as an accomplice under § 39-11-402."); N.M. Stat. Ann. § 30-28-3(D) ("A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited."); and sources cited *infra* note 92.

[900] Michaels, *supra* note 52, at 562–64.

[901] For example, the legislatures in at least two jurisdictions statutorily adopt a broad version of Wharton's Rule alongside a conduct inevitably incident exception. *See* Ky. Rev. Stat. Ann. § 506.050 ("No person may be convicted of conspiracy to commit a crime *when an element of that crime is agreement with the person with whom he is alleged to have conspired* or when that crime is so defined that his conduct is an inevitable incident to its commission."); Del. Code Ann. tit. 11, § 521 ("No person may be convicted of conspiracy to commit an offense *when an element of the offense is agreement with the person with whom the person is alleged to have conspired*, or when the person with whom the person is alleged to have conspired is necessarily involved with the person in the commission of the offense."). For scholarly critiques of this form of Wharton's Rule consistent with the Model Penal Code approach, see, for example, Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1141–45 (1975); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83; LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 12.4(c)(4).

[902] Ark. Code Ann. § 5-3-103(a); *see* Ala. Code § 13A-4-1(c); N.Y. Penal Law § 100.20; Ky. Rev. Stat. Ann. § 506.050; Colo. Rev. Stat. Ann. § 18-2-301. Note also that a similar approach has been incorporated into a proposed revision to the Delaware Criminal Code, which reads:

> *Section 705. Defense for Victims and Conduct Inevitably Incident*
>
> Unless otherwise provided by the Code or by the law defining the offense, it is a defense to soliciting or conspiring to commit an offense that:
>
> (a) the person is the victim of the offense; or
>
> (b) the offense is defined in such a way that the person's conduct is inevitably incident to its commission.

Consistent with the above authorities, the RCC creates two generally applicable exceptions to solicitation and conspiracy liability. The first exception, RCC § 304(a)(1), excludes the "victim of the target offense" from the general principles of solicitation and conspiracy liability respectively set forth in RCC §§ 302 and 303. The second exception, RCC § 304(a)(2), excludes an actor whose "criminal objective is inevitably incident to commission of the target offense as defined by statute" from the general principles of solicitation and conspiracy liability respectively set forth in RCC §§ 302 and 303. Thereafter, subsection (b) establishes an important limitation on these two exceptions, namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that RCC § 304 *is not* intended to constitute a universal bar on criminal liability for victims or conduct inevitably incident, but rather, constitutes a default rule of construction applicable in the absence of legislative specification to the contrary.

The RCC's recognition of victim and conduct inevitably incident exceptions generally accords with the substantive policies reflected in Model Penal Code § 5.04(2). At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in one notable way, namely, it provides an explicit statement of the victim and conduct inevitably incident exceptions as they apply in the general inchoate context, rather than relying on the parallel complicity provisions to articulate them by reference. This departure finds support in state legislative practice.[903]

Proposed Del. Crim. Code § 705 (2017).

[903] *See supra* note 93 and accompanying text.

RCC § 22E-304. Renunciation Defense to Attempt, Conspiracy, and Solicitation.

Relation to National Legal Trends. A particularly difficult issue confronting all general inchoate crimes is determining the legal relevance of a defendant's voluntary and complete renunciation of his or her criminal intent prior to completion of the target offense.[904] On the one hand, "under normal liability rules, an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense."[905] But, on the other hand, at the heart of general inchoate liability is the idea that an actor, if uninterrupted, would complete or bring about a criminal offense—a notion that the person who renounces her criminal plans and stops them from coming to fruition contradicts.[906] The American criminal justice system's efforts at resolving this tension, as well as the competing policy considerations it implicates, in any comprehensive way is a "relatively recent" development, with roots in the Model Penal Code.[907]

Prior to the drafting of the Model Penal Code, renunciation-related issues were typically addressed by courts in a piecemeal fashion (if they were addressed at all), which in turn produced policies that were often unclear and inconsistent. With respect to criminal attempts, for example, it was "uncertain under the [common law] whether abandonment of a criminal effort, after the bounds of preparation have been surpassed, will constitute a defense to a charge of attempt."[908] As for criminal solicitations, early common law authorities, while sparse, seem to

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[904] GEORGE FLETCHER, RETHINKING CRIMINAL LAW 185-186 (2000); Paul R. Hoeber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377, 407 (1986).

[905] For example, it would be of no avail for a thief to argue that he subsequently returned the goods that he stole as a defense to a theft charge. Nor would courts find persuasive a defense to PWID that, although the actor illegally possessed narcotics with intent to sell on a Monday, he thought better of his drug trafficking scheme/voluntarily threw the drugs away on a Tuesday. Theft and PWID, like most other offenses are complete at the moment that the elements are satisfied, without regardless of whether actor has a subsequent change of heart. *See, e.g.*, ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; Cahill, *supra* note 20, at 753.

[906] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, FLETCHER, *supra* note 26, at 188 (observing that "the intent required for an attempt is not merely a firm resolve up to the time the attempt is complete as a punishable act," but rather, an "intent . . . to carry through").

[907] Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1, 7 (1989).

[908] Model Penal Code § 5.01 cmt. at 356. In reviewing common law authorities the Model Penal Code drafters distinguished between voluntary and involuntary abandonment:

> An "involuntary" abandonment occurs when the actor ceases his criminal endeavor because he fears detection or apprehension, or because he decides he will wait for a better opportunity, or because his powers or instruments are inadequate for completing the crime. There is no doubt that such an abandonment does not exculpate the actor from attempt liability otherwise incurred.
>
> A "voluntary" abandonment occurs when there is a change in the actor's purpose that is not influenced by outside circumstances. This may be termed repentence or change of heart. Lack of resolution or timidity may suffice. A reappraisal by the actor of the criminal sanctions applicable to his contemplated conduct would presumably be a motivation of the voluntary type as long as the actor's fear of the law is not related to a particular threat of apprehension or detection. Whether voluntary abandonments constitute a defense to an attempt charge is far from clear, there being few decisions squarely facing the issue.

Id.; *see* LAFAVE, *supra* note, at 2 SUBST. CRIM. L. § 11.5 (analyzing common law trends).

indicate that renunciation was a viable defense.[909] But with respect to criminal conspiracies, "[t]he traditional rule concerning renunciation as a defense" clearly pointed in the opposite direction: "no subsequent action can exonerate."[910] Yet this traditional rule was also in seeming conflict with the well-established withdrawal defense to accomplice liability reflected in common law authorities.[911]

Faced with this lack of clarity and consistency of treatment, the drafters of the Model Penal Code opted to develop a comprehensive, broadly applicable statutory approach to dealing with renunciation in the context of general inchoate crimes. What they ultimately devised specifically recognizes a limited "affirmative defense" for "renunciation of criminal purpose" to attempt, solicitation, and conspiracy.[912] The foundation for this approach is provided in the Model Penal Code's general attempt provision, § 5.01.

The relevant sub-section, Model Penal Code § 5.01(4), first establishes that it is an "affirmative defense" to attempt that the defendant "abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."[913] Thereafter, this same provision elucidates the meaning of the phrase "complete and voluntary."[914] It provides, first, that "renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."[915] Then this provision adds that "[r]enunciation is not *complete* if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."[916]

The Model Penal Code applies a similar approach to treating renunciation in the context of the other general inchoate crimes delineated in Article 5. With respect to criminal solicitations, Model Penal Code § 5.02(3) provides that "[i]t is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." And with respect to criminal conspiracies, Model Penal Code § 5.03(6) establishes that "[i]t is an affirmative defense that the actor, after

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[909] *See, e.g.*, Hawaii Rev. Laws § 248-8 (1955); *Regina v. Banks*, 12 Cox Crim. Cas. 393, 399 (Assizes 1873); *State v. Kinchen*, 126 La. 39, 52 So. 185 (1910); *Forman v. State*, 220 Miss. 276, 70 So.2d 848 (1954); *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909).

[910] Model Penal Code § 5.03 cmt. at 457 (collecting authorities).

[911] The common law rule is that "[o]ne who has given aid or counsel to a criminal scheme sufficient to otherwise be liable for the offense as an accomplice may sometimes escape liability by withdrawing from the crime." LAFAVE, *supra* note9, at 2 SUBST. CRIM. L. § 13.3 (collecting authorities); *see* Model Penal Code § 5.03 cmt. at 457.

[912] Model Penal Code §§ 5.01(4), 5.02(3), 5.03(6).

[913] *Id.* § 5.01(4).

[914] *Id.*

[915] *Id.* In specifying this motive of increased risk, the Model Penal Code drafters intended to distinguish between fear of the law reflected in a general "reappraisal by the actor of the criminal sanctions hanging over his conduct," which satisfies the requirement, and "fear of the law [that] is . . . related to a particular threat of apprehension or detection," which does not. Model Penal Code § 5.01 cmt. at 356.

[916] Model Penal Code § 5.01(4).

conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."[917]

The Model Penal Code's renunciation provisions, when viewed collectively and in relevant context, comprise policies that are substantively identical to one another. Most importantly, all three require that the renunciation be "voluntary and complete," as defined in Model Penal Code § 5.01(4).[918] And they also treat renunciation as an "affirmative defense," which, pursuant to the Model Penal Code's general provision concerning legal and evidentiary burdens,[919] "means that the defendant has the burden of raising the issue and the prosecution has the burden of persuasion" as to whether the defendant did, in fact, voluntarily and completely repudiate his or her criminal purpose.[920] (In practical effect, this means that "the prosecution is not required to disprove [the absence of renunciation] unless and until there is evidence in its support."[921])

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[917] The commentary to the Model Penal Code is careful to explain that the issue of renunciation "should be distinguished from abandonment or withdrawal from the conspiracy (1) as a means of commencing the running of time limitations with respect to the actor, or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (3) as a defense to substantive crimes subsequently committed by the other conspirators." Model Penal Code § 5.03 cmt. at 456.

[918] Model Penal Code § 5.01(4) (noting that the definition of "voluntary and complete" applies to all aspects of "this Article," that is, within Model Penal Code Article 5 that governs all inchoate crimes); *see* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[919] The pertinent provision, Model Penal Code § 1.12, states in relevant part that:

> (1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.
>
> (2) Subsection (1) of this Section does not:
>
> (a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or
>
> (b) apply to any defense that the Code or another statute plainly requires the defendant to prove by a preponderance of evidence.

[920] Model Penal Code § 5.01: Explanatory Note. With respect to the Code's allocation of burdens, the drafters provide two main reasons for why "it is proper to require the defendant to come forward first with evidence in support of the defense." Model Penal Code § 5.01 cmt. at 359. First, "[t]he decided cases would seem to indicate that instances of renunciation of criminal purpose are not frequent, and that their occurrence is therefore improbable." *Id.* And second, "the facts that bear on such renunciation are most likely to be within the control of the defendant." *Id.*

[921] Model Penal Code § 5.01 cmt. at 359. Here's how one state appellate court has described this framework:

> A defendant is deemed to have raised the defense of renunciation, and thus to have met his burden of going forward with respect to that defense, whenever the evidence presented at trial, if construed in the light most favorable to the defendant, is sufficient to raise a reasonable doubt in support of each essential element of the defense . . . The defendant, however, has no burden of proof with respect to the defense of renunciation. Instead, the state has the burden of disproving that defense beyond a reasonable doubt whenever it is duly raised at trial.

State v. Riley, 123 A.3d 123, 130 (Conn. 2015).

There are, however, some clear textual differences between these three provisions, namely, whereas § 5.01(4) speaks of "abandon[ing] [one's] effort to commit the crime or otherwise prevent[ing] its commission," § 5.02(3) speaks of "persuad[ing] [the solicitee] not to do so or otherwise prevent[ing] the commission of the crime," while § 5.03(6) speaks of "thwart[ing] the success of the conspiracy."[922] The commentary accompanying the Model Penal Code explains these variances as follows:

> Since attempt involves only an individual actor, abandonment will generally prevent completion of the crime, although in some cases the actor may have to put a stop to forces that he has set in motion and that would otherwise bring about the substantive crime independently of his will. The solicitor, on the other hand, has incited another person to commit the crime, unless the solicitation is uncommunicated or rejected; consequently, the Code requires that he either persuade the other person not to do so or otherwise prevent the commission of the crime. Since conspiracy involves preparation for crime by a plurality of agents, the objective will generally be pursued despite renunciation by one conspirator, and the Code accordingly requires for a defense of renunciation that the actor thwart the success of the conspiracy.[923]

The Model Penal Code commentary also provides a detailed analysis of the policy considerations that support recognition of the proposed renunciation defense to general inchoate crimes. That analysis revolves around two main rationales. First, "renunciation of criminal purpose tends to negative dangerousness."[924] In the context of attempt liability, for example, the drafters argue that:

> [M]uch of the effort devoted to excluding early "preparatory" conduct from criminal attempt liability is based on the desire not to impose liability when there is an insufficient showing that the actor has a firm purpose to commit the crime contemplated. In cases where the actor has gone beyond the line drawn for defining preparation, indicating prima facie sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime . . . .[925]

Second, a renunciation defense "provide[s] actors with a motive for desisting from their criminal designs, thereby diminishing the risk that the substantive crime will be committed."[926] The drafters of the Model Penal Code believed this incentive to hold "at all stages of the criminal

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[922] *See* Model Penal Code 5.03 cmt. at 458 (noting that "[t]he kind of action that will suffice varies for the three different inchoate crimes"). Textual variances aside, though, it seems relatively clear that a voluntary and complete renunciation, when accompanied by prevention of the offense contemplated, will similarly constitute a defense to attempt, solicitation, and conspiracy under the Code. *See infra* note 99 and accompanying text.

[923] Model Penal Code 5.03 cmt. at 458.

[924] Model Penal Code 5.01 cmt. at 359.

[925] *Id*.

[926] *Id*.

effort," but nevertheless thought that it would be most significant "as the actor nears his criminal objective and the risk that the crime will be completed is correspondingly high."[927] That is,

> At the very point where abandonment least influences a judgment as to the dangerousness of the actor—where the last proximate act has been committed but the resulting crime can still be avoided—the inducement to desist stemming from the abandonment defense achieves its greatest value.[928]

Although framed in terms of attempt liability, the Model Penal Code commentary clarifies that the same "two most sensible propositions"—that renunciation negates dangerousness and incentivizes desistance—are just as applicable to the general inchoate crimes of solicitation and conspiracy.[929]

Since completion of the Model Penal Code, the drafters' recommendations concerning recognition of a broadly applicable renunciation defense to all general inchoate crimes has gone on to become quite influential. Based upon one survey of prevailing legal trends, for example, it appears that "[a] majority of American jurisdictions recognize some form of renunciation defense to an attempt to commit an offense."[930] That same survey likewise concludes that: (1) "[n]early every jurisdiction permits some form of renunciation defense to a charge of criminal solicitation"[931]; and that (2) "[n]early every jurisdiction permits some form of renunciation defense to a charge of conspiracy."[932]

Legislative adoption of the Model Penal Code approach to renunciation is a particularly pervasive feature of modern criminal codes.[933] For example, a strong majority of reform

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[927] *Id.*

[928] *Id.* The Model Penal Code commentary acknowledge "that the defense of renunciation of criminal purpose may add to the incentives to take the *first* steps toward crime," i.e., "[k]nowledge that criminal endeavors can be undone with impunity may encourage preliminary steps that would not be undertaken if liability inevitably attached to every abortive criminal undertaking that proceeded beyond preparation." Model Penal Code § 5.01 cmt. at 359. The drafters conclude, however, that "this is not a serious problem" for two reasons:

> First, any consolation the actor might draw from the abandonment defense would have to be tempered with the knowledge that the defense would be unavailable if the actor's purposes were frustrated by external forces before he had an opportunity to abandon his effort. Second, the encouragement this defense might lend to the actor taking preliminary steps would be a factor only where the actor was dubious of his plans and where, consequently, the probability of continuance was not great.

Id. "On balance," then, the MPC drafters "concluded that renunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stages of an attempt, it significantly negatives dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort." *Id.*

[929] *See* Model Penal Code § 5.02 cmt. at 382 (solicitation); Model Penal Code § 5.03 cmt. at 457-58 (conspiracy).

[930] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; *see id.* at n.16 (collecting authorities).

[931] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; *see id.* at n.56 (collecting authorities).

[932] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; *see id.* at n.30 (collecting authorities).

[933] *See, e.g.,* Hoeber, *supra* note 26, at 427 ("Most of the jurisdictions adopting comprehensive criminal codes in the wake of the Model Penal Code have enacted provisions for the defense.") (collecting authorities). Various legal authorities have recognized the importance of legislative, rather than judicial, resolution of renunciation-related issues. *See, e.g., Com. v. Nee*, 458 Mass. 174, 185, 935 N.E.2d 1276, 1285 (2010) ("[W]hatever merits renunciation may have . . . its incorporation into our criminal law must be left to the Legislature."); *State v. Stewart*, 143 Wis. 2d

jurisdictions include: (1) a renunciation defense to attempt liability based on Model Penal Code § 5.01(4)[934]; (2) a renunciation defense to solicitation liability based on Model Penal Code § 5.02(3)[935]; and (3) renunciation defense to conspiracy liability based on Model Penal Code § 5.03(6).[936] And "about two thirds" of these reform jurisdictions have also adopted a broadly applicable statutory elaboration of the meaning of "voluntary and complete" based on that provided by Model Penal Code § 5.01(4).[937]

While the Model Penal Code approach to renunciation has had a broad influence on modern criminal codes, it's also important to note that legislatures in reform jurisdictions routinely modify it. Many of these revisions are clarificatory or organizational; however, some are substantive.[938] Most significant is that a strong plurality of reform jurisdictions relax the Code's requirement that the target of the attempt, solicitation, or conspiracy *actually* be prevented/thwarted.[939] Instead, these state statutes allow for proof of a "substantial,"[940]

28, 45-46, 420 N.W.2d 44, 51 (1988) ("The public policy arguments in favor of the [renunciation] defense are better addressed to the legislature than to the court."); Robert E. Wagner, *A Few Good Laws: Why Federal Criminal Law Needs A General Attempt Provision and How Military Law Can Provide One*, 78 U. CIN. L. REV. 1043, 1072-73 (2010) ("One problem with [federal judicial recognition of the] abandonment defense is that circuits are not consistent about what is required to establish the defense."). *But cf.* Murat C. Mungan, *Abandoned Criminal Attempts: An Economic Analysis*, 67 ALA. L. REV. 1, 3 (2015) (noting "significant variation among states" on treatment of abandoned criminal attempts, including "cases where courts (i) excuse abandoning defendants even when the law does not provide an abandonment defense and (ii) punish abandoning defendants even where, under a strict reading of the law, the defendant ought to be excused.").

[934] *See* Ala. Code § 13A-4-2; Alaska Stat. § 11.31.100; Ark. Code Ann. § 5-3-204; Colo. Rev. Stat. Ann. § 18-2-101; Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11, § 541; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-5; Ky. Rev. Stat. Ann. § 506.020; Me. Rev. Stat. Ann. tit. 17-A, § 154; Mont. Code Ann. § 45-4-103; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-1; N.Y. Penal Law § 40.10; N.D. Cent. Code § 12.1-06-05; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.430; Pa. Cons. Stat. Ann. tit. 18, § 901; Tex. Penal Code Ann. § 15.04; Wyo. Stat. § 6-1-301; Ariz. Rev. Stat. Ann. § 13-1005; Haw. Rev. Stat. § 705-530; Minn. Stat. Ann. § 609.17.

[935] *See* Alaska Stat. § 11.31.110; Ark. Code Ann. § 5-3-302; Colo. Rev. Stat.Ann. § 18-2-301; Del. Code Ann. tit. 11, § 541; Fla. Stat. Ann. § 777.04; Iowa Code Ann. § 705.2; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.060; Me. Rev. Stat. Ann. tit. 17-A, § 153; Mich. Comp. Laws Ann. § 750.157b; N.H. Rev. Stat. Ann. § 629:2; N.Y. Penal Law § 40.10; N.D. Cent. Code § 12.1-06-05; Or. Rev. Stat. § 161.440; Pa. Cons. Stat. Ann. tit. 18, § 902; Tex. Penal Code Ann. § 15.04; Wyo. Stat. § 6-1-302; Ala. Code § 13A-4-1; Ariz. Rev. Stat. Ann. § 13-1005; Haw. Rev. Stat. § 705-530; N.M. Stat. Ann. § 30-28-3.

[936] *See* Ark. Code Ann. § 5-3-405; Colo. Rev. Stat. Ann. § 18-2-203; Conn. Gen. Stat. Ann. § 53a-48; Del. Code Ann. tit. 11, § 541; Fla. Stat. Ann. § 777.04; Haw. Rev. Stat. § 705-523; Ky. Rev. Stat. Ann. § 506.050; Me. Rev. Stat. Ann. tit. 17-A, § 154; Mo. Ann. Stat. § 564.016; N.J. Stat. Ann. § 2C:5-2; N.Y. Penal Law § 40.10; Ohio Rev.Code Ann. § 2923.01; Or. Rev. Stat. § 161.460; Pa. Cons. Stat. Ann. tit. 18, § 903; Tenn. Code Ann. § 39-12-104; Tex. Penal Code Ann. § 15.04; Wyo. Stat. § 6-1-303; Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ariz. Rev. Stat. Ann. § 13-1005; Ark. Code Ann. § 5-3-405; Haw. Rev. Stat. § 705-530; Neb. Rev. Stat. § 28-203; N.H. Rev. Stat. Ann. § 629:3; Vt. Stat. Ann. tit. 13, § 1406.

[937] Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1188 n.267 (1975) (collecting citations); *see* Hoeber, *supra* note 26, at 427 n.102 (same).

[938] *See infra* notes 98-116 and accompanying text.

[939] *See, e.g.*, R. Michael Cassidy & Gregory I. Massing, *The Model Penal Code's Wrong Turn: Renunciation As A Defense to Criminal Conspiracy*, 64 FLA. L. REV. 353, 368 (2012).

[940] With respect to conspiracy, for example, see Ala. Code § 13A-4-3(c) (stating that the defendant is not liable if "he gave a timely and adequate warning to law enforcement authorities or made a substantial effort to prevent the enforcement of the criminal conduct contemplated by the conspiracy"); N.Y. Penal Law § 40.10(1) (allowing an affirmative defense that "the defendant withdrew from participation in such offense prior to the commission thereof and made a substantial effort to prevent the commission thereof"); Ark. Code Ann. § 5-3-405 (stating that defendant

"reasonable,"[941] or "proper"[942] effort to prevent or thwart the target offense—including, but not limited to, providing "timely warning to law enforcement authorities"[943]—to support a renunciation defense to either all,[944] some,[945] or at least one[946] of the general inchoate crimes of attempt, solicitation, and conspiracy.[947]

Modifications aside, it is nevertheless clear that the Model Penal Code approach to renunciation has robust support in American legal practice. And it is also supported by American legal commentary.[948] Indeed, as the drafters of the Hawaii Criminal Code observe:

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may qualify for renunciation defense if he or she "(A) [g]ave timely warning to an appropriate law enforcement authority; or (B) [o]therwise made a substantial effort to prevent the commission of the offense").

[941] With respect to conspiracy, for example, see Ariz. Rev. Stat. Ann. § 13-1005(A) (recognizing renunciation if the defendant "gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the . . . conspiracy"); Haw. Rev. Stat. Ann. § 705-530(3) (allowing an affirmative defense if the defendant "gave timely warning to law-enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the conspiracy"); Minn. Stat. Ann. § 609.05(3) (holding that a person who "makes a reasonable effort to prevent the commission of the crime prior to its commission is not liable if the crime is thereafter committed"); Neb. Rev. Stat. Ann. § 28-203 (allowing the defense for a defendant who "gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result");

[942] With respect to conspiracy, for example, see Alaska Stat. § 11.31.120(f) (allowing the affirmative defense if defendant "either (1) gave timely warning to law enforcement authorities; or (2) otherwise made proper effort that prevented the commission of the crime that was the object of the conspiracy"); *see also* N.H. Rev. Stat. Ann. § 629:3(III) (allowing a defendant who renounces "by giving timely notice to a law enforcement official of the conspiracy and of the actor's part in it, or by conduct designed to prevent commission of the crime agreed upon"); Vt. Stat. Ann. tit. 13, § 1406 (2009) (establishing that renunciation is achieved by "(1) conduct designed to prevent the commission of the crime agreed upon; or (2) giving timely notice to a law enforcement official of the conspiracy and of the defendant's part in it"). Note that Ohio fully exonerates a defendant who merely withdraws from or "abandon[s] the conspiracy . . . by advising all other conspirators of the actor's abandonment." Ohio Rev. Code Ann. § 2923.01(I)(2).

[943] *See* sources cited *supra* notes 62-64.

[944] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1005 (reasonable effort formulation, applicable to attempt, conspiracy, and solicitation); Haw. Rev. Stat. Ann. § 705-530 (same).

[945] *Compare* Ala. Code § 13A-4-1 (substantial effort for solicitation) and Ala. Code § 13A-4-3 (substantial effort for conspiracy) *with* Ala. Code § 13A-4-2 (actually prevent commission of target offense, where attempt charged).

[946] *Compare* Neb. Rev. Stat. Ann. § 28-203 (reasonable efforts for conspiracy) *with* Neb. Rev. Stat. Ann. § 28-201 (no renunciation defense for attempt).

[947] In support of this position, it has been argued that "[t]he law should not demand more than can reasonably be expected. In particular, criminal liability should not be imposed because of police ineptitude or other happenstance factors, which deprive an actor's attempts to defuse a conspiracy of their ordinary effectiveness. Buscemi, *supra* note 59, at 1171. The opposing position contends that:

> If the renunciation defense is regarded as essentially a form of statutory grace conferred on deserving transgressors, then the more limited applicability of the MPC definition may be justified. To put it another way, since renunciation by its very nature comprehends absolution for an already-completed conspiracy offense, the defense may legitimately be restricted to those occasions when an actor succeeds in protecting society from the consequences of his prior criminal agreement. Where prevention efforts are unavailing, even a reformed conspirator will not be heard, under this line of reasoning, to gainsay his part in the illegal scheme.

Id.

[948] For scholarly commentary in support, see Moriarty, *supra* note 29; Hoeber, *supra* note 26; FLETCHER, *supra* note 26; LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. at §§ 11.1, 11.5, and 12.4; D. Stuart, *The Actus Reus in Attempts*, 1970 CRIM. L. REV. 505. *But see* Cassidy & Massing, *supra* note 61 (arguing against recognition of renunciation defense to conspiracy).

"Modern penal theory" has embraced "renunciation as an affirmative defense to inchoate crimes" for the same "two basic reasons" emphasized by the drafters of the Model Penal Code, namely, dangerousness and deterrence.[949]

With respect to incapacitating dangerous persons, it has been argued that recognition of a renunciation defense is:

> [a] cost-effective technique to . . . concentra[ting] our resources on those who seem most likely to commit crime, and to target our measures of social defense at those persons who are most dangerous and whom we most fear . . . If on their own [people] renounce their wrongdoing and cease to aim at bringing about criminal ends, they no longer pose a danger and we no longer have a basis to fear them. Their actions suggest that they possess sufficient internal controls to avoid criminal conduct and therefore are not in need of the external control mechanisms wielded by the criminal law.[950]

And, insofar as deterrence is concerned, it has been asserted that the renunciation defense appropriately reflects the fact that:

> [T]hose that commit some harm should be encouraged to commit less rather than more. Just as the degree structure of criminal law threatens greater punishment for more aggravated forms of a given crime, thereby providing greater deterrence for the higher degrees of crime, so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage than they have already.[951]

Legal scholarship also highlights other relevant justifications beyond these dangerousness and deterrence-based rationales. For example, "[r]etributively oriented commentators note that [renunciation] makes us reassess our vision of the defendant's blameworthiness or deviance."[952] This may be a reflection of the fact that (as various authorities have asserted):

> [a]ll of us, or most of us, at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us,

[949] Haw. Rev. Stat. Ann. § 705-530. Other state law reform commissions have similarly endorsed these rationales. *See, e.g.,* Ala. Code § 13A-4-1 cmt. at 80 (1982); Minn. Stat. Ann. § 609.17 cmt. at 144 (1987); N.Y. Penal Law § 40.10 cmt. at 137 (1987).

[950] Moriarty, *supra* note 29, at 5-6.

[951] Moriarty, *supra* note 29, at 5. *See, e.g.,* LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.1 ("The avoidance-of-harm rationale for such a defense is very strong. The person who solicits an offense is commonly in the best position to, and sometimes is the only person who can, avoid the commission of the offense. In addition, the possibility of effecting such avoidance is generally high; since the solicitor had the means to provide the motivation for the commission of the offense, he is also likely to have the means to effectively undercut that motivation.").

[952] Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981).

> when we reach a certain point, desist, and return to our roles as law-abiding citizens.[953]

Whatever the basis of this intuition, it seems that members of the public share it.[954] Based upon the limited empirical research that has been conducted, it appears that lay jurors believe that those who voluntarily and completely renounce their criminal plans are not sufficiently blameworthy to merit punishment.[955]

One other point highlighted by scholarly commentary is the extent to which "[i]nstances of renunciation of criminal purpose are not frequent."[956] As a result, the practical effect of enacting renunciation defenses rooted in the Model Penal Code approach "has *not been* to save large numbers of repentant criminals from confinement."[957] Rather, it has been to secure an intuitively fair outcome, otherwise consistent with important crime control considerations, with comparatively little social cost.[958]

It's important to point out that the broad support for the substantive policies that comprise the Model Penal Code's renunciation provisions does not extend to the Code's recommended evidentiary policies. Whereas the Model Penal Code ultimately places the burden of disproving the existence of a renunciation defense on the government beyond a reasonable doubt,[959] the majority approach, reflected in both contemporary national case law and legislation, is to require the defendant to persuade the factfinder of the presence of a renunciation defense beyond a

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[953] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.4 (quoting Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937)); *see Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011), *as amended* (Aug. 31, 2011) (quoting LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.4).

[954] *See* PAUL H. ROBINSON, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 247-57 (2014).

[955] In the relevant study, researchers employed a scenario-based methodology, which offered variations on a core burglary scenario. With respect to the renunciation scenario that occurred *after a substantial step* had been committed, the study found that 85% of people polled reported a finding of "no liability" and 92% reported a finding of "no liability or no punishment." And with respect to the renunciation scenario that occurred *after the point of dangerous proximity to completion* had been reached, the study found that 46% reported a finding of "no liability" and 85% reported a finding of "no liability or no punishment." *See id.* at 250.

[956] Model Penal Code § 5.01 cmt. at 361.

[957] Moriarty, *supra* note 29, at 11.

[958] *Id.*

[959] As noted above, this means that once the defendant has met his or her burden of raising the issue, the prosecution is then required to *disprove* the presence of a voluntary and complete renunciation beyond a reasonable doubt. Absent this showing by the government, the defendant cannot be held guilty of the general inchoate crime for which he or she has been charged. *See supra* notes 41-43 and accompanying text.

preponderance of the evidence.[960] This is so, moreover, in the context of attempt,[961] solicitation,[962] and conspiracy[963] prosecutions alike.

Scholarly commentary emphasizes a range of policy rationales, which explain this departure from the Model Penal Code. First, "as an accurate reflection of reality, the defense will be relatively rare." [964] Second, "the absence of renunciation will be difficult for a prosecutor to prove" given that (among other reasons) "the defense will frequently involve information peculiarly within the knowledge of the defendant which he is best qualified to present."[965] Third, and perhaps most important, presenting a renunciation defense is "tantamount to an admission that [the] defendant did participate in a criminal [scheme]."[966] As a result, "one's sense of fairness is not as likely to be offended if the defendant is given the burden of demonstrating that it is more likely than not that he should be exculpated."[967]

An illustrative example of these policy considerations at work is the U.S. Supreme Court's recent decision in *Smith v. United States*, which held that the burden of persuasion for withdrawal from a conspiracy under federal law rests with the defendant, subject to a preponderance of the evidence standard.[968] "Where," as the *Smith* Court explained, "the facts

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[960] *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 ("The burden of production for the defenses of renunciation, abandonment, and withdrawal is always on the defendant . . . . The burden of persuasion is generally on the defendant, by a preponderance of the evidence."); *State v. Rollins*, 321 S.W.3d 353 (Mo. Ct. App. W.D. 2010) (observing that, as a matter of common law, "[t]he burden of establishing [a renunciation] defense is on the defendant"); *see also* LAFAVE, *supra* note 9, at 1 SUBST. CRIM. L. § 1.8 (observing that "[a] few of the modern codes put the burden of persuasion on the prosecution as to virtually all issues, while a greater number allocate the burden to the defendant as to any matter which has been designated an 'affirmative defense.'").

[961] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 n.15 ("Most jurisdictions employing general provisions to allocate the burden of persuasion for renunciation of an attempt require the defendant to prove the defense by a preponderance of the evidence.") (collecting authorities); *see* Model Penal Code § 5.01 cmt. at 361 n.282 (citing reform codes which apply this evidentiary scheme to renunciation of an attempt).

[962] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 n.15 ("[M]ost jurisdictions employing general provisions to allocate the burden of persuasion for renunciation of solicitation require the defendant to prove the defense by a preponderance of the evidence.") (collecting authorities).

[963] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 n.15 ("[M]ost jurisdictions employing general provisions to allocate the burden of persuasion for renunciation of conspiracy require the defendant to prove the defense by a preponderance of the evidence.") (collecting authorities); *see* Model Penal Code § 5.03 cmt. at 460 (citing reform codes which apply this evidentiary scheme to renunciation of a conspiracy).

[964] Buscemi, *supra* note 59, at 1173.

[965] *Id*.

[966] *Id*.

[967] Robinson, *supra* note 11, at 1 CRIM. L. DEF. § 171. As various legal commentators have observed, this reflects a:

> [S]ubtle balance which acknowledges that a defendant ought not to be required to defend until some solid substance is presented to support the accusation, but beyond this perceives a point where need for narrowing the issues coupled with the relative accessibility of evidence to the defendant warrants calling upon him to present his defensive claim.

LAFAVE, *supra* note 9, at 1 SUBST. CRIM. L. § 1.8 (quoting Model Penal Code § 1.12, cmt. at 194).

[968] *Smith v. United States*, 568 U.S. 106 (2013); *see* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. In determining that the burden of persuasion for withdrawal from a conspiracy under federal law lies with the defense, the *Smith* held that doing so does not violate the Due Process Clause. *Id*. at 110. The *Smith* Court's reasoning can be summarized as follows:

with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof."[969] This is particularly true in the context of repudiating a criminal enterprise, where "the informational asymmetry heavily favors the defendant."[970] Whereas "[t]he defendant knows what steps, if any, he took to dissociate" himself from the criminal enterprise,[971] it may be "nearly impossible for the Government to prove the negative that an act of withdrawal never happened."[972] And, perhaps most importantly, "[f]ar from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense."[973] As a result, the *Smith* Court concluded, requiring the defendant to establish a withdrawal defense beyond a preponderance of the evidence is both "practical and fair."[974]

Consistent with the above considerations, the RCC incorporates a broadly applicable renunciation defense, subject to proof by the defendant beyond a preponderance of the evidence, to the general inchoate crimes of attempt, solicitation, and conspiracy. The RCC's recognition of a broadly applicable renunciation defense comprised of prevention, voluntariness, and completeness requirements generally accords with the substantive policies reflected in the relevant Model Penal Code provisions. At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in a few notable ways.[975]

> While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged proof of the nonexistence of all affirmative defenses has never been constitutionally required. The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense does negate an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but "does not controvert any of the elements of the offense itself," the Government has no constitutional duty to overcome the defense beyond a reasonable doubt. Withdrawal does not negate an element of the conspiracy crimes charged . . . .

ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. For a state appellate decision applying the same constitutional reasoning in the renunciation context, see *Harriman v. State*, 174 So. 3d 1044, 1050 (Fla. Dist. Ct. App. 2015); *see also Cowart v. State*, 136 Ga. App. 528 (1975); *People v. Vera*, 153 Mich. App. 411 (1986)).

[969] *Smith*, 568 U.S. at 111 (quoting *Dixon v. United States*, 548 U.S. 1, 9 (2006)).

[970] *Smith*, 568 U.S. at 111.

[971] *Id.* at 113. For example, "[h]e can testify to his act of withdrawal or direct the court to other evidence substantiating his claim." *Id.*

[972] *Id.* at 113 ("Witnesses with the primary power to refute a withdrawal defense will often be beyond the Government's reach: The defendant's co-conspirators are likely to invoke their right against self-incrimination rather than explain their unlawful association with him.").

[973] *Id.* at 110-11.

[974] *Id.* The *Smith* Court's observations have even more force in the context of a renunciation defense, however, given that the elements of a *voluntary* and *complete* renunciation are even more subjectively-oriented than those of withdrawal.

[975] RCC § 304 is based on, but not identical to, general renunciation provision incorporated into the Delaware Reform Code. More specifically, that provision, Delaware Reform Code § 706, reads as follows:

> (a) In a prosecution for attempt, solicitation, or conspiracy in which the offense contemplated was not in fact committed, it is a defense that:
>
> (1) the defendant prevented the commission of the offense
>
> (2) under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose.
>
> (b) *Voluntary and Complete Renunciation Defined*. A renunciation is not "voluntary and complete" within the meaning of Subsection (a) when it is motivated in whole or in part by:
>
> (1) a belief that circumstances exist that:

First, and most generally, RCC § 304 culls together all renunciation policies into a single general provision—whereas the Model Penal Code separately codifies them in distinct general provisions. This organizational revision, which is consistent with legislative practice in other jurisdictions, enhances the clarity, simplicity, and accessibility of the RCC. [976]

Second, RCC § 304(a) codifies the conduct element of renunciation (i.e., the nature of the requisite preventative efforts by the defendant) in a manner that addresses two different problems reflected in the Model Penal Code approach. The first problem is one of statutory drafting, namely, the Model Penal Code variously describes the kinds of preventative acts that will suffice for a renunciation defense, thereby obscuring their substantive similarity. For example, whereas § 5.01(4) speaks of "abandon[ing] [one's] effort to commit the crime or otherwise prevent[ing] its commission," § 5.02(3) speaks of "persuad[ing] [the solicitiee] not to do so or otherwise prevent[ing] the commission of the crime," while § 5.03(6) speaks of "thwart[ing] the success of the conspiracy." Notwithstanding these textual variances, prevention of the target offense appears to constitute both a necessary and sufficient condition for meeting any of these standards.[977] As a result, the Code's varying references to abandonment, persuasion, and thwarting are unnecessarily confusing—whereas a singular reference to prevention of the target offense would suffice.

The second problem relates to the substance of the Model Penal Code's conduct requirement, namely, it appears[978] to require proof that the defendant's preventative efforts were,

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(A) increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or

(B) render accomplishment of the criminal purpose more difficult; or

(2) a decision to:

(A) postpone the criminal conduct until another time; or

(B) transfer the criminal effort to:

(i) another victim; or

(ii) another but similar objective.

(c) *Burden of Persuasion on Defendant.* The defendant has the burden of persuasion for this defense and must prove the defense by a preponderance of the evidence.

[976] For jurisdictions that compile their renunciation policies within a single general provision, see Ariz. Rev. Stat. Ann. § 13-1005; Haw. Rev. Stat. § 705-530; N.Y. Penal Law § 40.10; Fla. Stat. Ann. § 777.04. Note also that RCC § 304(c) incorporates the burden of proof for this affirmative defense. *See, e.g.*, 18 U.S.C.A. § 373(b) ("If the defendant raises the affirmative defense [of renunciation to solicitation] at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.").

[977] For example, the "otherwise prevented" language employed in the Code's attempt provision "is intended to make clear that abandonment will not be sufficient where the attempt has already progressed to the point where abandonment alone will not prevent the offense." ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. As for the use of such language in the Code's solicitation provision, persuading the solicitee not to commit the target offense is but one means of preventing commission of an offense (e.g., notifying/assisting law enforcement with prevention provides another). *Id.* And while the Code's conspiracy provision instead speaks of "thwart[ing] the success of the conspiracy," this "[p]resumably [] means that the defendant must prevent the achievement of the offense or offenses that are the objective of the conspiracy." *Id.* (noting, however, that one could also "argue that preventing any part of multiple objectives, or even reducing the degree of success of the conspiracy, might constitute 'thwart[ing] the success of the conspiracy.'"); *see also id.* (suggesting that these varying formulations might reflect "inadvertence in drafting").

[978] *But see* Model Penal Code § 5.03 cmt. at 458 ("Second, he must take action *sufficient* to prevent consummation of the criminal objective.").

in fact, a causal force leading to prevention of the target offense.[979] Aside from the potential proof issues this kind of actual prevention standard raises,[980] such an approach effectively "den[ies] the defense to those who have unwittingly attempted the impossible [while offering] it to all others."[981] Illustrative of the problem is the impossible conspiracy/solicitation presented in the New York case, *People v. Sisselman*: D1 asked D2, an undercover police informant, to assault V, only to thereafter renounce the assault scheme—prior to finding out that D2 was a police informant—by directing D2 not to carry out the assault.[982] Under circumstances like these, actual prevention cannot be proven since D2 never intended to go through with the crime in the first place.[983] Yet it would be would be "unfair to deny" this kind of defendant a renunciation defense given that he or she lacks "individual dangerousness" in precisely the same way that a defendant who *actually* prevents commission of the target offense does.[984]

Consistent with the above analysis, as well as legislative practice in other reform jurisdictions, RCC § 304(a) revises the Model Penal Code approach to codifying the conduct requirement of renunciation in two key ways. First, RCC § 304(a) simplifies the conduct requirement for renunciation to a uniformly phrased prevention prong.[985] Second, this prevention prong does not require *actual* prevention; instead, it only requires proof that "[t]he defendant engaged in conduct *sufficient* to prevent commission of the target offense."[986]

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[979] Moriarty, *supra* note 29, at 37 ("Since the crime could not have occurred whether or not defendant renounced, the desistance is not a 'but for' condition of the crime's non-occurrence. Consequently, it cannot be said that his or her abandonment caused that result."); *United States v. Dvorkin*, 799 F.3d 867, 880 (7th Cir. 2015) (noting that prevention means "actually prevented the commission of the crime (not merely made efforts to prevent it") (quoting S. Rep. No. 98–225, at 309 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3489).

[980] For example, in the context of multi-participant inchoate crimes, how does one establish that the defendant's conduct was the but for cause of the criminal scheme's failure where the police have received other information relevant to preventing that scheme independent of the defendant's assistance?

[981] Moriarty, *supra* note 29, at 37.

[982] *People v. Sisselman*, 147 A.D.2d 261, 262–64 (1989).

[983] *Id.*

[984] *Id.* (quoting Model Penal Code § 5.03, cmt. at 457–458); *see* Moriarty, *supra* note 29, at 37 (noting that "[t]here seems to be no reason to distinguish between the two classes on the basis of [] social danger . . .").

[985] For state legislation that reduces the conduct requirement of renunciation of attempt to a singular prevention prong, see, for example, Alaska Stat. Ann. § 11.31.100 ("In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime."). For state legislation that reduces the conduct requirement of renunciation of conspiracy and solicitation to a singular prevention prong, see, for example, N.Y. Penal Law § 40.10 ("In any prosecution for criminal solicitation pursuant to article one hundred or for conspiracy pursuant to article one hundred five in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant prevented the commission of such crime."). *See also* Model Penal Code § 5.03 cmt. at 458 ("The means required to thwart the success of the conspiracy will of course vary in particular cases, and it would be impractical to endeavor to formulate a more specific rule."); *cf.* Model Penal Code § 2.06 cmt. at 326 (adopting general requirement of a "proper effort" to prevent the commission of the offense for withdrawal from accomplice liability, and observing that because "[t]he sort of effort that should be demanded turns so largely on the circumstances . . . it does not seem advisable to attempt formulation of a more specific rule").

[986] *See, e.g.*, N.H. Rev. Stat. Ann. § 629:3(III) (allowing defense for a defendant who renounces "by conduct designed to prevent commission of the crime agreed upon"); Vt. Stat. Ann. tit. 13, § 1406 (2009) (same); *see also* COMMENTARY ON HAW. REV. STAT. ANN. § 705-530 (noting that the "reasonable effort" standard entails proof that the defendant's conduct be sufficient under all foreseeable circumstances to prevent the offense); *see also* Moriarty, *supra* note 29, at 37 (observing that "a rule whose formulation leads to the conviction of the impossible attempter,

A third variance worth noting is that RCC § 304(b) codifies the meaning of "voluntary and complete" in a manner that addresses two different problems reflected in the Model Penal Code approach. The first problem is reflected in the Model Penal Code's explanation of voluntariness, which states, in relevant part, that "renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, *by circumstances* . . . that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."[987] The italicized language *could* be read to incorporate an objectiveness component—i.e., renunciation is only *involuntary* when such circumstances *actually exist*.[988] Such a reading, if accurate, is problematic, however, given the general immateriality of accuracy to voluntariness.[989] For example, a renunciation motivated by an erroneous belief in probable police interference—or any other circumstance rendering completion less likely—seems just as involuntary as a renunciation motivated by an accurate belief in the same.

The second problem relates to the disjunction between the Model Penal Code's usage of the "in whole or in part" language in the context of the Code's explanation of voluntariness and the absence of such language in the Code's explanation of completeness. More specifically, whereas under Model Penal Code § 5.01(4), renunciation "is not voluntary if *it is motivated, in whole or in part*, by [relevant] circumstances," a renunciation "is not complete if *it is motivated* by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."[990] This drafting variance *could* be read to indicate that where a defendant's renunciation is motivated *only in part* by a decision to postpone the criminal conduct until another time—or to transfer the criminal effort to another victim or similar objective—then the defense is still available. If true, however, this would be problematic: a renunciation premised only *in part* upon a decision to delay or transfer one's criminal scheme to another person seems just as incomplete as one *solely* motivated by such a decision.[991]

Consistent with the above analysis, as well as legislative practice in other reform jurisdictions, RCC § 304(b) revises the Model Penal Code approach to codifying the meaning of "voluntary and complete" in two key ways. First, RCC § 304(b) reframes the voluntariness prong in terms of whether a defendant is motivated by a "*belief* that [such] circumstances exist."[992] Second, RCC § 304(b) applies the "in whole or in part" language to both the voluntariness and completeness prongs of the renunciation defense.[993]

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while simultaneously freeing all others who renounce, suggests that a rethinking and possible reformulation of the rule may be in order").

[987] Model Penal Code § 5.01(4).

[988] Which is to say, where such circumstances do not in fact exist, then perhaps a defendant motivated by an *erroneous belief* in their existence could still avail him or herself of the defense.

[989] *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[990] Model Penal Code § 5.01(4).

[991] *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[992] *See, e.g.*, Haw. Rev. Stat. Ann. § 705-530(4)(a) ("belief that circumstances exist"); Ariz. Rev. Stat. Ann. § 13-1005(C)(1) (same); N.Y. Penal Law § 40.10(5) (same). This revision likely clarifies the meaning of the Model Penal Code approach; however, assuming that the reading discussed above is the right one, then it is intended to effectively narrow the instances in which renunciation will be held voluntary, by excluding from the defense cases where the defendant is motivated by an erroneous belief that one of the enumerated circumstances exists. *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[993] *See, e.g.*, Haw. Rev. Stat. Ann. § 705-530(4) ("A renunciation is not 'voluntary and complete' within the meaning of this section if it is motivated in *whole or in part* by . . . ."); Ariz. Rev. Stat. § 13-1005(C)(same); N.Y.

Finally, RCC § 304(c), by placing the burdens of production *and* persuasion with respect to a renunciation defense on the defendant, departs from the Model Penal Code's recommendations.[994] As noted above, this departure reflects majority legal trends and is also supported by important policy considerations.

Penal Law § 40.10(5) (same); *see also* 18 U.S.C.A. § 373 ("A renunciation is not 'voluntary and complete' if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective."). This revision likely clarifies the meaning of the Model Penal Code approach; however, assuming that the reading discussed above is the right one, then the dual application of the "in whole or in part" language is intended to effectively narrow the instances in which renunciation will be held complete, by excluding from the defense cases where the defendant is partially motivated by a decision to postpone or transfer the criminal effort. *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[994] *But see* Model Penal Code § 5.03 cmt. at 459 n.260 (conceding that it would be reasonable to put the burden on the defendant in states that have less stringent renunciation requirements, such as taking "reasonable efforts" to prevent the crime").

Subtitle II. Offenses Against Persons.

Chapter 10. Offenses Against Persons Subtitle Provisions.

RCC § 22E-1001. OFFENSES AGAINST PERSONS DEFINITIONS.[995]
[Now part of RCC § 22E-701. Index of Definitions.]

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

Relation to National Legal Trends. The Model Penal Code (MPC) defines "bodily injury" for offenses against persons as "physical pain, illness or any impairment of physical condition."[996] A plurality of jurisdictions with codified definitions of bodily injury follow the precise language of the MPC definition,[997] although many others codify variants on the MPC definition.[998]

(2) "Citizen patrol" means a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for District of Columbia neighborhoods with the goal of crime prevention.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define "citizen patrol."

(3) "Coercion" means causing another person to fear that, unless that person engages in particular conduct, then another person will:

(A) Inflict bodily injury on another person;
(B) Damage or destroy the property of another person;
(C) Kidnap another person;
(D) Commit any other offense;
(E) Accuse another person of a crime;
(F) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule;
(G) Notify a law enforcement official about a person's undocumented or illegal immigration status;
(H) Take, withhold, or destroy another person's passport or immigration document;
(I) Inflict a wrongful economic injury on another person;
(J) Take or withhold action as an official, or take action under color or pretense of right; or

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[995] The definitions in subsections (1)-(21) were issued in the First Draft of Report #14 (December 21, 2017). The definitions in subsections (22)-(26) were issued in the Second Draft of Report #14 (March 16, 2018).
[996] Model Penal Code § 210.0(2).
[997] *See, e.g.*, Haw. Rev. Stat. Ann. § 707-700; Me. Rev. Stat. Tit. 17-A, § 2; Neb. Rev. Stat. Ann. § 28-109; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-1-601; Vt. Stat. Ann. Tit. 13 § 1021.
[998] *See, e.g., Alaska Stat.* § 11.81.900 ("'physical injury' means a physical pain or an impairment of physical condition."); Ind. Code § 35-31.5-2-29 ("'Bodily injury' means any impairment of physical condition, including physical pain.).

(K) Perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.

Relation to National Legal Trends. The Model Penal Code (MPC) has no definition of "coercion." However, it has a similar list of threatening conduct in the definition of "theft by extortion." Additionally, within the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"), the three additions to the list of prohibited threats in coercion (subsections (D), (G) and (J)) are used in other reformed code jurisdictions.

(4) (A) "Consent" means words or actions that indicate an agreement to particular conduct.

(B) For offenses against property in Subtitle III of this Title:

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

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

Relation to National Legal Trends. The Model Penal Code (MPC) has no equivalent definition, although it does use the term "consent" in some provisions.[999] Other states and commentators have definitions that are very similar to the RCC definition.[1000] The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and has provided a draft definition of "consent" that is similar to the RCC's.[1001]

(5) "Dangerous weapon" means:

(A) A firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;

(B) A prohibited weapon as defined at § 22A-1001(14);

(C) A sword, razor, or a knife with a blade over three inches in length;

(D) A billy club;

(E) A stun gun; or

(F) Any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.

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

[1000] Wash. Rev. Code Ann. § 9A.44.010(7) ("Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."). *See also* Stephen J. Schulhofer, *Consent: What it Means and Why It's Time To Require It*, 47 U. PAC. L. REV. 665, 669 (2016). Schulhofer offers a tripartite definition of consent specific to sexual assault. The first part of the definition contains similar language to the RCC definition of consent: "'Consent' means a person's behavior, including words and conduct -- both action and inaction -- that communicates the person's willingness to engage in a specific act of sexual penetration or sexual conduct."

[1001] Model Penal Code: Sexual Assault and Related Offenses § 213.0(3) (Tentative Draft No. 3, April 6, 2017) ("'Consent' . . . means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact. Consent may be express or it may be inferred from behavior -- both action and inaction -- in the context of all the circumstances.").

Relation to National Legal Trends. First, the MPC and all 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1002] incorporate into their assault statutes inherently dangerous weapons and/or a broader category of objects or substances that can cause death or serious bodily, although the precise labeling of the terms used varies.[1003] The MPC and at least 27 of these reformed jurisdictions statutorily define the weapon terms used in their assault statutes. These definitions generally do not address whether imitation firearms or other weapons constitute either category of weapon, presumably leaving the matter to case law, although at least one jurisdiction statutorily defines a deadly weapon or dangerous weapon as including "a facsimile or representation . . . if the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury."[1004] In addition, two reformed jurisdictions include gradations in their assault statues for the use of imitation weapons or a complaining witness's perception of an object.[1005]

Second, of the 29 reformed jurisdictions, nine define dangerous weapons or similar terms by the item's actual use, attempted use, and threatened use,[1006] as does the RCC definition. In contrast, the MPC[1007] and nine reformed jurisdictions[1008] define dangerous weapons or similar

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[1002] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1003] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Alaska Stat. Ann. §§ 11.41.200(a)(1), 11.41.210(a)(1), 11.41.220(a)(1)(B), (a)(1)(C), (a)(4), 11.41.230(a)(2); Ark. Code Ann. §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Ariz. Rev. Stat. Ann. § 13-1204(A)(2); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(1)(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), (a)(5), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-2(c)(1), 5/12-3.05(e)(1), (f)(1); Ind. Code Ann. § 35-42-2-1(g)(2); Kan. Stat. Ann. §§ 21-5412(b)(1), 21-5413(b)(1)(B), (b)(2)(B); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.025(1)(a), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(B), 208-B(1)(A), (1)(B); Minn. Stat. Ann. § 609.222; Mo. Ann. Stat. §§ 565.052(1)(2), (1)(4), 565.056(1)(2); Mont. Code Ann. §§ 45-5-201(1)(b), 45-5-213(1)(a); N.H. Rev. Stat. Ann. §§ 631:1(I)(b), 631:2(I)(b), 631:2-a(I)(c); N.J. Stat. Ann. §§ 2C:12-1(a)(2), (b)(2), (b)(3); N.Y. Penal Law §§ 120.00(3), 120.05(2), (4), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(1)(b), 12.1-17-01.1(2), 12.1-17-02(1)(b); Ohio Rev. Code Ann. §§ 2903.13(A)(2), 2903.12(A)(2), 2903.14; Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(1)(a), (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a); 18 Pa. Stat. Ann. § 2701(a)(2), 2702.1(a)(4); S.D. Codified Laws §§ 22-18-1(3), 22-18-1.1(2); Tenn. Code Ann. § 39-13-102(a)(1)(A)(iii), (a)(1)(B)(iii); Tex. Penal Code § 22.02(a)(2); Utah Code Ann. § 76-5-103(1)(b)(i); Wis. Stat. Ann. § 940.24(1).

[1004] Utah Code Ann. § 76-1-601(5)(b)(i).

[1005] Ariz. Rev. Stat. Ann. § 13-1204(A)(11) (including as a grade of aggravated assault that a "simulated deadly weapon" was used); Mont. Code Ann. § 45-5-213 (including in assault offense causing "reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon.").

[1006] Ala. Code § 13A-1-2(5) (definition of "dangerous instrument."); Alaska Stat. Ann. § 11.81.900(15) (definition of "dangerous instrument."); Ariz. Rev. Stat. Ann. 13-105(12) (definition of "dangerous instrument."); Conn. Gen. Stat. Ann. § 53a-3(7) (definition of "dangerous instrument."); Del. Code Ann. tit. 11, § 222(4) (definition of "dangerous instrument."); Ky. Rev. Stat. Ann. § 500.080(3) (definition of "dangerous instrument."); N.Y. Penal Law § 10.00(13) (definition of "dangerous instrument."); Or. Rev. Stat. Ann. § 161.015(1) (definition of "dangerous weapon."); Wash. Rev. Code Ann. § 9A.04.110(6) (definition of "deadly weapon.").

[1007] Model Penal Code § 210.0(4).

[1008] Ark. Code Ann. § 5-1-102(4) (definition of "deadly weapon."); Colo. Rev. Stat. Ann. § 18-1-901(e)(II); Haw. Rev. Stat. Ann. § 707-700 (definition of "dangerous instrument."); Minn. Stat. Ann. § 609.02(6) (definition of "dangerous weapon."); 18 Pa. Stat. Ann. § 2301 (definition of "deadly weapon."); Tenn. Code Ann. § 39-11-106(5)

terms by the item's use or intended use. The remaining jurisdictions take a variety of different approaches[1009] or do not appear to statutorily define dangerous weapons or similar terms.

Third, the majority of the 27 reformed jurisdictions that statutorily define the weapons terms used in their assault statutes refer to the weapon as being "capable,"[1010] "highly capable,"[1011] or "readily capable"[1012] of causing death or serious bodily injury. However, four reformed jurisdictions use "likely"[1013] as does the RCC. The MPC definition of "deadly weapon" uses "known to be capable,"[1014] as do three reformed jurisdictions.[1015]

Fourth, the MPC and the majority of the 27 reformed jurisdictions that statutorily define the weapons terms used in their assault statutes generally do not address whether body parts can constitute dangerous weapons. However, at least one reformed jurisdiction statutorily defines "dangerous instrument" as including "parts of the human body when a serious physical injury is a direct result of the use of that part of the human body."[1016] There is extensive and conflicting case law in many jurisdictions on whether body parts can be dangerous weapons.[1017]

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

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

(ii) Preventing another person from acquiring material information;

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

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(definition of "deadly weapon."); Tex. Penal Code Ann. § 1.07(17) (definition of "deadly weapon."); Wis. Stat. Ann. § 939.22(10) (definition of "dangerous weapon."); N.J. Stat. Ann. § 2C:11-1(c) (definition of "deadly weapon.").

[1009] *See, e.g.*, Ind. Code Ann. § 35-31.5-2-86 ("in the manner it : (A) is used; (B) could ordinarily be used; or (C) is intended to be used."); Mont. Code Ann. § 45-2-101(79) (defining "weapon," in part, "regardless of its primary function.").

[1010] Utah Code Ann. § 76-1-601(5) (definition of "dangerous weapon."); Tex. Penal Code Ann. § 1.07(17) (definition of "deadly weapon."); Tenn. Code Ann. § 39-11-106(5) (definition of "deadly weapon."); Ohio Rev. Code Ann. § 2923.11(A) (definition of "deadly weapon."); Me. Rev. Stat. Ann. tit. 17-A, § 2(9); Conn. Gen. Stat. Ann. definition of "deadly weapon." 53a-3(7) (definition of "dangerous instrument."); Colo. Rev. Stat. Ann. § 18-1-901(e) (definition of "deadly weapon."); Alaska Stat. Ann. § 11.81.900(15) (definition of "dangerous instrument.").

[1011] Ala. Code §13A-1-2(5) definition of "dangerous instrument.")

[1012] Wash. Rev. Code Ann. § 9A.04.110(6) (definition of "deadly weapon."); Or. Rev. Stat. Ann. § 161.015(1) (definition of "dangerous weapon."); N.Y. Penal Law § 10.00(13) (definition of "dangerous instrument."); Mont. Code Ann. § 45-2-101(79) (definition of "weapon."); Mo. Ann. Stat. § 556.061(20) (definition of "dangerous instrument."); Ky. Rev. Stat. Ann. § 500.080(3) (definition of "dangerous instrument."); Ind. Code Ann. § 35-31.5-2-86 (definition of "deadly weapon."); Del. Code Ann. tit. 11, § 222(4) (definition of "dangerous instrument.")

[1013] Wis. Stat. Ann. § 939.22(10) (definition of "dangerous weapon."); S.D. Codified Laws § 22-1-2(10) (definition of "dangerous weapon."); 18 Pa. Stat. Ann. § 2301 (definition of "deadly weapon."); Minn. Stat. Ann. § 609.02(6) (definition of "dangerous weapon.");

[1014] Model Penal Code § 210.0(4).

[1015] N.J. Stat. Ann. § 2C:11-1(c) (definition of "deadly weapon."); N.H. Stat. Ann. § 625:11(V) (definition of "deadly weapon."); Haw. Rev. Stat. Ann. § 707-700 (definition of "dangerous instrument.");

[1016] Ky. Rev. Stat. Ann. § 500.080(3).

[1017] 67 A.L.R.6th 103 (Originally published in 2011).

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

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

Relation to National Legal Trends. The "deception" definition is not broadly supported by law in a majority of jurisdictions, but is largely consistent with law in a significant minority of jurisdictions with reformed criminal codes. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[1018] nearly half,[1019] as well as the Model Penal Code[1020] (MPC), have statutory definitions of "deception," either in standalone form, or incorporated into a specific offense.[1021] The "deception" definition is broadly consistent with the definitions in the MPC and other jurisdictions, with a few exceptions.

First, only a minority of the reformed code jurisdictions define "deception" to require materiality.[1022] However, the MPC[1023] and six states require that the false impression must be of "pecuniary significance."[1024]

Second, although the revised "deception" definition is consistent with the MPC[1025] in including a failure to correct a false impression when the defendant has a fiduciary duty or is in any other confidential relationship, most reformed code jurisdictions with statutory "deception" definitions have not followed this approach. Only three reformed code jurisdictions[1026] with statutory "deception" definitions criminalize failure to correct a false impression when the actor has a legal duty to do so.

Third, the MPC[1027] and a majority of reformed code jurisdictions with statutory "deception" definitions also include false impressions as to a person's state of mind.[1028] The

[1018] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1019] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 843; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010 ; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401; Wash. Rev. Code Ann. § 9A.56.010.

[1020] MPC § 223.3.

[1021] For example, the MPC does include a general deception definition, but instead defines the types of deceptions that would constitute theft by deception. MPC § 223.3.

[1022] Mo. Ann. Stat. § 570.010; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[1023] MPC § 223.3.

[1024] Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.

[1025] MPC § 223.3.

[1026] Ala. Code § 13A-8-1; N.H. Rev. Stat. Ann. § 637:4; S.D. Codified Laws § 22-30A-3.

[1027] MPC § 223.3.

definition includes false impressions as to state of mind insofar as the state of mind relates to false intentions to perform acts in the future. However, false impressions as to states of mind more generally are not included in the definition.

(7) "District official or employee" means 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.

[No discussion of national legal trends].

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

***Relation to National Legal Trends*.** Distinguishing offenses using the same principles of consent and "effective consent" is rare in other jurisdictions' statutes.

Two states, Texas and Tennessee, codify a definition of "effective consent" for use in property offenses,[1029] and a comparable distinction between consent and effective consent is made in Missouri,[1030] and case law in one state has used the distinction in the context of

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[1028] Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-36-101; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922.

[1029] Texas defines "effective consent" as: "consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." Tex. Penal Code Ann. § 31.01(3). This definition of "effective consent" is specific to the property offenses; Texas also has a general "effective consent" definition that applies broadly to the entire penal code. Tex. Penal Code Ann. § 1.07(19). The only difference between the two definitions is that the property-specific definition does not include "force" subsection (3)(A), and subsection (3)(E) in the property-specific section above is not included in the general definition. Tennessee defines effective consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion; (B) Given by a person the defendant knows is not authorized to act as an agent; (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or (D) Given solely to detect the commission of an offense." Tenn. Code Ann. § 39-11-106(9).

[1030] Mo. Ann. Stat. § 556.061 ("consent or lack of consent may be expressed or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of youth, mental disease or defect, intoxication, a drug-induced state, or any other reason is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) It is induced by force, duress or deception"). Unlike Tennessee and Texas, however, Missouri does not define force, duress, or deception. This gives very little guidance when attempting to ascertain what kinds of pressures may vitiate "consent" in Missouri. For example, will "assent" induced by any deception fail to constitute assent? Will the smallest amount of duress do the same? If not, then what degree of duress or deception is sufficient to meet the law's demand? Ultimately, while Missouri's definition of "consent" is useful, it is also inadequate. The RCC differs from Missouri in that it sets out not only the kinds of pressures render consent ineffective, but also the degree of pressure that must be brought to bear against the victim. The kinds of pressures are identified other in the offense definitions (e.g., deception in fraud, RCC § 22E-2201), or by the definition of effective consent. The degree of pressure is identified in the definitions of force, coercion, and deception themselves.

burglary.[1031] The Texas and Tennessee statutes first identify "consent" as a basic foundation for finding effective consent (or in the case of Tennessee, "assent" and then "consent") then the statutes provide a list of circumstances that render consent ineffective. In addition, Texas and Tennessee both state that consent given by certain people (generally, people with disabilities or children) is ineffective.[1032] Also, both Texas and Tennessee address the issue of consent given to detect the commission of an offense.[1033] The RCC does not address the issue of incompetence or consent given to detect the commission of an offense, but otherwise closely resembles these jurisdictions' statutes.

The Model Penal Code (MPC) contains a definition of "ineffective consent" in its General Part, in its description of the affirmative consent defense.[1034] But that definition of ineffective consent does not appear to be applied elsewhere in the MPC.

The relative lack statutory or case law use of the conceptual distinction between consent and "effective consent" may be due to the relatively recent origin of scholarly work on the topic.[1035] However, in recent years, use of the conceptual distinction between "effective consent"

[1031] Minnesota's burglary offense distinguishes between entries *without consent* and entries made "by using artifice, trick, or misrepresentation to obtain consent to enter." See *State v. Zenanko*, 552 N.W.2d 541, 542 (Minn. 1996) (affirming conviction of defendant who "misrepresented his purpose for being [in the dwelling] and gained entry by ruse") (internal quotations omitted), citing *State v. Van Meveren*, 290 N.W.2d 631, 632 (Minn. 1980) (affirming conviction of defendant who gained entrance to a dwelling by telling the occupant he needed to use the occupant's bathroom, and after entering, immediately began to sexually assault the occupant). *See* Minn. Stat. Ann. § 609.581. By comparison, the RCC says that burglary can be committed without consent and with consent obtained by deception. The RCC also covers burglaries committed with consent obtained by coercion.

[1032] Tex. Penal Code Ann. § 31.01(3)(C) and (3)(E); Tenn. Code Ann. § 39-11-106(9)(C).

[1033] Tex. Penal Code Ann. § 31.01(3)(D); Tenn. Code Ann. § 39-11-106(9)(D). The effect of this provision, it would seem, is to provide complete liability for an offense when a police officer makes a transaction with a criminal in an undercover operation. For example, when attempting to catch a defendant engaged in fraud, a police officer might pose as an innocent and unsuspecting victim. When the defendant tries to deceive the officer into giving money, the officer would clearly be aware of the defendant's deception. If thereafter convicted, the defendant might argue that the officer's consent to the transaction was not "obtained by deception," and therefore, that the defendant is not guilty of fraud. Rather, the defendant would seemingly be at most guilty of attempted theft, because the defendant mistakenly believed the consent *was* induced by the defendant's deception. The definition of effective consent operating in Texas and Tennessee obviate this defense. *See Smith v. States*, 766 S.W.2d 544 (Tex. App. 1989). Similar facts are at work in *Fussell v. United States*, 505 A.2d 72 (D.C. 1986), and the DCCA reversed the defendant's conviction entirely. *Id*. at 73.

[1034] Model Penal Code § 2.11(3) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.").

[1035] In large part, the conceptual structure involved in thinking through consent and effective consent—as well as the attendant pressures of force, coercion, and deception—is based on the influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 333 (2004). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

and simple consent has become widespread among new proposals for substantive criminal law.[1036]

(9) "Family member" means an individual to whom a person 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.

[No discussion of national legal trends].

(10) "Imitation dangerous weapon" means an object used or fashioned in a manner that would cause a reasonable person to believe that the article is a dangerous weapon.

[No National Legal Trends section.]

(11) "Law enforcement officer"

(A) A sworn member or officer of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;

(B) A sworn member or officer of the District of Columbia Protective Services;

(C) A licensed special police officer;

(D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;

(E) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Court Services and Offender Supervision Agency or the Pretrial Services Agency;

(F) Metro Transit police officers;

(G) An employee of the Family Court Social Services Division of the Superior Court charged with intake, assessment, or community supervision; and

(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.

National Legal Trends. The MPC does not enhance its offenses against persons based on the status of the complainant.

[1036] James Grimmelmann, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1517 (2016) (applying conceptual distinctions in consent to offenses involving computers); Stuart P. Green, *Introduction: Symposium on Thirteen Ways to Steal A Bicycle*, 47 NEW ENG. L. REV. 795 (2013) (discussing the use of differences of consent within the context of property offenses); Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 70 (2012) (using Westen's consent framework to discuss the ethics of prostitution); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016).

(12) "Owner" means a person holding an interest in property that the accused is not privileged to interfere with.

Relation to National Legal Trends. The Model Penal Code (MPC) does not codify a definition of "owner," although it uses the term in at least one of its property offenses.[1037]

Several of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1038] have a definition of "owner" that is similar to the definition in the RCC, but the precise language varies.[1039]

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

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

(14) "Prohibited weapon" means:

(A) A machine gun or sawed-off shotgun, as defined at D.C. Code § 7-2501;

(B) A firearm silencer;

(C) A blackjack, slungshot, sandbag cudgel,or sand club;

(D) Metallic or other false knuckles as defined at D.C. Code § 22-4501; or

(E) A switchblade knife.

Relation to National Legal Trends. Given the complexity of other jurisdictions' weapons laws, it is only possible to generally compare the RCC's treatment of the objects specified in the definition of "prohibited weapon" with the treatment of these objects in other jurisdictions and the MPC. The MPC defines "deadly weapon" as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury."[1040] Although this definition does not mention specific types of weapons other than firearms, the expansive definition would likely include all the objects in the RCC definition of "prohibited weapon," with the possible exception of a firearm silencer.

The 29 reformed jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1041] generally include the objects in the RCC definition of "prohibited weapon," again with the possible exception of a firearm silencer. Machine guns and sawed-off shotguns are included in many reformed

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[1037] MPC § 223.9 (unauthorized use of a vehicle).

[1038] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1039] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/15-2; Conn. Gen. Stat. Ann. § 53a-118; Tenn. Code Ann. § 39-11-106; Haw. Rev. Stat. Ann. § 708-800.

[1040] MPC § 210.0(4).

[1041] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

jurisdictions' assault gradations by the inclusion of "firearm"[1042] in the definition of "deadly weapon" or similar term, and are also presumably included in the expansive definitions of deadly weapons or dangerous weapons as objects likely to cause death or serious bodily injury.[1043] In addition, at least one reformed jurisdiction punishes an assault with a machine gun more seriously than an assault committed with another firearm or other deadly weapon.[1044] Several reformed jurisdictions also specifically include blackjacks,[1045] slungshots,[1046] metallic or other false knuckles,[1047] and switchblade knives[1048] in their assault gradations through the definitions of "deadly weapon" or other similar term for inherently dangerous weapons. It does not appear that any reformed jurisdictions specifically mention sandbag cudgels or sand clubs, but such weapons would presumably fall under broader categories such as bludgeons,[1049] as well as the expansive definitions of deadly weapons or dangerous weapons as objects likely to cause death or serious bodily injury.[1050] Firearm silencers appear to be largely excluded from the weapons gradations in reformed jurisdictions' assault offenses, although at least one reformed jurisdiction

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[1042] *See, e.g.*, Wis. Stat. Ann. § 939.22(10) (definition of "dangerous weapon" including "any firearm."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon" including a "firearm."); Mo. Ann. Stat. § 556.061(22) (definition of "deadly weapon."); N.D. Cent. Code Ann. § 12.1-01-04(6) (definition of "dangerous weapon."); Me. Rev. Stat. tit. 17-A, § 2 (definition of "use of a dangerous weapon" including "the use of a firearm."); N.H. Rev. Stat. Ann. § 625:11(V) (definition of "deadly weapon" including "any firearm.").

[1043] *See, e.g.*, Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon" including "any weapon, whether loaded or unloaded, from which a shot may be discharged ."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon" including "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."); Utah Code Ann. § 76-1-601(5)(a) (definition of "dangerous weapon" including "any item capable of causing death or serious bodily injury.").

[1044] Ill. Comp. Stat. Ann. 5/12-3.05(e)(1), (e)(5), (f)(1), (h) (making it a Class X felony to commit a battery by discharging a firearm other than a machine gun or a firearm equipped with a silencer, a Class X felony "for which a person shall be sentenced to a term of imprisonment of a minimum of 12 years and a maximum of 45 years" to commit a battery by discharging a machine gun or a firearm equipped with a silencer with MM, and making it a Class 3 felony to commit a battery by using a deadly weapon other than discharging a firearm).

[1045] *See e.g.*, Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); Mo. Ann. Stat. § 556.061(22) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon."); N.D. Cent. Code Ann. § 12.1-01-04(6) (definition of "dangerous weapon.").

[1046] *See, e.g.*, N.D. Cent. Code Ann. § 12.01-04(6) (definition of "dangerous weapon.").

[1047] *See, e.g.*, Ala. Code § 13A-1-2(7) (definition of "deadly weapon."); Alaska Stat. Ann. § 11.81.900(17) (definition of "deadly weapon."); Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon.").

[1048] *See, e.g.*, Ala. Code § 13A-1-2(7) (definition of "deadly weapon."); Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon."); N.D. Cent. Code Ann. § 12.01-04(6) (definition of "dangerous weapon.").

[1049] *See, e.g.*, Ala. Code § 13A-1-2(7) (definition of "deadly weapon."); Colo. Rev. Stat. Ann. § 18-1-901(e)(II) (definition of "deadly weapon."); Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); .D. Cent. Code Ann. § 12.1-01-04(6) (definition of "dangerous weapon."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon.").

[1050] *See, e.g.*, Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon" including "any weapon, whether loaded or unloaded, from which a shot may be discharged ."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon" including "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."); Utah Code Ann. § 76-1-601(5)(a) (definition of "dangerous weapon" including "any item capable of causing death or serious bodily injury.").

punishes an assault with a firearm equipped with a silencer more seriously than an assault with another firearm or other deadly weapon.[1051]

(15) "Protected person" means a person who is:

(A) Less than 18 years old, and, in fact, the defendant is at least 18 years old and at least 2 years older than the other person;

(B) 65 years old or older;

(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;

(G) A District official or employee, while in the course of official duties; or

(H) A citizen patrol member, while in the course of a citizen patrol.

Relation to National Legal Trends. The MPC does not enhance assault or robbery on the basis of the identity of the complainant. However, the revisions to the District's current penalty enhancements and offenses for individuals of specific ages, occupations, and status as a "vulnerable adult," as reflected in the definition of "protected person," are supported by national trends.

First, although the substance of the requirements for senior citizens and minors is largely the same in the definition of "protected person" as it is in the current penalty enhancements, the RCC assault and robbery offenses effectively eliminate the defenses for these enhancements that exist under current District law by relying on a culpable mental state requirement. Many of the reformed jurisdictions' assault statutes enhance some or all grades of the offense due to the complaining witness being elderly[1052] or young,[1053] with varying age thresholds. None of these jurisdictions use an affirmative defense in the penalty enhancement.

Second, inclusion of "vulnerable adult"[1054] in the definition of "protected person" effectively makes harms to a "vulnerable adult" subject to new enhanced penalties in RCC assault and robbery offenses. A significant number of the reformed jurisdictions enhance assaults against individuals with physical or mental disabilities that limit their ability to care for themselves.[1055]

[1051] Ill. Comp. Stat. Ann. 5/12-3.05(e)(1), (e)(5), (f)(1), (h) (making it a Class X felony to commit a battery by discharging a firearm other than a machine gun or a firearm equipped with a silencer, a Class X felony "for which a person shall be sentenced to a term of imprisonment of a minimum of 12 years and a maximum of 45 years" to commit a battery by discharging a machine gun or a firearm equipped with a silencer with MM, and making it a Class 3 felony to commit a battery by using a deadly weapon other than discharging a firearm).

[1052] *See, e.g.*, Ark. Code Ann § 5-13-202(a)(4)(D); Del. Code Ann tit. 11 § 612(a)(6); 720 Ill. Comp. Stat. Ann. 5/12-3.05(d)(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3).

[1053] *See, e.g.*, Ark. Code Ann. §§ 5-13-201(a)(7), 5-13-202(a)(4)(d); Ariz. Rev. Stat. Ann. § 13-1204(A)(6); Del. Code Ann tit. 11 § 612(a)(11); 720 Ill. Comp. Stat. Ann. 5/12-3.05(b); Ind. Code Ann. § 35-42-2-1(e)(3), (g)(5); N.H. Stat. Ann. §§ 631:1(I)(d), 631:2(d); N.D. Cent. Code Ann. § 12.1-17-02(2).

[1054] The definition of "vulnerable adult" is discussed in the commentary to the definition in RCC § 22E-1001(21).

[1055] *See, e.g.*, Ark. Code Ann. § 5-13-202(a)(4)(F); Conn. Gen. Stat. Ann. § 53a-59a; Colo. Rev. Stat. Ann. § 18-6.5-103; 720 Ill. Comp. Stat. Ann. 5/12-3.05(b); Ind. Code Ann. § 35-42-2-1(1)(e)(5), (1)(g)(5)(D); Del. Code Ann. tit. 11, § 1105; Minn. Stat. Ann. § 609.2231(8); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

Third, inclusion of a "law enforcement officer" and "public safety officer" in the definition of "protected person" effectively makes harms to some persons in these groups subject to new enhanced penalties in the RCC assault and robbery offenses. Most reformed jurisdictions enhance assaults when the complaining witness is a LEO.[1056] The scope of the definition of "law enforcement officer," "peace officer," and similar terms varies amongst jurisdictions, but several seem to include officers similar to Metro transit police.[1057] In addition, many reformed jurisdictions enhance assaults to emergency medical first responders, either in the same enhanced gradation for assaults against LEOs,[1058] or in a lesser gradation than an assault on a LEO.[1059]

Fourth, inclusion of "a transportation worker" in the definition of "protected person" effectively makes harms to some persons in this group subject to new enhanced penalties in the RCC assault and robbery offenses. At least one reformed jurisdiction, New York, enhances assaults against the drivers of private vehicles for hire,[1060] and several reformed jurisdictions specifically enhance assaults committed against public transportation workers.[1061]

Fifth, inclusion of "District official or employee" in the definition of "protected person" effectively makes harms to some persons in this group subject to different enhanced penalties in

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[1056] *See, e.g.*, Ala. Code § 13A-6-21(4); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025; N.D. Cent. Code Ann. § 12.1-17-01(2); Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(C)(5); Or. Rev. Stat. Ann. § 163.208; 18 Pa. Stat. Ann. § 2702(a)(2), (a)(3); Conn. Gen. Stat. Ann. §53a-167c(a)(1), (a)(5); Me. Rev. Stat. tit. 17-A, § 752-A; Utah Code Ann. § 76-5-102.4; Del. Code Ann. tit. 11, §§ 601(c), 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-1, 12-2(b)(4.1), (d), 12-3.05(a)(3), (d)(4), (h); Minn. Stat. Ann. §§ 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Mont. Code Ann. § 45-5-210; N.J. Stat. Ann. § 2C:12-1(5); S.D. Codified Laws §§ 22-18.1-05; Ind. Code Ann. § 35-42-2-1(e)(2), (g)(5); Ariz. Rev. Stat. Ann. § 13-1204(A)(8), (F); Wis. Stat. Ann. § 940.23; Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (c.5).

[1057] *See, e.g.*, Ark. Code Ann. § 5-1-102(10) ("'Law enforcement officer" means any public servant vested by law with a duty to maintain public order or to make an arrest for an offense."); Ariz. Rev. Stat. Ann. § 13-105(29) ("'Peace officer" means any person vested by law with a duty to maintain public order and make arrests and includes a constable."); Mont. Code Ann. § 45-2-101(55) ("'Peace officer' means a person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of the person's authority.").

[1058] *See, e.g.*, Ala. Code § 13A-6-21(4) ("emergency medical personnel."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (c.5) ("emergency medical service provider" or "emergency medical care provider."); Del. Code Ann. ti. 11, §§ 601(c), 612(a)(3), 613(a)(5) (including emergency medical technicians and paramedics); K.Y. Rev. Stat. Ann. § 508.025(1)(4) ("paid or volunteer emergency medical services personnel certified or licensed pursuant to KRS Chapter 311A, if the event occurs while personnel are performing job-related duties."); Conn. Gen. Stat. Ann. § 53a-167c(a) ("emergency medical . . . personnel."); Mo. Ann. Stat. §§ 565.052, 565.054, 565.056 and 565.002 (defining "special victim," in part, as "[e]mergency personnel, any paid or volunteer firefighter, emergency room, hospital, or trauma center personnel, or emergency medical technician, assaulted in the performance of his or her official duties or as a direct result of such official duties."); N.J. Stat. Ann. § 2C:12-1(b)(5)(a), (b)(5)(c) ("Any person engaged in emergency first-aid or medical services acting in the performance of his duties.").

[1059] *See, e.g.*, Ark. Code Ann. §§ 5-13-201(c)(3) (enhancing first degree battery if the complainant is a "law enforcement officer acting in the line of duty" and 5-13-202(a)(4)(A), (a)(4)(E) (enhancing second degree battery when the complainant is a LEO or an emergency medical services provider); Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a), (A)(8)(c), (E), (F) (making aggravated assault against a peace officer either a class 5 felony, unless it results in physical injury, in which case it is a class 4 felony, and making aggravated assault against an emergency medical technician or paramedic a class 6 felony).

[1060] N.Y. Penal Law § 60.07.

[1061] *See, e.g.*, Del. Code Ann. tit. §§ 11, 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. 5/12-3.05(d)(7); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); N.J. Stat. Ann. § 2C:12-1(g); Or. Rev. Stat. Ann. § 163.164(d); Tenn. Code Ann. § 39-13-102(d).

the RCC assault and robbery offenses. Several reformed jurisdictions enhance assaults against state officials or employees.[1062]

Sixth, inclusion of "a citizen patrol member" in the definition of "protected person" effectively makes harms to some persons in this group subject to different enhanced penalties in the RCC assault and robbery offenses. At least two reformed jurisdictions specifically enhance assaults on similar citizen patrol groups.[1063]

(16) "Public safety employee" means:

(A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and

(B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph.

[No discussion of national legal trends].

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

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement; or

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

Relation to National Legal Trends. The Model Penal Code (MPC) defines "serious bodily injury" for offenses against persons as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[1064] A majority of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1065] (reformed jurisdictions) have adopted the MPC definition[1066] or a substantively similar definition.[1067]

[1062] *See, e.g.*, Ark. Code Ann. § 5-13-202(4)(D); Del. Code Ann. tit. 11, § 612(a)(9); 720 Ill. Comp. Stat. 5/12-3.05(d)(6); Tenn. Code Ann. § 39-13-102(d); Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(A), (b)(2)(B); Wis. Stat. Ann. § 940.20.

[1063] Minn. Stat. Ann. § 609.2231(7); 720 Ill. Comp. Stat. Ann. 12-3.05(d)(4).

[1064] Model Penal Code § 210.0(3).

[1065] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1066] *See, e.g.*, Haw. Rev. Stat. Ann. § 707-700 ("'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Utah Code Ann. § 76-6-601(11) ("'Serious bodily injury' means bodily injury that creates serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death."); 18 Pa. Stat. Ann. § 2301 (defining "serious bodily injury"

The revised definition of "serious bodily injury" is substantially similar to the definitions in the MPC and reformed jurisdictions. In addition, the two revisions to the definition of "serious bodily injury," deleting "unconsciousness" and "extreme physical pain," are well supported by national legal trends. Only three reformed jurisdictions[1068] and at least one non-reformed jurisdiction[1069] include unconsciousness in the definition of the highest level of bodily injury. Similarly, only four reformed jurisdictions[1070] and at least one non-reformed jurisdiction[1071] include extreme pain or similar language in the definition of the highest level of bodily injury. The MPC definition of "serious bodily injury" does not include unconsciousness or pain.[1072]

(18) "Significant bodily injury" means 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. The following injuries constitute at least a significant bodily injury: 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.

Relation to National Legal Trends. Only seven[1073] of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and

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as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.").

[1067] *See, e.g.*, Ala. Code § 13A-1-2(14) (defining "serious physical injury as "[p]hysical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."); Ark. Code Ann. § 5-1-102(21) ("'Serious physical injury' means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ."); Me. Rev. Stat. tit. 17-A, § 2(23) ("'Serious bodily injury' means a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member organ, or extended convalescence necessary for recovery of physical health."); Tex. Penal Code Ann. § 1.07(46) ("'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Mo. Ann. Stat. § 556.061 (defining "serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); Wash. Rev. Code Ann. § 9A.04.110 (4)(c) (defining "great bodily harm" as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.").

[1068] Ind. Code Ann. § 35-31.5-2-292(2) ("unconsciousness."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("unconsciousness."); Tenn. Code Ann. § 39-11-106(34)(B) ("protracted unconsciousness.").

[1069] Wyo. Stat. Ann. § 6-1-104(x) ("unconsciousness.").

[1070] Ind. Code Ann. § 35-31.5-2-292(3) ("extreme pain."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("extreme pain."); Ohio Rev. Code Ann. § 2901.01(5) ("any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Tenn. Code Ann. § 39-11-106(34)(C) ("extreme physical pain.")

[1071] Wyo. Stat. Ann. § 6-1-104(x) ("severe protracted physical pain.").

[1072] Model Penal Code § 210.0(3).

[1073] Haw. Rev. Stat. Ann. § 707-700 ("substantial bodily injury."); Ind. Code Ann. § 35-31.5-2-204.5 ("moderate bodily injury."); Minn. Stat. Ann. § 609.02(7a) ("substantial bodily injury."); N.D. Cent. Code Ann. § 12.1-01-04(29) ("substantial bodily injury."); Utah Code Ann. § 76-1-601(12) ("substantial bodily injury."); Wash. Rev.

have a general part[1074] (reformed jurisdictions) have an intermediate level of bodily injury like "significant bodily injury" in current District law. In addition, at least one non-reformed jurisdiction has a similar intermediate level of bodily injury.[1075] The MPC does not have an intermediate level of bodily injury.

These jurisdictions take a variety of approaches in defining the intermediate level of bodily injury. None of them define the injury in terms of whether it requires immediate medical attention or hospitalization like the District's current and revised definitions of "significant bodily injury" do, although one jurisdiction does require "medical treatment when the treatment requires the use of regional or general anesthesia."[1076] The jurisdictions typically define the intermediate level of injury in relation to the impairment or disfigurement required in the highest level of bodily injury.[1077] Many of the jurisdictions also include in their definitions specific injuries that will satisfy the intermediate level of bodily injury like the RCC does, including a fracture of bone,[1078] certain lacerations,[1079] burns,[1080] temporary loss consciousness,[1081] and concussions.[1082] None of the definitions directly address injuries caused by strangulation or suffocation, although one jurisdiction does specifically list petechiae.[1083]

(19) "Strangulation or suffocation" means a restriction of normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

Code Ann. § 9A.04.110(4)(b) ("substantial bodily harm."); Wis. Stat. Ann. § 939.22(38) ("substantial bodily harm.").

[1074] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1075] S.C. Code Ann. § 16-3-600(A)(2) ("moderate bodily injury.").

[1076] S.C. Code Ann. § 16-3-600(A)(2) ("moderate bodily injury.").

[1077] *See, e.g.*, Minn. Stat. Ann. § 609.02(7a) (defining "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member") and 609.02(7b) (defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.); N.D. Cent. Code Ann. § 12.1-01-04(29) (defining "substantial bodily injury" as a "substantial temporary disfigurement, loss, or impairment of the function of any bodily member or organ") and § 12.1-01-04(27) (defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs.").

[1078] Haw. Rev. Stat. Ann. § 707-700 ("a bone fracture."); Minn. Stat. Ann. § 609.02(7a) ("causes a fracture of any bodily member."); Wash. Rev. Code Ann. § 9A.04.110(b) ("causes a fracture of any bodily part."); Wis. Stat. Ann. § 939.22(38) ("any fracture of a bone."); S.C. Code Ann. § 16-3-600(A)(2) ("injury that results in a fracture.").

[1079] Haw. Rev. Stat. Ann. § 707-700 ("a major . . . laceration, or penetration of the skin."); Wis. Stat. Ann. § 939.22(38) ("a laceration that requires stiches.").

[1080] Haw. Rev. Stat. Ann. § 707-700 ("a burn of at least second degree severity."); Wis. Stat. Ann. § 939.22(38) ("a burn.").

[1081] Wis. Stat. Ann. § 939.22(38) ("temporary loss of consciousness.").

[1082] Haw. Rev. Stat. Ann. § 707-700 ("concussion."); Wis. Stat. Ann. § 939.22(38) ("a concussion.").

[1083] Wis. Stat. Ann. § 939.22(38).

[No discussion of national legal trends].

(20) "Transportation worker" means:

(A) A person who is licensed to operate, and is operating, a publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia;

(B) Any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station within the District of Columbia;

(C) A person who is licensed to operate, and is operating, a taxicab within the District of Columbia; and

(D) A person who is registered to operate, and is operating within the District of Columbia, a personal motor vehicle to provide private vehicle-for-hire service in contract with a private vehicle-for-hire company as defined by D.C. Code § 50-301.03(16B).

[No discussion of national legal trends].

(21) "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.

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

(22) "Adult" means a person who is 18 years of age or older.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "adult."

(23) "Child" mean a person who is less than 18 years of age.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "child," although its offense for endangering the welfare of a child requires that the child be "under 18."[1084]

(24) "Duty of care" means a legal responsibility for the health, welfare, or supervision for another person.

Relation to National Legal Trends. The Model Penal Code (MPC) does not use the term "duty of care," but its offense for endangering the welfare of a child requires that the defendant violate "a duty of care, protection, or support."[1085]

(25) "Elderly person" means a person who is 65 years of age or older.

[1084] MPC § 230.4.
[1085] MPC § 230.4.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "elderly person."

(26) "Serious mental injury" means 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.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "serious mental injury."

§ 22E-1002. [Reserved].

Chapter 11. Homicide

RCC § 22E-1101. MURDER.

Relation to National Legal Trends. *The aggravated murder offense's above-mentioned substantive changes to current District law have mixed support in national legal trends*.

First, omitting as an aggravating circumstance that the murder was committing in the course of committing or attempting to commit kidnapping, robbery, arson, rape, or other sexual offense is not consistent with most criminal codes. A majority of states nationwide still include as an aggravating circumstance that the murder was committed in the course of committing, or attempting to commit, kidnapping.[1086]

Second omitting as an aggravating circumstance that the murder was committed in the course of committing or attempting to commit robbery, arson, rape, or other sexual offense is not consistent with most criminal codes. A majority of states nationwide still include as an aggravating circumstance that the murder was committed in the course of robbery, arson, or sexual offense, or in the course of attempting to commit one of those offenses.[1087]

Third, omitting as an aggravating circumstance that there was more than one murder arising out of one incident is supported by many criminal codes. Half of states nationwide do not include as an aggravating circumstance that more than one murder was committed in a single incident,[1088] including twelve[1089] of the 29 states that have adopted a new criminal code influenced by the Model Penal Code (MPC) ("reformed jurisdictions").[1090]

[1086] *E.g.*, Iowa Code Ann. § 707.2, N.Y. Penal Law § 125.26, Tex. Penal Code Ann. § 19.03. However, CCRC staff did not analyze how these states may provide for separate prosecution and penalties for commission of such crimes in the course of committing murder.

[1087] *E.g.*, Iowa Code Ann. § 707.2, N.Y. Penal Law § 125.26, Tex. Penal Code Ann. § 19.03.

[1088] Alaska Stat. Ann. § 12.55.125; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Fla. Stat. Ann. § 921.141; Ga. Code Ann. § 17-10-30; Iowa Code Ann. § 707.2; Idaho Code Ann. § 19-2515; Ind. Code Ann. § 35-50-2-9; Mass. Gen. Laws Ann. ch. 279, § 69; Mich. Comp. Laws Ann. § 750.316; Minn. Stat. Ann. § 609.185; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303; N.C. Gen. Stat. Ann. § 15A-2000; Neb. Rev. Stat. Ann. § 29-2523; N.H. Rev. Stat. Ann. § 630:1; N.J. Stat. Ann. § 2C:11-3; N.M. Stat. Ann. § 31-20A-5; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Okla. Stat. Ann. tit. 21, § 701.12; 42 Pa. Stat. Ann. § 9711; 11 R.I. Gen. Laws Ann. § 11-23-2; S.D. Codified Laws § 23A-27A-1; Wyo. Stat. Ann. § 6-2-102.

[1089] Alaska Stat. Ann. § 12.55.125; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Ind. Code Ann. § 35-50-2-9; Minn. Stat. Ann. § 609.185; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303;; N.H. Rev. Stat. Ann. § 630:1; N.J. Stat. Ann. § 2C:11-3; Ohio Rev. Code Ann. § 2903.01; 42 Pa. Stat. Ann. § 9711; S.D. Codified Laws § 23A-27A-1.

[1090] Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007).

Fourth, omitting as an aggravating circumstance that the murder involved a drive by or random shooting is consistent with most criminal codes. A majority of states do not recognize drive by or random shooting as an aggravating circumstance.[1091]

Fifth, omitting as an aggravating circumstance that the murder was committed due to the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression is consistent with most criminal codes and reformed criminal codes. Almost all states omit bias motivation as an aggravating circumstance for murder.[1092]

Sixth, omitting the recidivist aggravating circumstance is not consistent with state criminal codes. A majority of states recognize as an aggravating circumstance that the accused had been previously convicted or murder, manslaughter, or other violent offenses.[1093]

Seventh, adding as an aggravating circumstance that the victim was a law enforcement officer is consistent with state criminal codes. Only five states omit as an aggravating circumstance that the victim is a law enforcement officer.[1094] Adding as an aggravating factor that the victim was a participant in a citizen patrol, District official or employee, or family member of a District official or employee

Eighth, it is unclear whether recognizing as an aggravating factor that when the murder was committed with recklessness as to the victim being a public safety employee in the course of official duties, transportation worker in the course of official duties, District official or employee in the course of official duties, or member of a citizen patrol member, while in the course of a citizen patrol is consistent with national legal trends. CCRC staff has not yet determined whether other jurisdictions recognize the victim's status as a public safety employee, transportation worker, government official or employee, or member of a citizen patrol as an aggravating circumstance.

Ninth, it is unclear whether adding as an aggravating circumstance that the victim was under the age of 18, or over the age of 65 is supported by national legal trends. CCRC staff has not researched the specific age ranges that qualify as aggravating circumstances for murder in other jurisdictions. However, almost half of the states recognize as an aggravating circumstance that the victim was vulnerable due to age or infirmity.[1095]

[1091] Only seven states recognize drive by or random shootings as an aggravating circumstance for murder. Ala. Code § 13A-5-40; Cal. Penal Code § 190.2; 720 Ill. Comp. Stat. Ann. 5/9-1; La. Stat. Ann. § 14:30; Minn. Stat. Ann. § 609.185; Tenn. Code Ann. § 39-13-204; Wash. Rev. Code Ann. § 10.95.020.

[1092] Only four states explicitly include bias motivation as an aggravating circumstance for murder: Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Cal. Penal Code § 190.2; Nev. Rev. Stat. Ann. § 200.033.

[1093] Alaska Stat. Ann. § 12.55.125; Ala. Code § 13A-5-49; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Conn. Gen. Stat. Ann. § 53a-54b; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; Ga. Code Ann. § 17-10-30; Ind. Code Ann. § 35-50-2-9; Ky. Rev. Stat. Ann. § 532.025; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303; Neb. Rev. Stat. Ann. § 29-2523; N.Y. Penal Law § 125.27; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.D. Codified Laws § 23A-27A-1; Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Wyo. Stat. Ann. § 6-2-102. However, CCRC staff did not analyze how these states may provide for separate recidivist penalty enhancements applicable to murder.

[1094] Arkansas, Hawaii, Maine, Texas, and Wyoming.

[1095] Ala. Code § 13A-5-40; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Conn. Gen. Stat. Ann. § 53a-54b; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. §

Tenth, it is unclear whether adding as an aggravating circumstance that the victim was a "vulnerable adult" is consistent with national legal trends. Although it is unclear whether other jurisdictions' criminal codes define a term similar to the RCC's "vulnerable adult," almost half of all states recognize as an aggravating circumstance that the victim was vulnerable due to age or infirmity.[1096]

Eleventh, eliminating the procedural requirements procedural requirements under D.C. Code § 22-2104.01 and § 24-403.01, is not generally supported by state criminal codes. A majority of states hold a separate sentencing proceeding to determine whether aggravating circumstances were present.[1097]

Twelfth, it is unclear whether including as an aggravating circumstance that the murder was committed by using a dangerous weapon is consistent with national legal trends. Only a few states specifically recognize as an aggravating factor that a weapon was used to commit the murder.[1098] However, CCRC staff has not researched whether other jurisdictions' criminal codes include separate while-armed enhancement provisions that may authorize heightened penalties for murders committed while armed.

Thirteenth, omitting that the murder was EHAC as an aggravating circumstance has mixed support in state criminal codes. A slight majority of states do not recognize as an aggravating circumstance that the murder was EHAC.[1099] However, only a minority

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921.141; 720 Ill. Comp. Stat. Ann. 5/9-1; Ind. Code Ann. § 35-50-2-9; Kan. Stat. Ann. § 21-5401; La. Stat. Ann. § 14:30; N.J. Stat. Ann. § 2C:11-3; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.C. Code Ann. § 16-3-20; Tenn. Code Ann. § 39-13-204; Tex. Penal Code Ann. § 19.03**;** Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Wyo. Stat. Ann. § 6-2-102.

[1096] Ala. Code § 13A-5-40; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Conn. Gen. Stat. Ann. § 53a-54b; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; 720 Ill. Comp. Stat. Ann. 5/9-1; Ind. Code Ann. § 35-50-2-9; Kan. Stat. Ann. § 21-5401; La. Stat. Ann. § 14:30; N.J. Stat. Ann. § 2C:11-3; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.C. Code Ann. § 16-3-20; Tenn. Code Ann. § 39-13-204; Tex. Penal Code Ann. § 19.03**;** Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Wyo. Stat. Ann. § 6-2-102.

[1097] In most states that still employ the death penalty, a separate hearing is held after conviction for murder to determine whether aggravating factors outweigh any mitigating factors before the death penalty may be imposed. *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977). However, among non-death penalty states, a minority do not appear to require any separate proceeding to determine the presence of aggravating factors that authorize heightened penalties as compared to ordinary murder. Alaska Stat. Ann. § 11.41.100; Haw. Rev. Stat. Ann. § 707-701; Iowa Code Ann. § 707.2; Minn. Stat. Ann. § 609.185; *State v. Pallipurath*, No. A-5491-11T3, 2015 WL 10438847, at *11 (N.J. Super. Ct. App. Div. Mar. 11, 2016); *State v. Chadwick-McNally*, No. S-1-SC-36127, 2018 WL 1007882, at *4 (N.M. Feb. 22, 2018); *State v. Grega*, 168 Vt. 363, 386, 721 A.2d 445, 461 (1998).

[1098] Ala. Code § 13A-5-40 (but requires that weapon be fired into a house or vehicle); Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201 (but only if possession of the weapon constitutes a class 1 felony).

[1099] Haw. Rev. Stat. Ann. § 707-701; Iowa Code Ann. § 707.2; Ind. Code Ann. § 35-50-2-9; Kan. Stat. Ann. § 21-5401; Ky. Rev. Stat. Ann. § 532.025; La. Stat. Ann. § 14:30; Mass. Gen. Laws Ann. ch. 279, § 69; Md. Code Ann., Crim. Law § 2-203; Me. Rev. Stat. tit. 17-A, § 201; Minn. Stat. Ann. § 609.185; Miss. Code. Ann. § 97-3-19; Mont. Code Ann. § 46-18-303; N.D. Cent. Code Ann. § 12.1-16-01; N.H. Rev. Stat. Ann. § 630:1; N.M. Stat. Ann. § 31-20A-5; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; 11 R.I. Gen. Laws Ann. § 11-23-2; S.C. Code Ann. § 16-3-20; Tex. Penal Code Ann. § 19.03; Utah Code Ann. § 76-5-202 (include especially

of states explicitly recognize torture or infliction of substantial suffering[1100] or mutilation or desecration of the body[1101] as an aggravating circumstance.

Fourteenth, recognizing that acting under "extreme emotional disturbance" is a mitigating circumstance is not strongly supported by other criminal codes. Only ten states recognize acting "under extreme emotional disturbance" as a circumstance that can mitigate murder down to manslaughter.[1102] The majority of states use the traditional "heat of passion" formulation.[1103]

Fifteenth, statutorily recognizing that any legally recognized partial defenses may mitigate murder to manslaughter is not supported by national legal trends. Only four states' voluntary manslaughter statutes include partial defenses as a mitigating circumstance.[1104] However, the Commission has not reviewed relevant case law in other jurisdictions to determine if courts have recognized other partial defenses as a mitigating circumstance.

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

First, abolishing the distinction between premeditated and non-premeditated murders is consistent with national legal trends. A majority of the twenty nine reformed

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heinous, atrocious, or cruel, but "must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death"); Va. Code Ann. § 18.2-31; Vt. Stat. Ann. tit. 13, § 2311; Wash. Rev. Code Ann. § 10.95.020.

[1100] Del. Code Ann. tit. 11, § 4209; Ga. Code Ann. § 17-10-30; Ind. Code Ann. § 35-50-2-9; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303; N.J. Stat. Ann. § 2C:11-3; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.D. Codified Laws § 23A-27A-1.

[1101] Ind. Code Ann. § 35-50-2-9; Nev. Rev. Stat. Ann. § 200.033; S.C. Code Ann. § 16-3-20; Tenn. Code Ann. § 39-13-204; Utah Code Ann. § 76-5-202.

[1102] Ark. Code Ann. § 5-10-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; Ky. Rev. Stat. Ann. § 507.030; Mont. Code Ann. § 45-5-103; N.D. Cent. Code Ann. § 12.1-16-01; N.H. Rev. Stat. Ann. § 630:2; N.Y. Penal Law § 125.20; Or. Rev. Stat. Ann. § 163.118. In addition, Maine's manslaughter statute recognizes acting "under the influence of extreme anger or extreme fear brought about by adequate provocation[.]" Me. Rev. Stat. tit. 17-A, § 203.

[1103] Alaska Stat. Ann. § 11.41.115.; Ala. Code § 13A-6-3; Ariz. Rev. Stat. Ann. § 13-1103; Cal. Penal Code § 192; Colo. Rev. Stat. Ann. § 18-3-103; Ga. Code Ann. § 16-5-2; Iowa Code Ann. § 707.4; Idaho Code Ann. § 18-4006; 720 Ill. Comp. Stat. Ann. 5/9-2; Ind. Code Ann. § 35-42-1-3; Kan. Stat. Ann. § 21-5404; La. Stat. Ann. § 14:31; Com. v. Knight, 637 N.E.2d 240, 246 (Mass. App. Ct. 1994); Cox v. State, 534 A.2d 1333, 1335-36 (Md. 1988); People v. Sullivan, 586 N.W.2d 578, 582 (Mich. Ct. App. 1998); Minn. Stat. Ann. § 609.19; Mo. Ann. Stat. § 565.023; Miss. Code. Ann. § 97-3-35; State v. Alston, 588 S.E.2d 530, 535-36 (N.C. Ct. App.2003); Neb. Rev. Stat. Ann. § 28-305; Nev. Rev. Stat. Ann. § 200.040; N.J. Stat. Ann. § 2C:11-4; N.M. Stat. Ann. § 30-2-3; Nev. Rev. Stat. Ann. § 200.040; Ohio Rev. Code Ann. § 2903.03; Okla. Stat. Ann. tit. 21, § 711; State v. McGuy, 841 A.2d 1109, 1112-13 (R.I. 2003); State v. Smith, 609 S.E.2d 528, 530 (S.C. Ct. App. 2005); S.D. Codified Laws § 22-16-15; Tenn. Code Ann. § 39-13-211; Tex. Penal Code Ann. § 19.02; Canipe v. Com., 25 Va. App. 629, 643, 491 S.E.2d 747, 753 (1997); State v. Yoh, 910 A.2d 853, 864-65 (Vt. 2006); Wis. Stat. Ann. § 940.01; State v. Wade, 490 S.E.2d 724, 732 (W.V. 1997); Yung v. State, 906 P.2d 1028, 1035 (Wyo. 1995).

[1104] 18 Pa. Stat. Ann. § 2503; 720 Ill. Comp. Stat. Ann. 5/9-2; Kan. Stat. Ann. § 21-5404; Wis. Stat. Ann. § 940.01.

jurisdictions as well as the MPC[1105] and the Proposed Federal Criminal Code[1106] do not distinguish between murders that are premeditated and those that are not.

Second, criminalizing felony murder as second degree murder instead of first degree murder is not generally supported by state criminal codes. A majority of jurisdictions treat felony murder as a form of first degree murder. However, a small number of jurisdictions treat felony murder as a lower grade of murder as compared to intentionally or knowingly causing the death of another.[1107]

Third, the District would be an outlier in treating second degree murder with the addition of an aggravating circumstance as a form of first degree murder. No other jurisdictions specifically treat aggravated second degree murder as a form of first degree murder.[1108]

Fourth, it is unclear whether incorporating a penalty enhancement for using a dangerous weapon as an element that elevates second degree murder to first degree murder is consistent with national legal trends. Only a few states specifically recognize as an aggravating factor that a weapon was used to commit the murder.[1109] However, CCRC staff has not researched whether other jurisdictions' criminal codes include separate while-armed enhancement provisions that may authorize heightened penalties for murders committed while armed, or whether such enhancements may be applied on conjunction with other enhancements.

Fifth, it is unclear if eliminating the procedural requirements procedural requirements under § 24-403.01, is supported by state criminal codes. CCRC staff has not researched what procedures other jurisdictions require for applying sentencing enhancements applicable to second degree murder.

Sixth, abolishing D.C. Code § 22-2101, the specialized form of murder involving obstructing railroads, is consistent with national legal trends. The District is the only jurisdiction in the country that retains this form of murder as a separate offense.

Seventh, recognizing that acting under "extreme emotional disturbance" as a mitigating circumstance is not strongly supported by state criminal codes. Ten states recognize acting "under extreme emotional disturbance" as a circumstance that can

[1105] MPC § 210.2.

[1106] Proposed Federal Criminal Code § 1601.

[1107] Alaska Stat. Ann. § 11.41.100, Alaska Stat. Ann. § 11.41.110; Haw. Rev. Stat. Ann. § 707-701 (Hawaii does not recognize felony murder); Ky. Rev. Stat. Ann. § 507.020 (Kentucky does not recognize felony murder); Me. Rev. Stat. tit. 17-A, § 201, Me. Rev. Stat. tit. 17-A, § 202; 18 Pa. Stat. Ann. § 2502; Wis. Stat. Ann. § 940.05 Wis. Stat. Ann. § 940.03.

[1108] However, CCRC staff did not research whether or how these other states may have separate penalty enhancements that affect second degree murder.

[1109] Ala. Code § 13A-5-40 (but requires that weapon be fired into a house or vehicle); Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201 (but only if possession of the weapon constitutes a class 1 felony).

mitigate murder down to manslaughter.[1110] However, the majority of states use the traditional "heat of passion" formulation.[1111]

Seventh, statutorily recognizing that any legally recognized partial defenses may mitigate murder to manslaughter is not generally supported by state criminal codes. Only four states' voluntary manslaughter statutes include partial defenses as a mitigating circumstance.[1112] However, staff has not yet reviewed relevant case law in other jurisdictions to determine if courts have recognized other partial defenses as a mitigating circumstance.

Relation to National Legal Trends. *The changes to the second degree murder statute have mixed support from national legal trends.*

First, omitting knowingly causing the death of another without premeditation and deliberation from second degree murder is supported by national legal trends. A slight minority of reformed jurisdictions retains both first and second degree murder, and includes knowingly causing the death of another as a form of second degree murder.[1113]

Second, criminalizing felony murder as second degree murder is not generally supported by state criminal codes. A majority of jurisdictions treat felony murder as a form of first degree murder. Only six jurisdictions treat felony murder as a lower grade of murder as compared to intentionally or knowingly causing the death of another.[1114]

[1110] Ark. Code Ann. § 5-10-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; Ky. Rev. Stat. Ann. § 507.030; Mont. Code Ann. § 45-5-103; N.D. Cent. Code Ann. § 12.1-16-01; N.H. Rev. Stat. Ann. § 630:2; N.Y. Penal Law § 125.20; Or. Rev. Stat. Ann. § 163.118. In addition, Maine's manslaughter statute recognizes acting "under the influence of extreme anger or extreme fear brought about by adequate provocation[.]" Me. Rev. Stat. tit. 17-A, § 203.

[1111] Alaska Stat. Ann. § 11.41.115.; Ala. Code § 13A-6-3; Ariz. Rev. Stat. Ann. § 13-1103; Cal. Penal Code § 192; Colo. Rev. Stat. Ann. § 18-3-103; Ga. Code Ann. § 16-5-2; Iowa Code Ann. § 707.4; Idaho Code Ann. § 18-4006; 720 Ill. Comp. Stat. Ann. 5/9-2; Ind. Code Ann. § 35-42-1-3; Kan. Stat. Ann. § 21-5404; La. Stat. Ann. § 14:31; Com. v. Knight, 637 N.E.2d 240, 246 (Mass. App. Ct. 1994); Cox v. State, 534 A.2d 1333, 1335-36 (Md. 1988); People v. Sullivan, 586 N.W.2d 578, 582 (Mich. Ct. App. 1998); Minn. Stat. Ann. § 609.19; Mo. Ann. Stat. § 565.023; Miss. Code. Ann. § 97-3-35; State v. Alston, 588 S.E.2d 530, 535-36 (N.C. Ct. App.2003); Neb. Rev. Stat. Ann. § 28-305; Nev. Rev. Stat. Ann. § 200.040; N.J. Stat. Ann. § 2C:11-4; N.M. Stat. Ann. § 30-2-3; Nev. Rev. Stat. Ann. § 200.040; Ohio Rev. Code Ann. § 2903.03; Okla. Stat. Ann. tit. 21, § 711; State v. McGuy, 841 A.2d 1109, 1112-13 (R.I. 2003); State v. Smith, 609 S.E.2d 528, 530 (S.C. Ct. App. 2005); S.D. Codified Laws § 22-16-15; Tenn. Code Ann. § 39-13-211; Tex. Penal Code Ann. § 19.02; Canipe v. Com., 25 Va. App. 629, 643, 491 S.E.2d 747, 753 (1997); State v. Yoh, 910 A.2d 853, 864-65 (Vt. 2006); Wis. Stat. Ann. § 940.01; State v. Wade, 490 S.E.2d 724, 732 (W.V. 1997); Yung v. State, 906 P.2d 1028, 1035 (Wyo. 1995).

[1112] 18 Pa. Stat. Ann. § 2503; 720 Ill. Comp. Stat. Ann. 5/9-2; Kan. Stat. Ann. § 21-5404; Wis. Stat. Ann. § 940.01.

[1113] Alaska Stat. Ann. § 11.41.110; Ariz. Rev. Stat. Ann. § 13-1104; Ark. Code Ann. § 5-10-103; Colo. Rev. Stat. Ann. § 18-3-103; Haw. Rev. Stat. Ann. § 707-701.5; Kan. Stat. Ann. § 21-5403; Minn. Stat. Ann. § 609.19; Mo. Ann. Stat. § 565.021; N.H. Rev. Stat. Ann. § 630:1-b; N.Y. Penal Law § 125.25; S.D. Codified Laws § 22-16-7; Tenn. Code Ann. § 39-13-210; Wash. Rev. Code Ann. § 9A.32.050; Wis. Stat. Ann. § 940.05.

[1114] Alaska Stat. Ann. § 11.41.100, Alaska Stat. Ann. § 11.41.110 (although Alaska criminalizes felony murder as second degree murder, the same grade as depraved heart or intent-to-cause-serious—physical-injury murder, Alaska's first degree murder statute does include unintentional forms of murder when the victim is under the age of 16, and recognizes a limited form of felony murder that must be predicated on

Third, it is unclear whether the changes to predicate offenses for felony murder are consistent with national legal trends. CCRC staff has not researched which specific offenses may serve as predicate offenses for felony murder in other jurisdictions, and how those offenses correspond to the offenses included in the revised second degree murder statute.

Fourth, the limitations to felony murder liability also have mixed support from other jurisdictions. First, a minority of states' felony murder statutes include an "in furtherance" requirement.[1115] Second, a minority of states bar felony murder liability when the decedent was a participant in the underlying felony.[1116] Third, slightly less than half of reformed jurisdictions require that the lethal act be committed by the accused or an accomplice to the underlying offense.[1117]

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either intentionally damaging an oil or gas pipeline, or making terroristic threats); Haw. Rev. Stat. Ann. § 707-701.5 (Hawaii is one of two states to entirely abolish the felony murder rule by statute); Ky. Rev. Stat. Ann. § 507.020 (Kentucky is one of two states to abolish the felony murder rule by statute); Me. Rev. Stat. tit. 17-A, § 201; Me. Rev. Stat. tit. 17-A, § 202; *People v. Aaron*, 299 N.W.2d 304, 326 (Mich. 1980) (Abolishing the felony murder rule. "Our review of Michigan case law persuades us that we should abolish the rule which defines malice as the intent to commit the underlying felony"); 18 Pa. Stat. Ann. § 2502 (under Pennsylvania's criminal code, intentionally cause the death of another is first degree murder, felony murder is second degree murder); Wis. Stat. Ann. § 940.01, Wis. Stat. Ann. § 940.01 (Wisconsin's first-degree intentional homicide covers intentionally causing the death of another, and felony murder is covered by a separate statute with less severe penalties).

[1115] Ark. Code Ann. § 5-10-102; Ariz. Rev. Stat. Ann. § 13-1105; Colo. Rev. Stat. Ann. § 18-3-102; Conn. Gen. Stat. Ann. § 53a-54c; N.D. Cent. Code Ann. § 12.1-16-01; N.Y. Penal Law § 125.25; Or. Rev. Stat. Ann. § 163.115; Tex. Penal Code Ann. § 19.02; Wash. Rev. Code Ann. § 9A.32.030, Wash. Rev. Code Ann. § 9A.32.050.

[1116] Alaska Stat. Ann. § 11.41.110 ("causes the death of a person other than one of the participants"); Colo. Rev. Stat. Ann. § 18-3-102 ("the death of a person, other than one of the participants, is caused by anyone"); Conn. Gen. Stat. Ann. § 53a-54c ("causes the death of a person other than one of the participants"); N.J. Stat. Ann. § 2C:11-3 ("causes the death of a person other than one of the participants"); N.Y. Penal Law § 125.25 ("causes the death of a person other than one of the participants"); Or. Rev. Stat. Ann. § 163.115 ("causes the death of a person other than one of the participants"); Utah Code Ann. § 76-5-203 ("a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense"); *Wooden v. Com.*, 284 S.E.2d 811, 816 (Va. 1981) ("we hold that under § 18.2-32, a criminal participant in a felony may not be convicted of the felony-murder of a co-felon killed by the victim of the initial felony"); Wash. Rev. Code Ann. § 9A.32.030 ("causes the death of a person other than one of the participants").

[1117] Colo. Rev. Stat. Ann. § 18-3-102; Ark. Code Ann. § 5-10-102; Conn. Gen. Stat. Ann. § 53a-54c; *Weick v. State*, 420 A.2d 159, 161-62 (Del. 1980) ("The defendants contend that this section was improperly applied to them because, manifestly, s 635(2) was not intended to punish one who commits a felony for a homicide that occurs during the perpetration of that felony but is not committed by him, his agent, or someone under his control. We agree."); *State v. Sophophone*, 270 Kan. 703, 713, 19 P.3d 70, 77 (2001) ("We hold that under the facts of this case where the killing resulted from the lawful acts of a law enforcement officer in attempting to apprehend a co-felon, Sophophone is not criminally responsible for the resulting death of Somphone Sysoumphone, and his felony-murder conviction must be reversed"); Me. Rev. Stat. tit. 17-A, § 20; *Poole v. State*, 295 Md. 167, 174, 453 A.2d 1218, 1223 (1983); *State v. Branson*, 487 N.W.2d 880, 885 (Minn. 1992) ("The felony murder statute, Minn.Stat. § 609.19(2), does not extend to apply to a situation in which a bystander is killed during exchange of gunfire in which defendant allegedly participated but where the fatal shot was fired by someone in a group adverse to the defendant rather than by the defendant or someone associated with the defendant in committing or attempting to commit a felony"); Mont. Code Ann. § 45-5-102; N.D. Cent. Code Ann. § 12.1-16-01; State v. Quintana, 261 Neb.

RCC § 22E-1102. MANSLAUGHTER.

Relation to National Legal Trends. *The above mentioned changes to current District law are not supported by state criminal codes. Although nearly all jurisdictions define voluntary manslaughter, which is analogous to the RCC's first degree manslaughter offense, as causing the death of another under circumstances that would constitute murder, no other jurisdictions integrate aggravating circumstances applicable to voluntary manslaughter into a separate aggravated manslaughter offense. However, CCRC staff did not research what penalty enhancements other jurisdictions apply to voluntary manslaughter.*

Relation to National Legal Trends. *The above mentioned changes to current District law are not supported by state criminal codes. Although nearly all jurisdictions define voluntary manslaughter, which is analogous to the RCC's first degree manslaughter offense, as causing the death of another under circumstances that would constitute murder, no other jurisdictions integrate aggravating circumstances applicable to voluntary manslaughter into a separate aggravated manslaughter offense. However, CCRC staff did not research whether or how these other states may have separate penalty enhancements that affect second degree murder.*

Relation to National Legal Trends. *The revised second degree manslaughter offense's two above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, eliminating the "misdemeanor manslaughter" form of involuntary manslaughter is generally consistent with state criminal codes. Although a slight majority of all states retain a version of "misdemeanor manslaughter" twenty of the

38, 59, 621 N.W.2d 121, 138, opinion modified on denial of reh'g, 261 Neb. 623, 633 N.W.2d 890 (Neb. 2001) ("Causation, in the context of felony murder, requires that the death of the victim result from an act of the defendant or the defendant's accomplice"); *Jackson v. State*, 589 P.2d 1052, 1052 (NM 1979) ("The sole question presented by this petition for writ of certiorari is whether a co-perpetrator of a felony can be charged with the felony murder of a co-felon, under s 30-2-1(A)(3), N.M.S.A. 1978, (formerly s 40A-2-1(A)(3), N.M.S.A. 1953), when the killing is committed by the intended robbery victim while resisting the commission of the offense. We hold that he cannot."); N.Y. Penal Law § 125.25; Or. Rev. Stat. Ann. § 163.115; *State v. Severs*, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988) (holding that felony murder rule was inapplicable when lethal act was perpetrated by an innocent party who was thwarting the felony); *Blansett v. State*, 556 S.W.2d 322, 324–25 (Tex. Crim. App. 1977) (rev'd on other grounds) (holding that felony murder liability does not apply when death was caused by police officer acting in legal self defense); *Rivers v. Com.*, 21 Va. App. 416, 422, 464 S.E.2d 549, 551 (1995); *People v. Washington*, 402 P.2d 130, 133 (Wash. 1965)(in bank) ("When a killing is not committed by a robber or by his accomplice but by his victim, malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate robbery.")

twenty-nine reformed code jurisdictions, and the MPC,[1118] do not define involuntary manslaughter to include "misdemeanor manslaughter."[1119]

Second, eliminating the "criminal negligence" form of involuntary manslaughter is also consistent with state criminal codes. A majority of states do not include a criminal negligence form of involuntary manslaughter, including twenty three of the twenty nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereinafter "reformed jurisdictions").[1120]

In general, defining second degree manslaughter as recklessly causing the death of another is consistent with state criminal codes. A majority of states, the Model Penal Code (MPC)[1121], and the proposed Federal Criminal Code[1122] define involuntary manslaughter as recklessly causing the death of another. This is also the clear majority approach across the twenty-nine reformed jurisdictions, of which twenty-two define involuntary manslaughter as recklessly causing the death of another.[1123]

RCC § 22E-1103. NEGLIGENT HOMICIDE.

Relation to National Legal Trends. *The revised negligent homicide statute's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, changing the negligent homicide offense to require that the accused acted with criminal negligence and not merely civil negligence is strongly supported by state criminal codes. Only six states provide homicide liability on the basis of civil

[1118] MPC § 210.3.

[1119] Alaska Stat. Ann. § 11.41.120; Ariz. Rev. Stat. Ann. § 13-1103; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-56; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; Mont. Code Ann. § 45-2-101 (note that Montana does not criminalize recklessly causing the death of another, and only includes a negligent homicide offense); N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; N.D. Cent. Code Ann. § 12.1-16-02; Or. Rev. Stat. Ann. § 163.125; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wash. Rev. Code Ann. § 9A.32.060; Wis. Stat. Ann. § 940.06.

[1120] Alaska Stat. Ann. § 11.41.120; Ariz. Rev. Stat. Ann. § 13-1103; Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Fla. Stat. Ann. § 782.07; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Ind. Code Ann. § 35-42-1-4; Ky. Rev. Stat. Ann. § 507.040; Mo. Ann. Stat. § 565.024; Mont. Code Ann. § 45-5-104; N.D. Cent. Code Ann. § 12.1-16-02; Neb. Rev. Stat. Ann. § 28-305; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; Ohio Rev. Code Ann. § 2903.04; Or. Rev. Stat. Ann. § 163.118; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wis. Stat. Ann. § 940.06.

[1121] MPC § 210.3.

[1122] Proposed Federal Criminal Code § 1602.

[1123] Ala. Code § 13A-6-4; Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Kan. Stat. Ann. § 21-5405; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; N.D. Cent. Code Ann. § 12.1-16-02; Or. Rev. Stat. Ann. § 163.118; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wash. Rev. Code Ann. § 9A.32.060.

negligence.[1124] The other forty-four jurisdictions do not have an analogous negligent homicide offense[1125]; require gross or criminal negligence[1126]; or require civil negligence plus an additional aggravating factor, such as intoxication[1127], or violation of a state or local traffic law.[1128] The American Law Institute's Model Penal Code negligent homicide offense also requires criminal negligence.[1129]

Second, broadening the negligent homicide offense by omitting the requirement that the accused operated a vehicle is also generally supported by state criminal codes. The Model Penal Code,[1130] the Proposed Federal Criminal Code[1131], and twenty one of the twenty-nine states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[1132] criminalize negligently causing the death of another, regardless of whether a vehicle was used.[1133]

[1124] Cal. Penal Code § 193; Conn. Gen. Stat. Ann. § 14-222a; Haw. Rev. Stat. § 701-107; Mass. Gen. Laws Ann. ch. 90; § 24G, Nev. Rev. Stat. Ann. § 193.150; Okla. Stat. Ann. tit. 47, § 11-903.

[1125] These states are: Georgia, Illinois, Indiana, Michigan (previously had a negligent homicide offense that applied simple negligence, but that statute was repealed in 2010); Nebraska, New Jersey, Rhode Island, South Dakota, West Virginia, and Maryland.

[1126] Alaska Stat. Ann. § 11.41.130; Ala. Code § 13A-6-4; Ariz. Rev. Stat. Ann. § 13-1102; Colo. Rev. Stat. Ann. § 18-3-105; Conn. Gen. Stat. Ann. § 53a-58 ; Del. Code Ann. tit. 11, § 631; Ky. Rev. Stat. Ann. § 507.050 (Kentucky uses the term "recklessness" in place of "negligence"); La. Rev. Stat. Ann. 14:32; Me. Rev. Stat. tit. 17-A, § 203 (criminalized as a form of manslaughter, equivalent to recklessly causing the death of another); Mo. Ann. Stat. § 565.024; Miss. Code. Ann. § 97-3-47 (included as a form of manslaughter); Mont. Code Ann. § 45-5-104; N.C. Gen. Stat. Ann. § 14-18, *State v. Hudson*, 483 S.E.2d 436, 439 (N.C. 1997); N.D. Cent. Code Ann. § 12.1-16-03; N.H. Rev. Stat. Ann. § 630:3; N.M. Stat. Ann. § 30-2-3 (included as a form of manslaughter); N.Y. Penal Law § 125.10; Ohio Rev. Code Ann. § 2903.05 (but requires use of a firearm and ordinance); Okla. Stat. Ann. tit. 21, § 716; Or. Rev. Stat. Ann. § 163.145; 75 Pa. Cons. Stat. Ann. § 3732 (West); *Commonwealth v. Sloat*, 11 Pa. D. & C.3d 745, 747 (Pa. Com. Pl. 1979) ("the legislature has acted to fill the gap and to make punishable conduct which is more blameworthy than civil negligence yet which is not encompassed within involuntary manslaughter under the Pennsylvania Crimes Code with its requirement for acting in a reckless or grossly negligent manner while causing the death of another").; S.C. Code Ann. § 16-3-60 (included as a form of manslaughter); Tenn. Code Ann. § 39-13-212; Tex. Penal Code Ann. § 12.35; Utah Code Ann. § 76-5-206; *State v. Viens*, 144-45, 978 A.2d 37, 42-43 (Vt. 2009); Wash. Rev. Code Ann. § 9A.32.070 (included as a form of manslaughter); Wyo. Stat. Ann. § 6-2-107.

[1127] *E.g.*, Utah Code Ann. § 76-5-207 (West) (requiring that defendant operates a motor vehicle in a negligent manner causing the death of another *and* that the defendant had a blood alcohol concentration above .08 grams, or was under the influence of alcohol or drugs to a degree that renders the person incapable of safely operating a vehicle).

[1128] *E.g.*, N.C. Gen. Stat. Ann. § 15A-1340.23 (West) (requires that the defendant was "engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic").

[1129] Model Penal Code § 210.4.

[1130] *Id*.

[1131] Proposed Federal Criminal Code § 1603.

[1132] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1133] Alaska Stat. Ann. § 11.41.130; Ala. Code § 13A-6-4; Ariz. Rev. Stat. Ann. § 13-1102; Ark. Code Ann. § 5-10-105; Colo. Rev. Stat. Ann. § 18-3-105; Conn. Gen. Stat. Ann. § 53a-58; Del. Code Ann. tit. 11, § 631; Ky. Rev. Stat. Ann. § 507.050; Minn. Stat. Ann. § 609.205; Mo. Ann. Stat. § 565.024; Mont. Code Ann. § 45-5-104; N.H. Rev. Stat. Ann. § 630:3; N.Y. Penal Law § 125.10; N.D. Cent. Code Ann. § 12.1-

Third, replacing the "criminal negligence" version of manslaughter with the revised negligent homicide offense is consistent with national legal trends. A majority of states define involuntary manslaughter as recklessly causing the death of another.[1134] A minority of states, by statute, define manslaughter to include negligently causing the death of another.[1135] However, CCRC staff has not comprehensively reviewed case law in other jurisdictions to determine how many states still recognize a criminal negligence version of manslaughter.

Chapter 12. Robbery, Assault, and Threat Offenses

RCC § 22E-1201. ROBBERY.

Relation to National Legal Trends. *The revised robbery statute's above-mentioned substantive changes to current District law are broadly supported by national legal trends, with the exception of distinctly recognizing carjacking as a form of robbery.*

First, excluding from the revised robbery statute pickpocketing and sudden and stealthy seizures is consistent with the approach across the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1136] (hereinafter "reformed code jurisdictions"). No reformed code jurisdictions criminalize pickpocketing as a form of robbery. Robbery statutes in all reformed code jurisdictions, as well as the MPC,[1137] require either "bodily injury,"[1138]

16-03; Ohio Rev. Code Ann. § 2903.05 (though Ohio's negligent homicide requires that the defendant used a deadly weapon or dangerous ordinance); Or. Rev. Stat. Ann. § 163.145; 18 Pa. Stat. Ann. § 2504; Tenn. Code Ann. § 39-13-212; Tex. Penal Code Ann. § 12.35; Utah Code Ann. § 76-5-206; Wash. Rev. Code Ann. § 9A.32.070.

[1134] Alaska Stat. Ann. § 11.41.120; Ala. Code § 13A-6-4; Ark. Code Ann. § 5-10-104; Ariz. Rev. Stat. Ann. § 13-1103; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Kan. Stat. Ann. § 21-5405; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; N.D. Cent. Code Ann. § 12.1-16-02; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; Or. Rev. Stat. Ann. § 163.118; S.C. Code Ann. § 16-3-60; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wis. Stat. Ann. § 940.06; Wyo. Stat. Ann. § 6-2-105.

[1135] Fla. Stat. Ann. § 782.07; Idaho Code Ann. § 18-4006; *Cox v. State*, 534 A.2d 1333, 1335-36 (1988); Md. Code Ann., Crim. Law § 2-209; Me. Rev. Stat. tit. 17-A, § 203; *In re Gillis*, 512 N.W.2d 79, 80 (Mich. 1994); Minn. Stat. Ann. § 609.205; Miss. Code. Ann. § 97-3-27; Mo. Ann. Stat. § 565.024 (but requires operation of a motor vehicle, otherwise manslaughter requires recklessness); State v. Hudson, 483 S.E.2d 436, 439 (N.C. 1997); Okla. Stat. Ann. tit. 21, § 716; 18 Pa. Stat. Ann. § 2504; *State v. Ortiz*, 824 A.2d 473, 485-86 (R.I. 2003); S.C. Code Ann. § 16-3-60 (but negligence is defined as "reckless disregard for the safety of others"); *State v. Viens*, 978 A.2d 37, 42-43 (Vt. 2009); Wash. Rev. Code Ann. § 9A.32.070.

[1136] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1137] Model Penal Code § 222.1.

[1138] Me. Rev. Stat. tit. 17-A; Mo. Ann. Stat. § 570.025; Mont. Code Ann. § 45-5-401; N.J. Stat. Ann. § 2C:15-1; N.D. Cent. Code Ann. § 12.1-22-01; Ohio Rev. Code Ann. § 2911.02; 18 Pa. Stat. Stat. Ann. § 3701; Tex. Penal Code Ann. § 29.02.

force[1139], threat of force,[1140] violence[1141], intimidation,[1142] or commits or threatens to commit any felony.[1143] No reformed code jurisdictions' robbery statutes include taking property from the immediate actual possession of another by sudden or stealthy seizure.[1144] Commentators have noted that "[t]aking the owner's property by stealthily picking his pocket is not taking by force and so is not robbery"; nor is it robbery "when the thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking."[1145] The revised criminal code's requirement of bodily injury, a criminal menace, or overpowering physical force is consistent with these reform code jurisdictions.[1146]

[1139] Ala. Code § 13A-8-43; Alaska Stat. Ann. § 11.41.510; Ariz. Rev. Stat. Ann. § 13-1902; Ark. Code Ann. § 5-12-102; Colo. Rev. Stat. Ann. § 18-4-301; Conn. Gen. Stat. Ann. § 53a-133; Del. Code Ann. tit. 11, § 831; Haw. Rev. Stat. Ann. § 708-841; 720 Ill. Comp. Stat. Ann. 5/18-1; Ind. Code Ann. § 35-42-5-1; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.030; Minn. Stat. Ann. § 609.245; Mo. Ann. Stat. § 570.025; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; N.Y. Penal Law § 160.00; Or. Rev. Stat. Ann. § 164.395; S.D. Codified Laws § 22-30-1; Utah Code Ann. § 76-6-301; Wash. Rev. Code Ann. § 9A.56.190; Wis. Stat. Ann. § 943.32. Note that Commission staff did not research case law interpreting the term "force" in each of these jurisdictions. It is possible that in at least some of these states, the "force" element can be satisfied by the most minimal degree of physical contact or jostling.

[1140] Ala. Code § 13A-8-43; Alaska Stat. Ann. § 11.41.510; Ariz. Rev. Stat. Ann. § 13-1902; Ark. Code Ann. § 5-12-102; Colo. Rev. Stat. Ann. § 18-4-301; Conn. Gen. Stat. Ann. § 53a-133; Del. Code Ann. tit. 11, § 831; Haw. Rev. Stat. Ann. § 708-841; 720 Ill. Comp. Stat. Ann. 5/18-1; Ind. Code Ann. § 35-42-5-1; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.030; Me. Rev. Stat. tit. 17-A; Minn. Stat. Ann. § 609.245; Mont. Code Ann. § 45-5-401; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; N.Y. Penal Law § 160.00; N.D. Cent. Code Ann. § 12.1-22-01; Ohio Rev. Code Ann. § 2911.02; Or. Rev. Stat. Ann. § 164.395; 18 Pa. Stat. Stat. Ann. § 3701; S.D. Codified Laws § 22-30-1; Tenn. Code Ann. § 39-13-401; Tex. Penal Code Ann. § 29.02; Utah Code Ann. § 76-6-301; Wash. Rev. Code Ann. § 9A.56.190; Wis. Stat. Ann. § 943.32.

[1141] Tenn. Code Ann. § 39-13-401; Wash. Rev. Code Ann. § 9A.56.190.

[1142] Colo. Rev. Stat. Ann. § 18-4-301.

[1143] Mont. Code Ann. § 45-5-401; 18 Pa. Stat. Stat. Ann. § 3701.

[1144] Although statutes in all 29 reformed jurisdictions require at the very least, force or threats of force, it is unclear exactly how broadly robbery statutes have been interpreted by courts in other jurisdictions. Although stealthily taking property from the immediate actual possession of another without any touching would not constitute robbery in the 29 reformed jurisdictions, it is possible that a pick-pocketing that involves even a slight amount of physical contact could still satisfy the force requirement in some jurisdictions. *See,* 18 Pa. Stat. Stat. Ann. § 3701 (defining robbery as taking or removing property, *"by force however slight[.]"). See also,* LaFave, Wayne, 3 Subst. Crim. L. § 20.3 (2d ed.) ("Taking the owner's property by stealthily picking his pocket is not taking by force and so is not robbery;[50] but if the pickpocket or his confederate jostles the owner,[51] or if the owner, catching the pickpocket in the act, struggles unsuccessfully to keep possession,[52] the pickpocket's crime becomes robbery. To remove an article of value, attached to the owner's person or clothing, by a sudden snatching or by stealth is not robbery unless the article in question (e.g., an earring, pin or watch) is so attached to the person or his clothes as to require some force to effect its removal.") .

[1145] LaFave, 3 SUBST. CRIM. L. § 20.3. In most jurisdictions, purse snatching itself does not constitute robbery. Peter G. Guthrie, *Purse Snatching as Robbery or Theft*, 42 A.L.R.3d 1381 (2014). However, depending on the specific facts, it is conceivable that a purse snatching could involve sufficient use of physical strength to constitute "overpowering physical force." However, this would be a highly fact specific inquiry, and the revised robbery statute is not intended to categorically include or bar purse snatchings.

[1146] It is possible that case law in some reformed code jurisdictions would construe "force" in their statutes to include some conduct that is more severe than the incidental jostling and movements involved in sudden

Second, dividing robbery into multiple penalty grades and grading based on the severity of bodily injury is also consistent with national norms. Of the twenty-nine reformed code jurisdictions, only one state, Montana, uses a single penalty grade for robbery.[1147] A majority of the reformed code jurisdictions, and the MPC[1148], divide robbery into two penalty grades[1149], ten use three penalty grades[1150], and two use five or more grades.[1151] Of the twenty-nine reformed jurisdictions, twenty-two states, and the MPC,[1152] use the severity of injury inflicted as a grading factor.[1153] However, the revised robbery statute would be an outlier in distinguishing between bodily injury, serious bodily injury, and significant bodily injury in its robbery statute, consistent with the fact that few jurisdictions that have a level of harm comparable to the District's "significant bodily injury."[1154]

Third, including robbery gradations based on causing injury by means of a dangerous weapon is consistent with national norms, although the District would be in the minority by requiring that the defendant actually use the weapon. Of the twenty-nine

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snatchings, but is less severe than "overpowering" physical force, the lowest standard for force recognized in the revised District statute.

[1147] Mont. Code Ann. § 45-5-401.

[1148] Model Penal Code § 222.1.

[1149] Alaska Stat. Ann. § 11.41.500; Alaska Stat. Ann. § 11.41.510; Ark. Code Ann. § 5-12-102; Ark. Code Ann. § 5-12-103; Del. Code Ann. tit. 11, § 831; Del. Code Ann. tit. 11, § 832; Haw. Rev. Stat. Ann. § 708-840; Haw. Rev. Stat. Ann. § 708-841; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.020; Ky. Rev. Stat. Ann. § 515.030; Me. Rev. Stat. tit. 17-A, § 651; Mo. Ann. Stat. § 570.023; Mo. Ann. Stat. § 570.025; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; S.D. Codified Laws § 22-30-6; Tex. Penal Code Ann. § 29.02; Tex. Penal Code Ann. § 29.03; Utah Code Ann. § 76-6-301; Utah Code Ann. § 76-6-302; Wash. Rev. Code Ann. § 9A.56.200; Wash. Rev. Code Ann. § 9A.56.210; Wis. Stat. Ann. § 943.32.

[1150] Ala. Code § 13A-8-41; Ala. Code § 13A-8-42; Ala. Code § 13A-8-43; Ariz. Rev. Stat. Ann. § 13-1902; Ariz. Rev. Stat. Ann. § 13-1903; Ariz. Rev. Stat. Ann. § 13-1904; Colo. Rev. Stat. Ann. § 18-4-301; Colo. Rev. Stat. Ann. § 18-4-302; Colo. Rev. Stat. Ann. § 18-4-303; Conn. Gen. Stat. Ann. § 53a-134; Conn. Gen. Stat. Ann. § 53a-135; Conn. Gen. Stat. Ann. § 53a-136; Minn. Stat. Ann. § 609.245; Minn. Stat. Ann. § 609.24; N.D. Cent. Code Ann. § 12.1-22-01; N.Y. Penal Law § 160.05; N.Y. Penal Law § 160.10; N.Y. Penal Law § 160.15; Ohio Rev. Code Ann. § 2911.02; Ohio Rev. Code Ann. § 2911.01; Ohio Rev. Code Ann. § 2913.02; Or. Rev. Stat. Ann. § 164.395; Or. Rev. Stat. Ann. § 164.405; Or. Rev. Stat. Ann. § 164.415; 18 Pa. Stat. Stat. Ann. § 3701; Tenn. Code Ann. § 39-13-401; Tenn. Code Ann. § 39-13-402; Tenn. Code Ann. § 39-13-403.

[1151] 720 Ill. Comp. Stat. Ann. 5/18-1, Ind. Code Ann. § 35-42-5-1.

[1152] Model Penal Code § 222.1 ("Robbery is a felony of the second degree, expect that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, purposely inflicts or attempts to inflict serious bodily injury.").

[1153] Alaska Stat. Ann. § 11.41.500; Ala. Code § 13A-8-41; Ark. Code Ann. § 5-12-103; Conn. Gen. Stat. Ann. § 53a-134; Del. Code Ann. tit. 11, § 832; Haw. Rev. Stat. Ann. § 708-840; 720 Ill. Comp. Stat. Ann. 5/18-1; Ind. Code Ann. § 35-42-5-1; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.020; Mo. Ann. Stat. § 570.023; N.D. Cent. Code Ann. § 12.1-22-01; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; N.Y. Penal Law § 160.10; Ohio Rev. Code Ann. § 2911.01; Or. Rev. Stat. Ann. § 164.415; 18 Pa. Stat. Stat. Ann. § 3701; Tenn. Code Ann. § 39-13-403; Tex. Penal Code Ann. § 29.03; Utah Code Ann. § 76-6-302; Wash. Rev. Code Ann. § 9A.56.200.

[1154] As noted in the Commentary to the revised assault statute, RCC § 22A-1202, only eight states appear to provide for an intermediate gradation of assault that requires an injury similar to the District's "significant bodily injury." Ind. Code Ann. § 35-31.5-2-204.5 ("Moderate bodily injury" means any impairment of physical condition that includes substantial pain."); Haw. Rev. Stat. Ann. 707-700; Minn. Stat. Ann. 609.02; N.D. Cent. Code Ann. 12.1-01-04; Utah Code Ann. 76-1-601; Wash. Rev. Code Ann. 9A.04.110; Wis. Stat. Ann. 939.22; S.C. Code Ann. § 16-25-10.

reformed jurisdictions, twenty-five states punish robbery more severely when the defendant was armed with or used a dangerous or deadly weapon.[1155] A majority of these states merely require that the defendant was armed while committing the robbery, although ten states require that the defendant used or brandished the weapon during commission of the robbery in order to authorize more severe penalties.[1156]

Fourth, 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 government law enforcement and public safety employees in the course of their duties;[1157] operators of private-vehicles-for hire in the course of their duties;[1158] and vulnerable adults.[1159] No reformed jurisdictions appear to enhance robbery on the basis of an individual's status as a law enforcement or public safety employee or operator of a private-vehicle-for-hire. However, several of the 29 reformed jurisdictions do enhance some or all of their gradations of robbery on the basis of the complainant's disability.[1160]

[1155] Ala. Code § 13A-8-41; Alaska Stat. Ann. § 11.41.500; Ariz. Rev. Stat. Ann. § 13-1904; Ark. Code Ann. § 5-12-103; Conn. Gen. Stat. Ann. § 53a-134; Del. Code Ann. tit. 11, § 832; Haw. Rev. Stat. Ann. § 708-840; 720 Ill. Comp. Stat. Ann. 5/18-2; Ind. Code Ann. § 35-42-5-1; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.020; Minn. Stat. Ann. § 609.245; Mo. Ann. Stat. § 570.023; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; N.Y. Penal Law § 160.15; Ohio Rev. Code Ann. § 2911.02; Or. Rev. Stat. Ann. § 164.405; Wash. Rev. Code Ann. § 9A.56.200;

[1156] Colo. Rev. Stat. Ann. § 18-4-302 (requires that defendant was armed with "a deadly weapon, with intent, if resisted, to kill, main, or wound the person robbed or any other person[.]");720 Ill. Comp. Stat. Ann. 5/18-2 (more severe penalties authorized if defendant "personally discharges a firearm" during commission of the crime, and more severe if this results in "great bodily harm, permanent disability, permanent disfigurement, or death[.]"); N.Y. Penal Law § 160.15 (first degree robbery requires either being armed with a "deadly weapon," or actually using or threatening to use a "dangerous instrument"); Ohio Rev. Code Ann. § 2911.01 (aggravated robbery includes possessing a "deadly weapon" and requires that the defendant "either display the weapon, brandish it, indicate that the offender possesses it, or use it"); Or. Rev. Stat. Ann. § 164.415 (first degree robbery requires that the defendant was either armed with a deadly weapon, or "uses or attempts to use a dangerous weapon"); S.D. Codified Laws § 22-30-6 (one form of first degree robbery requires that the offense be "accomplished by use of a dangerous weapon"); Tenn. Code Ann. § 39-13-402; Tenn. Code Ann. § 39-13-403; Tex. Penal Code Ann. § 29.03 (one form of aggravated robbery requires that the defendant "uses or exhibits a deadly weapon"); Utah Code Ann. § 76-6-302 (one form of aggravated robbery requires that the defendant "uses or threatens to use a dangerous weapon"); Wis. Stat. Ann. § 943.32.

[1157] See commentary to RCC § 22A-1001(11) regarding the definition of a law enforcement officer.

[1158] 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.

[1159] 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.

[1160] *See, e.g.*, Haw. Rev. Stat. Ann. § 706-669(a)(ii) ("in the course of committing or attempting to commit a felony, causes the death or inflicts serious or significant bodily injury upon another person who is . . . blind, a paraplegic, or a quadriplegic."); N.H. Rev. Stat. Ann. § 651:6(I)(d) (authorizing an extended term of imprisonment if a jury finds beyond a reasonable doubt that the defendant has "committed an offense involving the use of force against a person with the intention of taking advantage of the victim's age or physical disability."); 720 Ill. Comp. Stat. Ann. 5/18-1 (making robbery a Class 2 felony unless the "victim . . . is a person with a physical disability."); Tex. Penal Code § 29.03((a)(3)(B) (defining aggravated robbery, in part, as "causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is . . . a disabled person.").

In addition, several reformed jurisdictions enhance robbery on the basis of the complainant's status as a senior citizen,[1161] as do current District law and the RCC. Unlike current law, the RCC robbery statute does not provide a penalty enhancement for: persons robbed because of their participation in a citizen patrol (but not while on duty);[1162] persons robbed because of their status as District officials or employees (but not while on duty);[1163] and persons robbed because of their familial relationship to a District official or employee.[1164] No reformed jurisdictions appear to enhance robbery on the basis of these categories. The MPC does not enhance robbery on the basis of the identity of the complainant.

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.[1165] The MPC and reformed jurisdictions generally do not statutorily address stacking a weapon enhancement with another enhancement, although at least one jurisdiction explicitly permits stacking.[1166]

Fifth, eliminating carjacking as a separate offense is consistent with national norms, although the District would be in a small minority by continuing to recognize carjacking as a form of robbery. Of the twenty-nine reform jurisdictions, four states distinguish carjacking as a form of robbery,[1167] and five include separate carjacking offenses in their codes.[1168] The majority of reform jurisdictions do not appear to penalize carjacking differently than other forms of robbery. Also, requiring that the defendant acted knowingly with respect to taking a motor vehicle is consistent with national norms.

[1161] *See, e.g.*, Haw. Rev. Stat. Ann. § 706-669(a)(ii) ("in the course of committing or attempting to commit a felony, causes the death or inflicts serious or significant bodily injury upon another person who is . . . sixty years of age or older."); N.H. Rev. Stat. Ann. § 651:6(I)(d) (authorizing an extended term of imprisonment if a jury finds beyond a reasonable doubt that the defendant has "committed an offense involving the use of force against a person with the intention of taking advantage of the victim's age or physical disability."); Del. Code Ann. tit. 11, § 832(a)(4) (defining first degree robbery, in part, as committing robbery in the second degree and, "in the course of the commission of the crime or immediate flight therefrom, the person or another participant in the crime . . . commits said crime against a person who is 62 years of age or older."); 720 Ill. Comp. Stat. Ann. 5/18-1 (making robbery a Class 2 felony unless the "victim . . . is 60 years of age or over."); Tex. Penal Code § 29.03((a)(3)(A) (defining aggravated robbery, in part, as "causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is 65 years of age or older.").

[1162] D.C. Code § 22-3602(b).

[1163] D.C. Code § 22-851.

[1164] D.C. Code § 22-851.

[1165] 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.

[1166] Me. Rev. Stat. tit. 17-A, § 1252 ("Subsections in this section that make the sentencing class for a crime one class higher than it would otherwise be when pled and proved may be applied successively if the subsections to be applied successively contain different class enhancement factors.").

[1167] Conn. Gen. Stat. Ann. § 53a-136a; Haw. Rev. Stat. Ann. § 708-840; N.Y. Penal Law § 160.10; Utah Code Ann. § 76-6-302.

[1168] N.J. Stat. Ann. § 2C:15-2; 18 Pa. Stat. Ann. § 3702; 720 Ill. Comp. Stat. Ann. 5/18-3; Del. Code Ann. tit. 11, § 836; Tenn. Code Ann. § 39-13-404.

No reform jurisdictions with specific statutory provisions that address carjacking apply a recklessness mental state as to taking of a motor vehicle.[1169]

Sixth, eliminating the asportation element is also consistent with national norms. Although robbery traditionally required that the defendant carry away property[1170], as discussed above, in nearly all of the reformed jurisdictions' robbery statutes, actually carrying away the property is not required. Twenty seven of the reformed code jurisdictions' statutes, and the MPC's robbery statute[1171], can be satisfied if the defendant takes or attempts to take property.[1172]

Seventh, eliminating the separate penalty provision for attempted robbery is consistent with national norms. None of the reformed code jurisdictions includes separate penalties for attempted robbery apart from their general rules for punishing attempts.

RCC § 22E-1202. ASSAULT.

[1169] Del. Code Ann. tit. 11, § 835 ("A person is guilty of carjacking in the second degree when that person knowingly and unlawfully takes possession or control of a motor vehicle from another person or from the immediate presence of another person by coercion, duress or otherwise without the permission of the other person."); 720 Ill. Comp. Stat. Ann. 5/18-3 ("A person commits vehicular hijacking when he or she knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force."); Tenn. Code Ann. § 39-13-404 ("Carjacking" is the intentional or knowing taking of a motor vehicle from the possession of another by use of: (1) A deadly weapon; or (2) Force or intimidation."); Utah Code Ann. § 76-6-302 (robbery requires that the defendant "intentionally takes or attempts to take personal property). Connecticut, and New York's robbery statutes require that the defendant commit larceny, which requires intent or knowledge. Conn. Gen. Stat. Ann. § 53a-136a; *State v. Papandrea*, 991 A.2d 617, 623 (Conn. App. Ct. 2010) ("Because larceny is a specific intent crime, the state must show that the defendant acted with the subjective desire or knowledge that his actions constituted stealing"); N.Y. Penal Law § 160.10; *People v. Almonte*, 424 N.Y.S.2d 868, 868 (Sup. Ct. 1980) ("the basic elements of the crime of robbery in the second degree, as charged here, are that: the defendant (1) stole property (2) from an owner thereof (3) by force (4) with intent to deprive the owner of the property permanently").

[1170] Lafave, Wayne. Robbery, 3 Subst. Crim. L. § 20.3 (2d ed.) ("Just as larceny requires that the thief both 'take' (secure dominion over) and 'carry away' (move slightly) the property in question, so too robbery under the traditional view requires both a taking[12] and an asportation (in the sense of at least a slight movement) of the property.").

[1171] Model Penal Code § 222.1 ("An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.").

[1172] Ala. Code § 13A-8-40; Alaska Stat. Ann. § 11.41.510; State v. Ali, 886 A.2d 449, 451 (Conn. App. Ct. 2005); Del. Code Ann. tit. 11, § 831; Haw. Rev. Stat. Ann. § 708-842; Morgan v. Com., 730 S.W.2d 935 (Ky. 1987); Me. Rev. Stat. tit. 17-A, § 651; Mont. Code Ann. § 45-5-401; N.D. Cent. Code Ann. § 12.1-22-01; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; Ohio Rev. Code Ann. § 2911.02; Or. Rev. Stat. Ann. § 164.395; 18 Pa. Stat. Stat. Ann. § 3701; Tex. Penal Code Ann. § 29.01; Utah Code Ann. § 76-6-301.

Relation to National Legal Trends. *The revised assault offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[1173]

First, limiting the revised assault statute to inflicting bodily injury or using overpowering physical force is well-supported by national legal trends. A majority of the 28 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1174] limit their assault statutes to causing physical injury[1175] or include intent-to-frighten assault or offensive physical contact in the lower grades of assault.[1176] Similarly the MPC aggravated assault offense is limited to bodily injury, with intent-to-frighten assault included in simple assault.[1177] Of these 28 reformed code jurisdictions, only six have assault statutes that include intent-to-frighten assault or offensive physical contact in the higher grades of assault.[1178] An

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[1173] It should be noted that several jurisdictions label their physical assault offenses as "battery." In addition, this commentary considers statutes with "attempt" to cause injury as still being limited to causing injury because that remains the focus of the offense and it is unclear if "attempt" in a jurisdiction is meant to encompass intent-to-frighten assault.

[1174] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1175] Ala. Code §§ 13A-6-20, 13A-6-21(a)(1), (a)(2), (a)(3), 13A-6-22(a)(1), (a)(2), (a)(3); Ark. Code §§ 5-13-201(a)(1), (a)(2), (a)(3), (a)(8), 5-13-202(1), (2), (3), 5-13-203; Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), (1)(b), (1)(c), 18-3-203(1)(b), (1)(d), (1)(g); Conn. Gen. Stat. Ann. §§ 53a-59(a), 53a-60, 53a-60a, 53a-61; Del. Code Ann. tit. 11, §§ 611, 612(a)(1), (a)(2), 613(a)(1), (a)(2), (a)(3); Haw. Rev. Stat. Ann. §§ 707-710, 707-711(1)(a), (1)(b), (1)(d), 707-712; Ky. Rev. Stat. Ann. §§ 508.010, 508.020, 508.030; N.H. Rev. Stat. Ann. §§ 631:1(I)(a), (I)(b), 631:2(I)(a), (I)(b), (I)(c); N.J. Stat. Ann. § 2C:12-1(b)(1), (b)(2), (b)(3), (b)(7); N.Y. Penal Law §§ 120.00, 120.05(1), (2), (4), 120.10; N.D. Cent. Code Ann. §§ 12.1-17-01(1)(a), (1)(b), 12.1-17-01.1, 12.1-17-02(1)(a), (1)(b), (1)(c); Ohio Rev. Code Ann. §§ 2903.11(A)(1), (A)(2), 2903.13(A), (B), 2903.14; Or. Rev. Stat. Ann. §§ 163.160, 163.165(1)(a), (b), (c), 163.175, 163.185(1)(a); 18 Pa. Stat. Ann. § 2702(a)(1), (a)(4); Wis. Stat. Ann. §§ 940.19, 940.21, 940.23, 940.24.

[1176] Alaska Stat. Ann. § 11.41.220(a)(3) (fourth degree assault prohibiting, in part, "by words or other conduct that person recklessly places another person in fear of imminent physical injury."); Me. Rev. Stat. tit. 17-A, § 207(1)(A) (defining assault as "causes bodily injury or offensive physical contact."); Mo. Ann. Stat. § 565.056(1)(3) (fourth degree assault statute prohibiting, in part, "places another person in apprehension of immediate physical injury" and "causes physical contact with another person knowing the other person will regard the contact as offensive or provocative."); S.D. Codified Laws § 22-18-1(4) (assault offense prohibiting, in part, "attempts by physical menace or credible threat to put another in fear of imminent bodily harm, with or without the actual ability to harm the other person.").

[1177] MPC § 211.1.

[1178] Ariz. Rev. Stat. Ann. § 13-1203 (assault statute prohibiting, in part, "causing any physical injury to another person," "placing another person in reasonable apprehension of imminent physical injury," or "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(1), (2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "causes serious physical injury to another" or "uses a deadly weapon or dangerous instrument."); Minn. Stat. Ann. § 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and various assault offenses in §§ 609.221(1), 609.222, 609.223(1), 609.224(1)(1), (1)(2); Mont. Code Ann. § 45-5-202 (defining aggravated assault, in part, as "causes serious bodily injury to another or purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another."); Tenn. Code Ann. §

additional three states include offensive physical contact in a higher grade of assault, but only when a weapon is used.[1179]

Second, the revised assault statute no longer includes "assault with intent to" or "AWI" offenses, such as assault with intent to kill.[1180] Instead, 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. None of the reformed jurisdictions or the MPC have specific offenses for assault with-intent-to commit other offenses.

Third, the revised assault statute replaces the separate common law offenses of mayhem and malicious disfigurement. Instead of mayhem and malicious disfigurement, the revised assault statute has two new gradations in subsection (a)(1) and subsection (a)(2) that require purposeful, permanent injuries. Subsection (b)(1) of first degree assault also includes injuries that are currently covered by mayhem and malicious disfigurement. National legal trends support deleting mayhem and malicious disfigurement. Only two of the reformed jurisdictions have specific offenses for mayhem or malicious disfigurement,[1181] although several reformed jurisdictions specifically include in the higher grades of assault purposely or intentionally disfiguring or maiming another person[1182] like the revised aggravated assault statute (subsections (a)(1) and (a)(2)). The MPC does not have separate offenses for mayhem and malicious disfigurement, but does include purposely or knowingly causing serious bodily injury in aggravated assault.[1183]

Fourth, in combination with the aggravated criminal menace statute in RCC § 22E-1203, the revised assault statute's enhanced penalties for use of a dangerous weapon

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39-13-101 (defining assault in part as "causes another to reasonably fear imminent bodily injury" or "causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and § 39-13-102(a)(1)(A) (aggravated assault offense requiring that a person commits an assault "as defined in § 39-13-101, and the assault" results in serious bodily injury or death to another, involved a deadly weapon, or involved strangulation or attempted strangulation); Tex. Penal Code Ann. § 22.01(a) (requiring that a person causes bodily injury to another, threatens another with imminent bodily injury, or causes offensive physical contact with another person) and § 22.02(a) (requiring a person to "commit[] assault as defined in § 22.01" and cause serious bodily injury or use or exhibit a deadly weapon); Utah Code Ann. § 76-5-103(1)(a)(ii), (1)(b) (defining aggravated assault, in part, as "a threat, accompanied by a show of immediate force or violence, to do bodily harm to another" that includes the use of a dangerous weapon, impeding the breathing or blood circulation of another person, or other means or force likely to produce death or serious bodily injury).

[1179] 720 Ill. Comp. Stat. Ann. 5/12-3(a) and 5/12-3.05(f)(1) (defining battery as "causes bodily to an individual" or "makes physical contact of an insulting or provoking nature with an individual" and defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. §35-42-2-1(c)(1), (g)(2) (defining battery, in part, as "touches another person in a rude, insolent, or angry manner" and punishing it as a Level 5 felony when committed with a "deadly weapon."); Kan. Stat. Ann. § 21-5413(b)(1)(C) (aggravated battery offense punishing, in part, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted.").

[1180] D.C. Code § 22-401.

[1181] Utah Code Ann. § 76-5-107; Wis. Stat. Ann. § 940.21.

[1182] Ala. Code Ann. § 13A-6-20(a)(2); Ark. Code Ann. § 5-13-201(a)(2); Colo. Rev. Stat. Ann. § 18-3-202(1)(b); Conn. Gen. Stat. Ann. § 53a-59(a)(2); Del. Code Ann. tit. 11, § 613(a)(2); Ill. Comp. Stat. Ann. 5/12-3.05(a)(1); Kan. Stat. Ann. § 21-5413(b)(1)(B); Me. Rev. Stat. tit. 17-A, § 208(A-1); N.Y. Penal Law § 120.10(2); N.D. Cent. Code Ann. § 12.1-17-02(2).

[1183] MPC § 211.1(2)(a).

replace the separate offense of assault with a dangerous weapon (ADW). Instead of a separate ADW offense, the revised assault statute incorporates into its gradations enhanced penalties for causing different types of bodily injury "by means of" a dangerous weapon. At least 24 of the 28 reformed jurisdictions and the MPC[1184] use "by means of" or similar language in the weapons gradations of their assault statutes.[1185] In addition, most reformed jurisdictions do not penalize in their assault statutes use of a weapon with intent-to-frighten or use of a weapon with the use of physical force that overpowers, nor does the MPC,[1186] in contrast to the District's current ADW offense. A majority of the reformed jurisdictions either limit the weapon gradations in assault to causing bodily injury[1187] or include intent-to-frighten assault, with or without a weapon, in the lower grades.[1188] Six reformed jurisdictions include offensive physical contact with a weapon in the higher grades of assault[1189] and five have assault statutes that include intent-to frighten assault, with or without a weapon, in the higher grades of assault.[1190]

[1184] MPC § 211.1(1)(b) ("with a deadly weapon") and (2)(b) ("with a deadly weapon.").

[1185] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Alaska Stat. Ann. §§ 11.41.200(a)(1), 11.41.210(a)(1), 11.41.220(a)(1)(B), (a)(4), 11.41.230(a)(2); Ark. Code Ann. §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Ariz. Rev. Stat. Ann. § 13-1204(A)(2); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(1)(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), (a)(5), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-3.05 (e)(1), (f)(1); Kan. Stat. Ann. §§ 21-5413(b)(1)(B), (b)(2)(B); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.025(1)(a), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(B), 208-B(1)(A), (1)(B); Mo. Ann. Stat. §§ 565.052(1)(2), (1)(4), 565.056(1)(2); Mont. Code Ann. §§ 45-5-201(1)(b), 45-5-213(1)(a); N.H. Rev. Stat. Ann. §§ 631:1(I)(b), 631:2(I)(b), 631:2-a(I)(c); N.J. Stat. Ann. §§ 2C:12-1(a)(2), (b)(2), (b)(3); N.Y. Penal Law §§ 120.00(3), 120.05(2), (4), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(1)(b), 12.1-17-01.1(2), 12.1-17-02(1)(b); Ohio Rev. Code Ann. §§ 2903.13(A)(2), 2903.14(A)(2), 2903.14; Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(1)(a), (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a); 18 Pa. Stat. Ann. § 2701(a)(2), 2702.1(a)(4); S.D. Codified Laws §§ 22-18-1(3), 22-18-1.1(2), Tenn. Code Ann. § 39-13-102(a)(1)(A)(iii), (a)(1)(B)(iii); Wis. Stat. Ann. § 940.24.

[1186] Aggravated assault in the MPC requires, in part, "attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon." MPC § 211.1(2)(b). As noted previously, this commentary considers statutes with "attempt" to cause injury as still being limited to causing injury because that remains the focus of the offense and it is unclear if "attempt" in a jurisdiction is meant to encompass intent-to-frighten assault.

[1187] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Ark. Code §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. 11, §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(1)(C), 208-B(1)(A), (1)(B); Mo Ann. Stat. § 565.052(1)(2); N.H. Rev. Stat. Ann. §§ 631:1(I)(b), 631:2(I)(b), 631:2-a(I)(c); N.J. Stat. Ann. § 2C:12-1(a)(2), (b)(2), (b)(3); N.Y. Penal Law §§ 120.00(3), 120.05(2), (4), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(1)(b), 12.1-17-01.1(2), 12.1-17-02(1)(b); Ohio Rev. Code Ann. §§ 2903.11(A)(2), 2903.14; Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(1)(a), (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a); 18 Pa. Stat. Ann. §§ 2701(a)(2), 2702(a)(4); Wis. Stat. Ann. § 940.24.

[1188] Alaska Stat. Ann. §§ 11.41.220(a)(1)(A), 11.41.230(a)(3); Mo. Ann. Stat. § 565.056(1)(2); 18 Pa. Stat. Ann. § 270(a)(3); S.D. Codified Laws § 22-18-1(4).

[1189] Ariz. Rev. Stat. Ann. § 13-1203(A)(3) (assault statute prohibiting, in part, "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/12-3(a)(2) and 5/12-3.05(f)(1) (defining battery, in part, as "makes physical contact of an insulting or provoking nature with an individual" and defining

In addition, through the definition of "dangerous weapon" in RCC § 22E-1001, the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon,[1191] as well as imitation firearms,[1192] no longer results in an enhanced penalty for assault as it does under current District law. The MPC and reformed jurisdictions' statutes generally do not address whether a complaining witness's perception is sufficient for constituting a "dangerous weapon, presumably leaving the matter to case law, although at least one state statutorily defines "dangerous weapon" as including "a facsimile or representation . . . if the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious

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aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. § 35-42-2-1(c)(1), (g)(1), (g)(2) (battery offense prohibiting, in part, "touches another person in a rude, insolent, or angry manner" and making it aggravated battery if committed with a "deadly weapon."); Kan. Stat. Ann. § 21-5413(b)(1)(B, (b)(1)(C) (aggravated battery offense prohibiting, in part, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon"); Tenn. Code Ann. §§ 39-13-101(a)(3) (assault offense prohibiting, in part, causing "physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and 39-13-102(a)(1)(A)(iii) (making "assault as defined in § 39-13-101" aggravated assault if it "involved the use or display of a deadly weapon."); Tex. Penal Code Ann. § 22.01(a)(3) (offense prohibiting, in part, causing "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2), (b) (making "assault as defined in § 22.01" a felony of the second degree in most situations if the defendant "uses or exhibits a deadly weapon during the commission of the assault.").

[1190] Ariz. Rev. Stat. Ann. § 13-1203(A)(2), (A)(3) (assault statute prohibiting, in part, "placing another person in reasonable apprehension of imminent physical injury" and "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); Minn. Stat. Ann. § 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and § 609.221(1) (prohibiting assault with a dangerous weapon); Mont. Code Ann. § 45-5-213(1)(b) (making it a felony with a 20 year maximum term of imprisonment to cause "reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon."); Tenn. Code Ann. § 39-13-101(a)(2), (a)(3) (defining assault, in part, as "causes another to reasonably fear imminent bodily injury" and "causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and § 39-13-102(a)(1)(A)(iii) (aggravated assault offense requiring that a person commits an assault "as defined in § 39-13-101, and the assault . . . involved the use or display of deadly weapon."); Tex. Penal Code Ann. § 22.01(a)(2), (a)(3) (requiring, in part, that a person "threatens another with imminent bodily injury" and "causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2) (requiring a person to "commit[] assault as defined in § 22.01" and use or exhibit a deadly weapon); Utah Code Ann. § 76-5-103(1)(a)(ii), (1)(b)(i) (defining aggravated assault, in part, as "a threat, accompanied by a show of immediate force or violence, to do bodily harm to another . . . that includes the use of a dangerous weapon.").

[1191] *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.").

[1192] *See, e.g.*, *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) (finding 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" in an ADW case); *Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016) ("An imitation firearm is a gun, which is an inherently dangerous weapon for purposes of ADW, and therefore, a defendant may be appropriately charged with ADW where the defendant commits an assault using an imitation firearm.").

bodily injury."[1193] Similarly, two reformed jurisdictions include gradations in their assault statutes for the use of imitation weapons or a complaining witness's perception of an object.[1194]

The elimination of ADW as a separate offense reduces unnecessary overlap in the current D.C. Code between multiple means of enhancing assaults committed with a weapon. Due to the complexity of weapons offenses, it is impossible to generalize about overlap between similar offenses in reformed jurisdictions. The MPC does not include weapons offenses. However, as is discussed below, a significant number of reformed jurisdictions limit or eliminate overlap between a separate weapons enhancement or offense and the weapons gradations in their assault statutes.

Fifth, in combination with the aggravated criminal menace statute in RCC § 22E-1203, the revised assault statute's enhanced penalties for the use of a dangerous weapon replace the separate "while armed" penalty enhancement in current District law. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of assault-type offenses[1195] "when armed with" or "having readily available" a dangerous weapon, including firearms. Instead of having a separate "while armed" enhancement, the revised assault offense incorporates into its gradations enhanced penalties for causing different types of bodily injury "by means of" the weapon. An individual who merely possesses a firearm would still have potential liability for purposely possessing a dangerous weapon in furtherance of an assault per RCC § 22E-XXXX [revised PFCOV-type offense].

Limiting the weapons gradations in the revised assault statute to use of the weapon is well-supported by national legal trends. The requirements for the involvement of the weapon in reformed jurisdictions' assault statutes depend on whether the weapon at issue is a firearm or other weapon. The MPC does not have weapons enhancements or offenses. Seventeen of the 28 reformed jurisdictions include weapons or dangerous weapons in their weapons enhancements or separate offenses.[1196] Only one of these jurisdictions has a standard that is similar to the "readily available" available standard under current District law, although it is arguably narrower, requiring the weapon be "within [the person's] immediate control."[1197] Six of these jurisdictions include

[1193] Utah Code Ann. § 76-1-601(5)(b)(i).

[1194] Ariz. Rev. Stat. Ann. § 13-1204(A)(11) (including as a grade of aggravated assault that a "simulated deadly weapon" was used); Mont. Code Ann. § 45-5-213 (including in assault offense causing "reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon.").

[1195] 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.

[1196] Ala. Code § 13A-5-6; Alaska Stat. Ann. § 12.55.125(c); Ariz. Rev. Stat. Ann. § 13-3102(A)(1); Colo. Rev. Stat. Ann. § 18-1.3-406(7); Del. Code Ann. tit. 11, § 1447; Haw. Rev. Stat. Ann. §§ 134-51, 134-52, 134-53; 720 Ill. Comp. Stat. Ann. 5/33A-2; Me. Rev. Stat. tit. 17-A, § 1252(4), (5); Mo. Ann. Stat. § 571.015; Mont. Code Ann. § 45-18-221; N.H. Rev. Stat. Ann. §§ 650-A:1, 159:15; N. Y. Penal Law §§ 265.08, 265.09; Wash. Rev. Code Ann. §§ 9.94A.535(3), (4); Wis. Stat. Ann. § 939.63; Utah Code Ann. § 76-3-203.8; Minn. Stat. Ann. § 609.11; N.D. Cent. Code Ann. § 12.1-32-09(1)(a).

[1197] Ariz. Rev. Stat. Ann. § 13-3102(A)(1).

possessing the weapon or being "armed" with the weapon.[1198] The remaining 10 states, however, require use of the weapon.[1199] Eighteen of the 28 states limit their weapons enhancements or offenses to firearms or specifically include firearms.[1200] Three of these reformed jurisdictions have a standard that is similar to "readily available" under current District law, although they are arguably narrower, requiring "within the person's immediate control"[1201] or "on or about" an offender's person.[1202] Eight of these jurisdictions include possessing the firearm or being "armed" with the firearm.[1203] In the remaining states, six require the use of the firearm,[1204] and one prohibits both possession and use, but punishes use more severely.[1205] Limiting the weapons gradations in the revised assault statute to use of the weapon is well-supported by national legal trends. In

[1198] Del. Code Ann. tit. 11, § 1447 ("in possession of a deadly weapon."); Haw. Rev. Stat. Ann. §§ 134-51; ("possesses . . . or uses or threatens to use a deadly or dangerous weapon."); 720 Ill. Comp. Stat. Ann. 5/33A-2(a) ("while armed with a dangerous weapon."); N. Y. Penal Law §§ 265.08(1), 265.09(1)(a) ("possesses a deadly weapon."); Wash. Rev. Code Ann. §§ 9.94A.535(4) ("was armed with a deadly weapon other than a firearm."); Wis. Stat. Ann. § 939.63(a) ("in possession of a deadly weapon.").

[1199] Ala. Code § 13A-5-6(a)(5), (a)(6) ("deadly weapon was used or attempted to be used."); Alaska Stat. Ann. § 12.55.125(c)(2) ("used a dangerous instrument."); Colo. Rev. Stat. Ann. § 18-1.3-406(7) ("use of a dangerous weapon."); Me. Rev. Stat. tit. 17-A, § 1252(4) ("with the use of a dangerous weapon."); Mo. Ann. Stat. § 571.015(1) ("by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon."); Mont. Code Ann. § 45-18-221(1) ("displayed, brandished, or otherwise used . . . or other dangerous weapon."); N.H. Rev. Stat. Ann. § 159:15(I) ("uses or employs . . . or other deadly weapon."); Utah Code Ann. § 76-3-203.8(2) ("a dangerous weapon was used."); Minn. Stat. Ann. § 609.11(4) ("used . . . a dangerous weapon other than a firearm."; N.D. Cent. Code Ann. § 12.1-32-09(1)(a) ("inflicts or attempts to inflict bodily injury upon another, threatens or menaces another with imminent bodily injury with a dangerous weapon.").

[1200] Alaska Stat. Ann. § 12.55.125(c)(2); Conn. Gen. Stat. Ann. § 53a-216; Del. Code Ann. tit. 11, § 1447A; Haw. Rev. Stat. Ann. §§ 706-660.1, 134-21; Ind. Code Ann. § 35-50-2-11; Kan. Stat. Ann. § 21-6804; Me. Rev. Stat. tit. 17-A, § 1252(5); N. H. Rev. Stat. Ann. § 650-A:1; N. J. Stat. Ann. § 2C:43-6(c); N. Y. Penal Law §§ 265.08, 265.09; 42 Pa. Stat. Ann. § 9712; Tenn. Code Ann. § 39-17-1324; Tex. Penal Code § 46.02; Wash. Rev. Code Ann. § 9.94A.553(3); Or. Rev. Stat. Ann. § 161.610; Minn. Stat. Ann. § 609.111(5); Ohio Rev. Code Ann. §§ 2929.14(B)(1)(a)(ii), (B)(1)(a)(iii), 2941.141, 2941.145; Ark. Code Ann. § 16-90-120.

[1201] Haw. Rev. Stat. Ann. § 134-21.

[1202] Ohio Rev. Code Ann. §§ 2929.14(B)(ii), (B)(iii), 2941.141, 2941.145; Tex. Penal Code § 46.02(a-1).

[1203] Alaska Stat. Ann. § 12.55.125(c)(2) ("possessed a firearm."); Del. Code Ann. tit. 11, § 1447A(a) ("in possession of a firearm."); N. H. Rev. Stat. Ann. § 650-A:1 ("was armed with a pistol."); N. J. Stat. Ann. § 2C:43-6(c) ("used or was in possession of a firearm."); 42 Pa. Stat. Ann. § 9712(a) ("visibly possessed a firearm."); Wash. Rev. Code Ann. § 9.94A.553(3) ("was armed with a firearm."); Minn. Stat. Ann. § 609.111(5) ("had in possession or used . . . a firearm."); N. Y. Penal Law §§ 265.19, 265.03 (offense of aggravated criminal possession of a weapon referring to an offense that prohibits "possess[ing]" certain firearms, including loaded firearms).

[1204] Conn. Gen. Stat. Ann. § 53a-216(a) ("uses or threatens the use of a pistol . . . or other firearm."); Ind. Code Ann. § 35-50-2-11(d) ("used a firearm."); Kan. Stat. Ann. § 21-6804(h) ("when a firearm is used."); Me. Rev. Stat. tit. 17-A, § 1252(5) ("with the use of a firearm."); Or. Rev. Stat. Ann. § 161.610(2) ("use or threatened use of a firearm."); Ark. Code Ann. § 16-90-120(a) ("employed any firearm.").

[1205] Tenn. Code Ann. § 39-17-1324(a), (g)(1) (enhancement making it a class D felony with a three year mandatory minimum sentence if a person "possess[es] a firearm with the intent to go armed during the commission of or attempt to commit a dangerous felony") and § 39-17-1324(b), (h)(1) (enhancement making it a class C felony with a six year mandatory minimum sentence if a person "employ[s] a firearm . . . during the commission of a dangerous felony . . . or an attempt to commit a dangerous felony.").

addition, most of the reformed jurisdictions use "by means of" a weapon or similar language[1206] as does the revised assault statute.

By incorporating the use of a weapon into the gradations of the revised assault statute, the RCC reduces unnecessary overlap between multiple means of enhancing assaults committed with a weapon under current District law. The reduction in overlap is well-supported by national legal trends. The MPC does not have weapons enhancements or offenses. However, a majority of the 28 reformed jurisdictions with enhancements or separate offenses for the involvement of weapons or firearms in offenses prohibit or largely limit overlap between the weapons gradations of assault and the separate enhancements or offenses. First, five of the reformed jurisdictions statutorily prohibit applying a weapons or firearm enhancement to an offense that requires as an element or mandatory sentencing factor a weapon or firearm.[1207] An additional two reformed states limit overlap to a certain class of felony[1208] or to assaults where the weapon is a firearm.[1209] The remaining states appear to statutorily permit overlap between the assault gradations and the weapons enhancements or offenses only for inherently dangerous weapons and not for substances and articles that are capable of causing or likely to cause death or serious bodily injury. Nine jurisdictions have assault statutes that prohibit the use of a weapon,[1210] but the jurisdictions' weapons enhancement or offense is limited to firearm.[1211] In these states, it appears that the use of any dangerous weapon in an assault,

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[1206] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Ark. Code §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. 11, §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(1)(C), 208-B(1)(A), (1)(B); Mo Ann. Stat. § 565.052(1)(2); N.H. Rev. Stat. Ann. §§ 631:1(I)(b), 631:2(I)(b), 631:2-a(I)(c); N.J. Stat. Ann. § 2C:12-1(a)(2), (b)(2), (b)(3); N.Y. Penal Law §§ 120.00(3), 120.05(2), (4), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(1)(b), 12.1-17-01.1(2), 12.1-17-02(1)(b); Ohio Rev. Code Ann. §§ 2903.11(A)(2), 2903.14; Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(1)(a), (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a); 18 Pa. Stat. Ann. §§ 2701(a)(2), 2702(a)(4); Wis. Stat. Ann. § 940.24.

[1207] Ill. Comp. Stat. ann. 5/33A-2(a) (stating the enhancement applies to any felony except specified crimes against persons and "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."); Mont. Code Ann. § 46-18-221(a) (stating the enhancement applies to "any offense other than an offense in which the use of a weapon is an element of the offense."); Tenn. Code Ann. § 39-17-1324(c) (excluding offenses "if possessing or employing a firearm is an essential element of the underlying dangerous felony as charged."); Wis. Stat. Ann. § 939.63(2) ("The increased penalty provided in this section does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged."); S.D. Codified Laws § 22-14-14 ("No offense may be charged . . . if the use of a dangerous weapon is a necessary element of the principal felony alleged to have been committed or attempted.").

[1208] Alaska Stat. Ann. § 12.55.125(b), (c), (d).

[1209] Me. Rev. Stat. Ann. tit. 17-A, § 1252(4), (5).

[1210] Conn. Gen. Stat. Ann. §§ 53a-59(a), 53a-60, 53a-60a, 53a-61; Ind. Code Ann. § 35-42-2-1(g)(2); Kan. Stat. Ann. § 21-5413(b)(1)(B), (b)(1)(C), (b)(2)(B); N.J. Stat. Ann. § 2C: 12-1(a)(2), (b)(2), (b)(3); 18 Pa. Stat. Ann. §§ 2701(a)(2), 2702(a)(4); Tex. Penal Code Ann. § 22.02(a)(2); Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(10(a), (1)(c), 163.175(1)(b), (1)(c), Ohio Rev. Code Ann. §§ 2903.11(A)(2), 2903.14; Ark. Code Ann. §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3), 5-13-203(a)(3).

[1211] Conn. Gen. Stat. Ann. § 53a-216; Ind. Code Ann. § 35-50-2-11; Kan. Stat. Ann. § 21-6904; N.J. Stat. Ann. § 2C:43-6(c); 42 Pa. Stat. Ann. § 9712; Tex. Penal Code Ann. § 46.02; Or. Rev. Stat. Ann. § 161.610; Ohio Rev. Code Ann. §§ 2929.14(B)(ii), (B)(iii), 2941.141, 2941.145; Ark. Code Ann. § 16-90-120.

other than a firearm, receives no penalty beyond the assault statute. Similarly, seven jurisdictions have assault statutes that prohibit the use of both inherently dangerous weapons, as well as substances and articles that are capable of causing or likely to cause death or serious bodily injury,[1212] but the weapons enhancement or offense is limited to firearms or other inherently dangerous weapons.[1213] In these states, it appears that the use of an inherently dangerous weapon in an assault is subject to additional penalty enhancement, but any other weapon is not. In total, there are only five states, like D.C., with no statutory limitation on overlap between the weapons gradations in assault and the weapons enhancements or separate offenses.[1214]

In addition, because the revised assault statute incorporates enhancements for use of a 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,[1215] or to double-stack different weapon penalties and offenses.[1216]

[1212] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Ariz. Rev. Stat. Ann. § 13-1204(A)(2); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(c), 18-3-204(a); Del. Code Ann. tit. 11, §§ 611(1), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); N.Y. Penal Law §§120.00(3), 120.05(2), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(b), 12.1-17-01.1(2), 12.1-17-02(1)(b).

[1213] Ala. Code § 13A-5-6(a)(5), (a)(6); Ariz. Rev. Stat. Ann. § 13-3102(A)(1); Colo. Rev. Stat. Ann. § 18-1.3-406(7); Del. Code Ann. tit. 11, §§ 1447, 1447A; Haw. Rev. Stat. Ann. §§ 706-660.1, 134-51, 134-52, 134-53, 134-21; N.Y. Penal Law §§ 265.08, 265.09; N.D. Cent. Code Ann. § 12.1-32-02.1.

[1214] N.H. Sat. Ann. §§ 650-A:1, 159:15; Wash. Rev. Code Ann. § 9.94A.533; Utah Code Ann. § 76-3-203.8; Minn. Sta. Ann. § 609.11; Mo. Ann. Stat. § 571.017.

[1215] 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).

[1216] 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 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

Reformed jurisdictions generally do not statutorily address stacking a weapon enhancement with another enhancement, although at least one jurisdiction explicitly permits stacking.[1217]

Also, the revised assault statute caps the maximum penalty for an enhancement based on the use of weapons to never be greater than the most egregious type of actual harm inflicted—the purposeful infliction of a permanently disabling injury.[1218] At least nine of the 28 reformed jurisdictions similarly include causing serious bodily injury by use of a weapon in the highest grades of assault with other serious harms,[1219] although weapons enhancements and offenses outside of the assault statute may change the actual penalty imposed. At least an additional six reformed jurisdictions include causing bodily injury with a weapon in the same grade of assault as the most serious physical injuries.[1220] At least five states make the most serious type of physical injury the highest grade of assault, and reserve the use of weapons in lower grades[1221] and two states make causing serious bodily injury with a weapon the highest grade of assault.[1222]

In addition, through the definition of "dangerous weapon" in RCC § 22E-1001, the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon,[1223] as well as imitation firearms,[1224] no longer results in an enhanced

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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).

[1217] Me. Rev. Stat. tit. 17-A, § 1252 ("Subsections in this section that make the sentencing class for a crime one class higher than it would otherwise be when pled and proved may be applied successively if the subsections to be applied successively contain different class enhancement factors.").

[1218] 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 (subsections (a)(1) and (a)(2)) or first degree assault (subsection (b)(1)). Due to the nature of the injuries required in subsections (a)(1) and (a)(2), there is no enhancement for using a dangerous weapon. However, use of a dangerous weapon would enhance conduct in subsection (b)(1), meaning it would fall under subsection (a)(2) of aggravated assault.

[1219] *See, e.g.*, Ala. Code § 13A-6-20; Alaska Stat. Ann. § 11.41.200; Ark. Code Ann. § 5-13-201; Colo. Rev. Stat. Ann. § 18-3-202; Conn. Gen. Stat. Ann. § 53a-59; Del. Code Ann. tit. 11, § 613; Ky. Rev. Stat. Ann. § 508.010; N.H. Rev. Stat. Ann. § 631:1; N.Y. Penal Law § 120.10.

[1220] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1204(A)(1), (A)(2), (E); Ind. Code Ann. § 35-42-2-1(g)(1), (g)(2); Ohio Rev. Code Ann. § 2903.12(A)(1), (A)(2); S.D. Codified Laws § 22-18-1.1; Tenn. Code Ann. § 39-13-102; Tex. Penal Code Ann. § 22.02.

[1221] *See, e.g.*, Haw. Rev. Stat. Ann. §§ 707-710, 707-711, 707-712; Kan. Stat. Ann. § 21-5413(b)(1)(A), (b)(1)(B), (b)(2)(A), (b)(2)(B), (g)(2); Mo. Ann. Stat. §§ 565.050, 565.052, 565.054, 565.056; N.J. Stat. Ann. § 2C:12-1(b)(1), (b)(2), (b)(3); 18 Pa. Stat. Ann. § 2702(a)(1), (a)(2), (a)(4), (b).

[1222] Me. Rev. Stat. tit. 17-A, § 208-B; Or. Rev. Stat. Ann. § 163.185; Utah Code Ann. § 76-5-103.

[1223] *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.").

[1224] *See, e.g.*, *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) (finding 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" in an ADW case); *Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016) ("An imitation firearm is a gun, which is an inherently dangerous weapon for purposes of ADW, and therefore, a

penalty for assault as it does under current District law. The MPC and reformed jurisdictions' statutes generally do not address whether a complaining witness's perception is sufficient for constituting a "dangerous weapon, presumably leaving the matter to case law. However, at least one state defines "dangerous weapon" as including "a facsimile or representation . . . if the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury."[1225] Similarly, two reformed jurisdictions include gradations in their assault statutes for the use of imitation weapons or a complaining witness's perception of an object as a weapon.[1226]

Sixth, the revised assault statute criminalizes for the first time negligently causing bodily injury to another person by means of a what is, in fact, a "firearm, as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded" (subsection (e)(2)). At least 18 of the 28 reformed jurisdictions have assault gradations or offenses that prohibit negligently causing injury to another by negligent handling of some kind of weapon,[1227] as does the MPC.[1228] Of these 18 jurisdictions, two limit the category of weapons for the negligent gradation as does the RCC. One jurisdiction limits the gradation to firearms[1229] and the other jurisdiction limits the negligent gradation to inherently dangerous weapons.[1230] Broader categories of weapons are permitted for the other weapons gradations in these jurisdictions.[1231]

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defendant may be appropriately charged with ADW where the defendant commits an assault using an imitation firearm.").

[1225] Utah Code Ann. § 76-1-601(5)(b)(i).

[1226] Ariz. Rev. Stat. Ann. § 13-1204(A)(11) (including as a grade of aggravated assault that a "simulated deadly weapon" was used); Mont. Code Ann. § 45-5-213 (including in assault offense causing "reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon.").

[1227] Ala. Code § 13A-6-23(a)(3); Alaska Stat. Ann. § 11.41.230(a)(2); Ark. Code Ann. § 5-13-203; Colo. Rev. Stat. Ann. § 18-3-206; Conn. Gen. Stat. Ann. § 53a-61(a)(3); Del. Code Ann. tit. 11 § 611(2); Haw. Rev. Stat. Ann. § 707-712(1)(b); Mo. Ann. Stat. § 565.056(1)(2); Mont. Code Ann. § 45-5-210(1)(b); N.H. Rev. Stat. Ann. § 631:2-a(I)(c); N.J. Stat. Ann. § 2C:12-1(a)(2); N.Y. Penal Law § 120.00(3); N.D. Cent. Code Ann. § 12.1-17-01(b); Ohio Rev. Code Ann. § 2903.14; Or. Rev. Stat. Ann. § 163.160(1)(b); Pa. Stat. Ann. § 2701(a)(2); S.D. Codified Laws § 22-18-1(3); Wis. Stat. Ann. § 940.24.

[1228] MPC § 211.1(1)(b).

[1229] Mo. Ann. Stat. § 565.056(1)(2).

[1230] Or. Rev. Stat. Ann. §§ 163.60(1)(b), 161.015(2) (fourth degree assault offense requiring, in part, "with criminal negligence causes physical injury to another by means of a deadly weapon" and defining deadly weapon as "any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.").

[1231] Mo. Ann. Stat. §§ 565.052(1)(2), 556.061(20), (22) (gradation of assault requiring a "deadly weapon or dangerous instrument" and defining a "dangerous instrument" as "any instrument, article, or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" and "deadly weapon" as specific inherently dangerous weapons, such as firearms, and black jacks); Or. Rev. Stat. Ann. §§ 163.165(1)(a)(, (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a) 161.015(1), (2) (several gradations of assault requiring a "deadly or dangerous weapon" and defining "dangerous weapon" as "any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury" and "deadly weapon" as any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.").

Seventh, the revised assault statute's enhanced penalties for harming a law enforcement officer (LEO) replace the separate assault on a police officer (APO) offenses. The scope of conduct that receives a LEO enhancement in the revised assault statute is narrower than the current APO offenses, which include conduct that falls short of inflicting bodily injury or using overpowering physical force. The narrower scope of the revised LEO enhancement reflects national trends. The MPC does not have an APO offense or enhance assault on the basis of the identity of the complainant. Most reformed jurisdictions limit their LEO enhancements and APO offenses to bodily harm,[1232] or include intent-to-frighten or offensive physical contact APO in a lower grade or separate, lower offense.[1233] Only one jurisdiction appears to punish equally assaults on LEOs resulting in bodily injury, intent-to-frighten assaults, and offensive physical contact.[1234] A few jurisdictions punish intent-to-frighten APO equally with assaults resulting in bodily injury only if the intent-to-frighten assault involves a weapon.[1235] The MPC does

[1232] Some of these jurisdictions include attempting to cause bodily harm, in addition to causing bodily harm. They were still included because the focus of the offense is bodily harm. See, e.g., Ala. Code § 13A-6-21(4); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025; N.D. Cent. Code Ann. § 12.1-17-01(2); Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(C)(5); Or. Rev. Stat. Ann. § 163.208; 18 Pa. Stat. Ann. § 2702(a)(2), (a)(3); Conn. Gen. Stat. Ann. §53a-167c(a)(1), (a)(5); Me. Rev. Stat. tit. 17-A, § 752-A; Utah Code Ann. § 76-5-102.4.

[1233] Del. Code Ann. ti. 11, §§ 601(c), 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-1, 12-2(b)(4.1), (d), 12-3.05(a)(3), (d)(4), (h); Minn. Stat. Ann. §§ 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Mont. Code Ann. § 45-5-210; N.J. Stat. Ann. § 2C:12-1(5); S.D. Codified Laws §§ 22-18.1-05.

Ind. Code Ann. §§ 35-42-2-1 (c), (battery offense prohibiting touching another person or placing bodily fluid or waste on another "in a rude, insolent, or angry manner") and 35-42-2-1(e)(2), (g)(5) (aggravated battery offense making it a Level 6 felony to commit battery against a public safety official and a Level 5 felony if it results in "bodily injury" to a public safety official).

[1234] Arizona makes it a Class 5 felony to cause physical injury to a LEO, place a LEO in reasonable apprehension of imminent physical injury, or make offensive physical contact on a LEO. If physical injury results, however, it is a Class 4 felony. Ariz. Rev. Stat. Ann. §§ 13-1203 (assault statute prohibiting, in part, "causing any physical injury to another person," "placing another person in reasonable apprehension of imminent physical injury," or "touching another person with the intent to injure, insult or provoke such person") and 13-1204(A)(8)(a), (F) (aggravated assault statute making it a class 5 felony to "commit assault as prescribed by § 13-1203" if the person knows or has reason to know that the complaining witness is a "peace officer" unless "physical injury" results, in which case it is a class 4 felony).

It should be noted that Wisconsin's APO statute prohibits causing bodily harm as well as "threat[ening]" to cause bodily harm. Based upon the statute, it is unclear whether threats covers intent-to-frighten assault, and Wisconsin was not considered as punishing intent-to-frighten assault the same as physical harm. A review of reformed jurisdictions' threats statutes was not part of this assault commentary.

[1235] Ark. Code Ann. §§ 5-13-211(a)(2), (b)(2) (aggravated assault upon a LEO offense making it a class Y felony "discharge[ing] a firearm with a purpose to cause serious physical injury or death to a law enforcement officer" under certain circumstances) and 5-13-201(c)(3) (battery in the first degree making it a Class Y felony if the person injured is a LEO "acting in the line of duty."); Colo. Rev. Stat. Ann. § 18-3-202(1)(e) (assault in the first degree prohibiting, in part, "[w]ith intent to cause serious bodily injury upon the person of a peace officer . . . he or she threatens with a deadly weapon a peace officer."); Kan. Stat. Ann. §§ 21-5412(a), (d)(1) (defining assault as "placing another person in reasonable apprehension of immediate bodily harm" and making it a severity level 7 person felony if committed against a LEO "with a deadly weapon") and 21-5413(c)(2), (g)(3)(B) (making battery against a LEO a ; N.Y. Penal Law §§ 120.18 (making it Class D felony to place or attempt to place a "police officer . . . in reasonable fear of physical injury or death by displaying a deadly weapon, knife, pistol, revolver, rifle, shotgun, machine gun,

not have an APO offense, nor does it enhance the assault offense when the complainant is a LEO.

Unlike current District law, the RCC LEO enhancement applies to each type of bodily injury (bodily injury, significant bodily injury, and serious bodily injury), as well as the use of physical force that overpowers. It is difficult to generalize about the organization of the 2 reformed jurisdictions' APO offenses. However, while several states appear to apply a LEO enhancement to limited grades of the assault offense,[1236] many states apply a LEO enhancement to multiple gradations of assault.[1237]

Contrary to current District law, the revised assault offense requires recklessness as to the circumstance that the complainant is a law enforcement officer protected under the statute,[1238] rather than negligence.[1239] Due to the varying rules of construction, it is difficult to determine what culpable mental state, if any, the reformed jurisdictions apply to the fact that the complainant was a LEO. In the reformed jurisdictions that clearly specify a culpable mental state for this element, at least five require knowledge[1240] and at least three require knowledge or "should know" or other similar language.[1241]

Lastly, while the current statute criminalizing assaults on LEOs does not address assaults targeting their family members because of their relation to a LEO, the revised assault statute includes liability for such conduct consistent with the general provision regarding targeting family members of District employees in D.C. Code § 22-851.[1242] At

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or other firearm, whether operable or not") and 120.05(3) (making it a Class D felony to cause physical injury to a peace officer or police officer with intent to prevent that officer from performing a lawful duty).

[1236] *See, e.g.*, Ala. Code § 13A-6-21(a)(4); Ariz. Rev. Stat. Ann. § 13-1204(A)(8), (F); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025(1)(a)(1); N.D. Cent. Code Ann. § 12.1-17-01(2)(a).

[1237] *See, e.g.*, Ark. Code Ann. §§ Ark. Code Ann. §§ 5-13-201(a), (c)(3), 5-13-202(4); Del. Code Ann. tit. 11, §§ 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-3.05(a)(3), (d)(4), (e)(2), (e)(6), (h); Minn. Stat. Ann. § 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); N.Y. Penal Law §§ 120.05(3), 120.08, 120.011; Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(D)(5), (D)(6); S.D.C Codified Laws § 22-18-1.05.

[1238] Recklessness applies not only to the fact that the person assaulted is a "LEO" as defined by RCC § 22E-1001, but also the circumstances that the person was in the course of his or her official duties.

[1239] *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)).

[1240] Ark. Code Ann. § 5-13-202(4)(A)(i); 720 Ill. Comp. Stat. Ann. 5/12-3.05(a)(3); N.D. Cent. Code Ann. § 12.1-1701(2)(a); Or. Rev. Stat. Ann. § 163.208(1); Utah Code Ann. § 76-5-102.4(2);

[1241] Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a) ("knowing or having reason to know."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (1)(c.5), 18-3-204(b) ("knows or reasonably should know" or "knows or should know."); Wis. Stat. Ann. § 940.203(2)(a).

[1242] Many law enforcement officers, as "LEO" is defined in § 22E-1001, are District employees and therefore targeting of their families because of their relation to a LEO is already criminalized by D.C. Code § 22-851. However, there is no current provision in law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

least one reformed jurisdiction similarly includes family members of LEOs in its APO offense.[1243]

Eighth, the revised assault statute replaces the offenses of assault and aggravated assault on a public vehicle inspection officer. Public vehicle inspection officers are covered in the revised assault statute as District officials or employees in the definition of "protected person" (RCC § 22E-1001). However, the scope of conduct that receives an enhanced penalty for public vehicle inspection officers is significantly narrowed as compared to current District law. The revised assault offense requires some type of bodily injury or using physical force that overpowers. By contrast, the current assault on public vehicle inspection officers offenses include conduct that falls short of these requirements, as well as conduct that consists merely of "imped[ing], intimidate[ing], or interfer[ing] with" a public vehicle inspection officer.

The narrowed scope of assaultive conduct for public vehicle inspection officers is well-supported by national legal trends. A few reformed jurisdictions' assault statutes specifically include code enforcement officers[1244] and one reformed jurisdiction includes motor vehicle inspectors.[1245] Jurisdictions' definitions of law enforcement officer, peace officer, and similar terms also may include public vehicle inspection officers. The MPC does not have an APO offense, nor does it enhance the assault offense based on the identity of the complainant. In the reformed jurisdictions' assault statutes that specifically include code enforcement officers or motor vehicle inspectors, all[1246] but one[1247] are limited to physical harm. As is discussed in the above entry for the revised LEO enhancement, the majority of LEO enhancements and APO offenses in reformed jurisdictions are limited to bodily harm,[1248] or include intent-to-frighten or offensive physical contact APO in a lower grade or separate, lower offense.[1249] These national

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[1243] Wis. Stat. Ann. § 943.203(2).

[1244] *See, e.g.*, Ark. Code Ann. § 5-13-202(4); Ariz. Rev. Stat. Ann. § 13-12-4(A)(8)(g); Del. Code Ann. tit. 11, §§ 612(a)(3), (a)(5).

[1245] Conn. Gen. Stat. Ann. §53a-167c.

[1246] *See, e.g.*, Ark. Code Ann. § 5-13-202(4); Del. Code Ann. tit. 11, §§ 612(a)(3), (a)(5).

[1247] Ariz. Rev. Stat. Ann. §§ 13-1203 (assault statute prohibiting, in part, "causing any physical injury to another person," "placing another person in reasonable apprehension of imminent physical injury," or "touching another person with the intent to injure, insult or provoke such person") and 13-1204(A)(8)(g), (F) (aggravated assault statute making it a class 5 felony to "commit assault as prescribed by § 13-1203" if the person knows or has reason to know that the complaining witness is a "peace officer" unless "physical injury" results, in which case it is a class 4 felony).

[1248] Some of these jurisdictions include attempting to cause bodily harm, in addition to causing bodily harm. They were still included because the focus of the offense is bodily harm. See, e.g., Ala. Code § 13A-6-21(4); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025; N.D. Cent. Code Ann. § 12.1-17-01(2); Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(C)(5); Or. Rev. Stat. Ann. § 163.208; 18 Pa. Stat. Ann. § 2702(a)(2), (a)(3); Conn. Gen. Stat. Ann. §53a-167c(a)(1), (a)(5); Me. Rev. Stat. tit. 17-A, § 752-A; Utah Code Ann. § 76-5-102.4.

[1249] Del. Code Ann. ti. 11, §§ 601(c), 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-1, 12-2(b)(4.1), (d), 12-3.05(a)(3), (d)(4), (h); Minn. Stat. Ann. §§ 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Mont. Code Ann. § 45-5-210; N.J. Stat. Ann. § 2C:12-1(5); S.D. Codified Laws §§ 22-18.1-05.

Ind. Code Ann. §§ 35-42-2-1 (c), (battery offense prohibiting touching another person or placing bodily fluid or waste on another "in a rude, insolent, or angry manner") and 35-42-2-1(e)(2), (g)(5) (aggravated

trends support limiting assault on a public vehicle inspection to some type of bodily injury or use of physical force that overpowers.

In addition, none of the reformed jurisdictions' assault statutes include an automatic civil penalty of loss of license to operate public vehicles-for-hire as do the current assault on public vehicle inspection officer statutes, nor do they include any similar civil penalties. Deleting the automatic loss of license provision is supported by national legal trends. Similarly, the revised assault offense no longer includes a provision specifically barring justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority, as in current District law.[1250] None of the reformed jurisdictions' assault statutes appear to statutorily include prohibitions on justification and excuse defenses for civil enforcement authority.

Lastly, while the current statutes criminalizing assaults on a public vehicle inspection officer do not address assaults targeting their family members because of their relation to a public vehicle inspection officer, the revised assault statute includes liability for such conduct consistent with the general provision regarding targeting family members of District employees in D.C. Code § 22-851.[1251] At least one reformed jurisdiction similarly includes family members of LEOs in its APO offense.[1252]

Ninth, the "protected person" enhancement results in several changes to current District law regarding penalty enhancements for harming certain groups of people. First, through the definition of "protected person" in RCC § 22E-1001, the revised assault statute also extends enhanced penalties for assaults of drivers of private vehicles-for-hire, public safety employees, individuals that are "vulnerable adults," and District officials or employees. The MPC does not enhance assault based on the identity of the complainant, but many reformed jurisdictions do. A significant number of the 28 reformed jurisdictions enhance assaults against individuals with physical or mental disabilities that limit their ability to care for themselves.[1253] Many reformed jurisdictions enhance

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battery offense making it a Level 6 felony to commit battery against a public safety official and a Level 5 felony if it results in "bodily injury" to a public safety official).

[1250] 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.").

[1251] Many law enforcement officers, as "LEO" is defined in § 22E-1001, are District employees and therefore targeting of their families because of their relation to a LEO is already criminalized by D.C. Code § 22-851. However, there is no current provision in law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[1252] Wis. Stat. Ann. § 943.203(2).

[1253] *See, e.g.*, Ark. Code Ann. § 5-13-202(a)(4)(F); Conn. Gen. Stat. Ann. § 53a-59a; Colo. Rev. Stat. Ann. § 18-6.5-103; Haw. Rev. Stat. Ann. § 707-660.2(1)(a)(ii) (authorizing an extended term of imprisonment if "in the course of committing or attempting to commit a felony" a person "causes the death or inflicts serious or substantial bodily injury upon another person who is . . . blind, a paraplegic, or a quadriplegic."); N.H. Rev. Stat. Ann. § 651:6(I)(d) (authorizing an extended term of imprisonment if a jury finds beyond a reasonable doubt that a person "committed an offense involving the use of force against a person with the intention of taking advantage of the victim's age or physical disability."); 720 Ill. Comp. Stat. Ann. 5/12-3.05(b); Ind. Code Ann. § 35-42-2-1(1)(e)(5), (1)(g)(5)(D); Del. Code Ann. tit. 11, § 1105; Minn. Stat. Ann. § 609.2231(8); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

assaults to emergency medical first responders,[1254] either in the same enhanced gradation for assaults against LEOs,[1255] or in a lesser gradation than an assault on a LEO.[1256] At least one reformed jurisdiction, New York, enhances assaults against the drivers of private vehicles for hire.[1257] Several reformed jurisdictions enhance assaults against state officials or employees.[1258]

The revised assault statute applies a mental state of "recklessness" to whether the complaining witness is a "protected person." Due to the varying rules of construction, it is difficult to determine what culpable mental state, if any, the reformed jurisdictions apply to the fact that the complainant was a special category of individual, such as LEO, or vulnerable adult. However, in looking at the LEO enhancements, in the reformed jurisdictions that clearly specify a culpable mental state, at least five require knowledge[1259] and at least three require knowledge or "should know" or other similar language.[1260]

Tenth, in keeping with the special status certain categories of individuals have under current District law, the revised assault statute enhances the penalty for assaults committed against LEOs, public safety employees, participants in citizen patrols, District officials or employees, and family members of District officials or employees when the assault is committed "with the purpose of harming the complainant because of the complainant's status." Several of the 28 reformed jurisdictions enhance assaults committed against LEOs because of their status as LEOs, regardless of whether the LEO

[1254] The current APO statute already enhances assaults against firefighters, which is included in the definition of "public safety employee." D.C. Code § 22-405(a).

[1255] *See, e.g.*, Ala. Code § 13A-6-21(4) ("emergency medical personnel."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (c.5) ("emergency medical service provider" or "emergency medical care provider."); Del. Code Ann. ti. 11, §§ 601(c), 612(a)(3), 613(a)(5) (including emergency medical technicians and paramedics); K.Y. Rev. Stat. Ann. § 508.025(1)(4) ("paid or volunteer emergency medical services personnel certified or licensed pursuant to KRS Chapter 311A, if the event occurs while personnel are performing job-related duties."); Conn. Gen. Stat. Ann. § 53a-167c(a) ("emergency medical . . . personnel."); Mo. Ann. Stat. §§ 565.052, 565.054, 565.056 and 565.002 (defining "special victim," in part, as "[e]mergency personnel, any paid or volunteer firefighter, emergency room, hospital, or trauma center personnel, or emergency medical technician, assaulted in the performance of his or her official duties or as a direct result of such official duties."); N.J. Stat. Ann. § 2C:12-1(b)(5)(a), (b)(5)(c) ("Any person engaged in emergency first-aid or medical services acting in the performance of his duties.").

[1256] *See, e.g.*, Ark. Code Ann. §§ 5-13-201(c)(3) (enhancing first degree battery if the complainant is a "law enforcement officer acting in the line of duty" and 5-13-202(a)(4)(A), (a)(4)(E) (enhancing second degree battery when the complainant is a LEO or an emergency medical services provider); Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a), (A)(8)(c), (E), (F) (making aggravated assault against a peace officer either a class 5 felony, unless it results in physical injury, in which case it is a class 4 felony, and making aggravated assault against an emergency medical technician or paramedic a class 6 felony).

[1257] N.Y. Penal Law § 60.07.

[1258] *See, e.g.*, Ark. Code Ann. § 5-13-202(4)(D); Del. Code Ann. tit. 11, § 612(a)(9); 720 Ill. Comp. Stat. 5/12-3.05(d)(6); Tenn. Code Ann. § 39-13-102(d); Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(A), (b)(2)(B); Wis. Stat. Ann. § 940.20(4).

[1259] Ark. Code Ann. § 5-13-202(4)(A)(i); 720 Ill. Comp. Stat. Ann. 5/12-3.05(a)(3); N.D. Cent. Code Ann. § 12.1-1701(2)(a); Or. Rev. Stat. Ann. § 163.208(1); Utah Code Ann. § 76-5-102.4(2);

[1260] Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a) ("knowing or having reason to know."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (1)(c.5), 18-3-204(b) ("knows or reasonably should know" or "knows or should know."); Wis. Stat. Ann. § 940.203(2)(a).

was acting in the course of official duties at the time of the offense,[1261] and a few of these reformed jurisdictions extend this enhancement to fire fighters[1262] or medical first responders.[1263] As previously noted, several reformed jurisdictions enhance assaults against state officials or employees.[1264] Two of these jurisdictions expand the enhancement to assaults on the basis of the complainant's status as a state official or employee,[1265] but none appear to extend the enhancement to family members of the state official or employee. At least two reformed jurisdictions specifically enhance assaults on citizen patrol groups,[1266] and one of these specifically addresses targeting a person for their work performing citizen patrol duties.[1267]

Eleventh, the revised assault statute eliminates the separate assault offense of "willfully poisoning any well, spring, or cistern of water."[1268] None of the reformed jurisdictions appears to specifically include poison specifically in their assault statutes, nor does the MPC.

Twelfth, regarding the defendant's ability 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, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[1269] In practical effect, this means that intoxication may "serve as a

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[1261] *See, e.g.*, Del. Code Ann. tit 11, § 612(a)(3) ("For the purposes of this subsection, if a law-enforcement officer is off duty and the nature of the assault is related to that law-enforcement officer's official position, then it shall fall within the meaning of 'official duties' of a law-enforcement officer."); 720 Ill. Comp. Stat. Ann. 12-3.05(a)(3) ("battered in retaliation for performing his or her duties."); Ky. Rev. Stat. Ann. § 508.025(a)(1) ("peace officer."); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3), 565.002 (several gradations of assault specific to a "special victim" and defining "special victim" to include "[a] law enforcement officer assaulted . . . as a direct result of such official duties."); N.J. Stat. Ann. § 2C:12-1(5)(a) ("Any law enforcement officer . . . or because of his status as a law enforcement officer."); Wis. Stat. Ann. § 940.203 ("The act or threat is in response to any action taken by . . . a law enforcement officer.").

[1262] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 12-3.05(a)(3) ("battered in retaliation for performing his or her duties."); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3), 565.002(14)(b) (several gradations of assault specific to a "special victim" and defining "special victim" to include "any paid or volunteer firefighter . . . assaulted . . . as a direct result of such official duties.").

[1263] *See, e.g.*, Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3), 565.002(14)(b) (several gradations of assault specific to a "special victim" and defining "special victim" to include "emergency room, hospital, or trauma center personnel, or emergency medical technician, assaulted as a direct result of such official duties.").

[1264] *See, e.g.*, Ark. Code Ann. § 5-13-202(4)(D); Del. Code Ann. tit. 11, § 612(a)(9); 720 Ill. Comp. Stat. 5/12-3.05(d)(6); Tenn. Code Ann. § 39-13-102(d); Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(A), (b)(2)(B); Wis. Stat. Ann. § 940.20.

[1265] Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(B) ("in retaliation or on account of an exercise of official power or performance of an official duty as a public servant"; Wis. Stat. Ann. § 940.20(4) ("or as a result of any action taken within an official capacity.").

[1266] Minn. Stat. Ann. § 609.2231(7); 720 Ill. Comp. Stat. Ann. 12-3.05(d)(4).

[1267] 720 Ill. Comp. Stat. Ann. 12-3.05(d)(4) ("battered in retaliation for performing his or her official duties.").

[1268] D.C. Code § 22-401.

[1269] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon

defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[1270] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[1271]

Finally, national legal trends support the recognition of a defense for assaultive conduct carried out with effective consent of the complainant under various circumstances. At least twelve recently revised criminal codes codify such a defense in their general part.[1272] Such codification follows the approach of the Model Penal Code, which specifically addresses consent to bodily injury within a general provision on consent as a defense.[1273] Model Penal Code § 2.11(2),[1274] which the RCC assault subsection (i)(1) closely tracks, provides a broad exception for minor harms and serious harms resulting from consensual social interactions in legal activities.[1275] Most jurisdictions similarly limit an effective consent-type defense to assaults involving injury less than serious bodily injury,[1276] although this does not necessarily mean that most

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Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[1270] LAFAVE AT 2 SUBST. CRIM. L. § 9.5.

[1271] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[1272] *See, e.g.*, Ala. Code § 13A-2-7(b) (1982); Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Del. Code Ann. tit. 11, § 452 (1979); Haw. Rev. Stat. Ann. § 702-234 (1976); Me. Rev. Stat. Ann. tit. 17-A, § 109(2) (1983); Mo. Ann. Stat. § 565.010 (2017); Mont. Code Ann. § 45-2-211(1) (1983); N.D. Cent. Code § 12.1-17-08 (1976); N.H. Rev. Stat. Ann. § 626:6(II) (1974); N.J. Stat. Ann. § 2C:2-10(b) (West 1982); 18 Pa. Stat. Ann. § 311(b) (Purdon 1983); Tex. Penal Code Ann. tit. 5, § 22.06 (Vernon 1974).

[1273] Model Penal Code § 2.11(2).

[1274] Model Penal Code § 2.11(2) ("Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
(a) the bodily injury consented to or threatened by the conduct consented to is not serious; or
(b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or
(c) the consent establishes a justification for the conduct under Article 3 of the Code.").

[1275] *But see* Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 Geo. Wash. L. Rev. 165, 179 (2007) (Arguing that it is unclear "whether nonhostile consensual private encounters, such as religious mortification or sadomasochistic sex, may be entitled to legal protection under the MPC."). Notwithstanding other jurisdictions' occasional practice of narrowly construing the defense for behavior considered morally questionable, the RCC assault subsection (i)(1)(B) provision should be broadly construed to include such activities.

[1276] *See, e.g.*, Ala. Code § 13A-2-7(b)(1) (1982); Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Del. Code Ann. tit. 11, § 452 (1979); Me. Rev. Stat. Ann. tit. 17-A, § 109(2)(A) (1983); Mo. Ann. Stat. § 565.010(1)(1) (Vernon 1979); N.H. Rev. Stat. § 626:6(II) (1974); N.J. Stat. Ann. § 2C:2-10(b)(1) (West 1982); N.D. Cent. Code § 12.1-17-08(1)(a) (1976); Tex. Penal Code Ann. tit. 5, § 22.06(1) (Vernon 1974).

jurisdictions allow for a consent defense to significant bodily injury.[1277] Many jurisdictions specifically exclude injuries resulting from legal sporting events,[1278] and some extend the defense to all concerted activity.[1279] Legal experts have also summarized national legal practice in a manner consistent with the RCC assault defense provisions.[1280] Only two jurisdictions' statutes appear to characterize their consent to bodily injury defenses as "affirmative" defenses,[1281] while others simply refer to it as a "defense." The precise burdens of production and persuasion are not statutorily specified in either "defenses" or "affirmative defenses" of consent to bodily injury.[1282]

RCC § 22E-1203. CRIMINAL MENACING.
[Now RCC § 22E-1203. Menacing.]

Relation to National Legal Trends. *The above-mentioned substantive changes to current District law are generally supported by national legal trends.*

First, expanding second degree criminal menace to include words, not just conduct, appears to be supported by national legal trends amongst the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions").[1283] Six

[1277] As noted above, only eight states appear to provide for an intermediate gradation of assault that requires an injury similar to the District's "significant bodily injury." Ind. Code Ann. § 35-31.5-2-204.5 ("Moderate bodily injury" means any impairment of physical condition that includes substantial pain."); Haw. Rev. Stat. Ann. 707-700; Minn. Stat. Ann. 609.02; N.D. Cent. Code Ann. 12.1-01-04; Utah Code Ann. 76-1-601; Wash. Rev. Code Ann. 9A.04.110; Wis. Stat. Ann. 939.22; S.C. Code Ann. § 16-25-10. While Commission staff did not research case law in these jurisdictions, in at least one instance the statutory statement of an effective consent defense to assault is limited to assaults that do "bodily harm" (not the intermediate level of "substantial bodily injury" in that jurisdiction). *See* N.D. Cent. Code Ann. § 12.1-17-08.

[1278] *See, e.g.,* Ala. Code § 13A-2-7(b)(2) (2015); Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Del. Code Ann. tit. 11, § 452 (1979); Haw. Rev. Stat. Ann. § 702-234 (2015); Mo. Ann. Stat. § 565.080 (2015); and Tenn. Code Ann. § 39-13-104 (2017).

[1279] *See, e.g.,* Del. Code Ann. tit. 11, § 452 (1979); N.J. Stat. Ann. § 2C:2-10(b) (West 1982).

[1280] *See, e.g.,* Paul H. Robinson, 1 Criminal Law Defenses § 66, § 106 (1984) ("The general rule is that consent is ordinarily a defense to the charge of battery in cases: (1) involving sexual overtones, (2) involving reasonably foreseeable and known hazards of lawful athletic contests or competitions, lawful sports or professions, or occupations, (3) where consent establishes justification for the serious harm, (4) involving reasonable corporal punishment by a teacher upon a pupil for disobedience and where reasonably necessary for the proper education and discipline of the pupil, and (5) where the battery is not atrocious, aggravated, or fatal and does not include a breach of the public peace."). *See also* 58 A.L.R.3d 662 (1974) ("Although the cases are replete with broad general statements that consent is a defense in a prosecution for assault,2 most of these statements are drawn from cases involving sexual assaults of one kind or another,3 and in the few cases which have involved an actual battery, without sexual overtones, the courts have usually taken the view that since the offense in question involved a breach of the public peace as well as an invasion of the victim's physical security, the victim's consent would not be recognized as a defense, at least where the battery is a severe one.").

[1281] Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Mo. Ann. Stat. § 565.010(1)(1) (Vernon 1979).

[1282] Staff has not researched, at this time, other statutory provisions (e.g. on defenses generally) or case law in these jurisdictions to analyze trends in how the burdens of production and persuasion are allocated.

[1283] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa,

jurisdictions clearly require some kind of physical act for their menacing offenses,[1284] whereas three states explicitly include menaces by physical conduct and by words.[1285] Nine jurisdictions, however, only require proof of "causing" apprehension of imminent harm, or of "creating" such apprehension,[1286] implicitly including both words and conduct in menacing. Therefore, it appears[1287] there is a majority trend favoring the expansion of menacing to include more than physical conduct. The Model Penal Code uses the phrase "attempts . . . to put another in fear."[1288] With respect to the reformed code jurisdictions and threats, the RCC appears to be somewhat in line with national legal trends. States generally do not provide statutory guidance on whether the offense requires words, or whether it encompasses conduct, as well. The eleven states and the Model Penal Code use the open-ended term, "threatens,"[1289] and an additional four use the term "communicates."[1290] A few states, however, qualify those verbs, by saying that the offense is committed when one "threatens by any means" (one state)[1291], or when one "threatens by words or conduct" (four states).[1292] And two states use other terms.[1293] At the very least, therefore, the use of the word "communicates" is generally in line with the majority of states. And those states that, by statute, specify what type of communications count for threats generally have a broader view of what threats can be. Therefore, the inclusion of "communicates" and the Commentary indicating that the word is intended to include more than just words appears to be in line with national legal trends.

Second, the inclusion of robbery, sexual assault, and kidnapping in criminal menacing is partially supported by national legal trends. No other jurisdiction includes any harm besides some form of bodily injury (assault) within their criminal menace statutes, and many jurisdictions include only serious bodily harms in their criminal menace statutes. Seven states and the Model Penal Code require that the menace create a

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Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1284] Ala. Code § 13A-6-23; Conn. Gen. Stat. Ann. § 53a-62 ("by physical threat"); Del. Code Ann. tit. 11, § 602 ("by some movement of body or any instrument"); N.H. Rev. Stat. Ann. § 631:4 ("by physical conduct"); N.J. Stat. Ann. § 2C:12-1 ("by physical menace"); N.Y. Penal Law § 120.15 ("by physical menace"); 18 Pa. Stat. and Cons. Stat. Ann. § 2701 ("by physical menace").

[1285] Alaska Stat. Ann. § 11.41.230 ("by words or other conduct"); Colo. Rev. Stat. Ann. § 18-3-206 ("by any threat or physical action"); Or. Rev. Stat. Ann. § 163.190 ("by word or conduct").

[1286] Ark. Code Ann. § 5-13-207 ("creates"); Ariz. Rev. Stat. Ann. § 13-1203 ("placing"); Kan. Stat. Ann. § 21-5412 ("placing"); Ky. Rev. Stat. Ann. § 508.050 ("places"); Me. Rev. Stat. tit. 17-A, § 209 ("places"); Mont. Code Ann. § 45-5-201 ("causes"); N.D. Cent. Code Ann. § 12.1-17-05 ("places"); Tenn. Code Ann. § 39-13-101 ("causes"); Tex. Penal Code Ann. § 22.01 ("threatens").

[1287] The CCRC did not research other jurisdiction case law corresponding to this menacing language.

[1288] Model Penal Code § 221.1(1)(c).

[1289] Ark. Code Ann. § 5-13-301; Conn. Gen. Stat. Ann. § 53a-61aa; Del. Code Ann. tit. 11, § 621; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.Y. Penal Law § 490.20; N.D. Cent. Code Ann. § 12.1-17-04; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020; Model Penal Code § 211.3.

[1290] Kan. Stat. Ann. § 21-5415; Me. Rev. Stat. tit. 17-A, § 210; Mo. Ann. Stat. § 574.115; Mont. Code Ann. § 45-5-203.

[1291] Ala. Code § 13A-10-15

[1292] Ariz. Rev. Stat. Ann. § 13-1202; Haw. Rev. Stat. Ann. § 707-715; Wash. Rev. Code Ann. § 9A.46.020.

[1293] Ohio Rev. Code Ann. § 2903.21 ("cause another to believe"). 18 Pa. Stat. and Cons. Stat. Ann. § 2706

reasonable fear of serious bodily injury[1294] and eleven states provide liability for a menace that causes reasonable fear of any bodily injury or harm.[1295] However, reformed jurisdictions do include a wider set of harms in their threats statutes. Eleven states punish threatening bodily harm or serious bodily harm;[1296] nine states punish threatening to damage or destroy property;[1297] and eight states punish threatening to commit a crime of violence.[1298] Additionally, the exclusion of offensive physical contact also may be supported by national trends. Only one other jurisdiction clearly includes offensive contact as a basis for menacing.[1299]

Third, it does not appear that any other reformed code jurisdiction's menacing statute statutorily provides liability based on proof that the defendant "intended to cause injury." Similarly, no reformed code jurisdiction's threat statute provides liability based on proof that the defendant "intended to cause injury." Additionally, the Model Penal Code does not provide such forms of liability.[1300]

Fourth, the exclusion of victim status as a grading factor in menacing is supported by national legal trends. Only five states have menacing statutes that explicitly include the status of the victim within the grading scheme for the offense.[1301] With respect to threats, five states include the status of the victim as a grading factor.[1302] And the Model Penal Code's menacing provision and threats provision have no grades based on victim

[1294] Ala. Code § 13A-6-23; Colo. Rev. Stat. Ann. § 18-3-206; Conn. Gen. Stat. Ann. § 53a-62; N.J. Stat. Ann. § 2C:12-1; N.D. Cent. Code Ann. § 12.1-17-05; Or. Rev. Stat. Ann. § 163.190; 18 Pa. Stat. and Cons. Stat. Ann. § 2701; Model Penal Code § 211.1(1)(c).

[1295] Ark. Code Ann. § 5-13-207; Alaska Stat. Ann. § 11.41.230; Ariz. Rev. Stat. Ann. § 13-1203; Del. Code Ann. tit. 11, § 602; Kan. Stat. Ann. § 21-5412; Ky. Rev. Stat. Ann. § 508.050; Me. Rev. Stat. tit. 17-A, § 209; Mont. Code Ann. § 45-5-201; N.Y. Penal Law § 120.15; Tex. Penal Code Ann. § 22.01; Tenn. Code Ann. § 39-13-101.

[1296] Alaska Stat. Ann. § 11.56.810; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Del. Code Ann. tit. 11, § 621; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Ohio Rev. Code Ann. §§ 2903.21, 2903.22; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[1297] Ala. Code § 13A-10-15; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[1298] Ala. Code § 13A-10-15; Conn. Gen. Stat. Ann. § 53a-62; Me. Rev. Stat. tit. 17-A, § 210; Minn. Stat. Ann. § 609.713; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.D. Cent. Code Ann. § 12.1-17-04; 18 Pa. Stat. and Cons. Stat. Ann. § 2706.

[1299] N.H. Rev. Stat. Ann. § 631:4. The New Hampshire statute allows conviction based on bodily injury or physical contact. The implication is that physical contact means something other than and less than bodily injury.

[1300] See Model Penal Code § 211.1(c).

[1301] Conn. Gen. Stat. Ann. § 53a-62 (threatening a person who is in certain designated places, such as houses of worship and schools); Kan. Stat. Ann. § 21-5412 (law enforcement officer); N.J. Stat. Ann. § 2C:12-1 (various occupations, including law enforcement and emergency personnel); Tex. Penal Code Ann. § 22.01 (family members of the defendant, public servants); Tenn. Code Ann. § 39-13-101 (victims of domestic abuse).

[1302] Haw. Rev. Stat. Ann. § 707-716 (public servants and emergency personnel); N.H. Rev. Stat. Ann. § 631:4-a (certain government officials); Ohio Rev. Code Ann. § 2903.22 (private and public child services officers); Tex. Penal Code Ann. § 22.07 (family members of the defendant, public servants); Wash. Rev. Code Ann. § 9A.46.020 ("criminal justice participants," meaning *inter alia* law enforcement officers).

status.[1303] Therefore, absenting menacing and threats from a victim-status grading scheme is in keeping with national legal trends.

Fifth, regarding the defendant's ability to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[1304] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[1305] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[1306]

RCC § 22E-1204. CRIMINAL THREATS.

Relation to National Legal Trends. *The revised criminal threats offense's above-mentioned substantive changes to current District criminal threats law are partially supported by national legal trends.*

First, the RCC's gradation of threats into two offenses is generally supported by national legal trends. However, the basis for the RCC's gradations (the type of threatened harm communicated by the defendant) is not supported by the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions").[1307] Of the twenty-nine reformed code jurisdictions, twelve have two or more gradations of threats.[1308] Of those twelve states, only two grade their threats offenses on the basis of

[1303] Model Penal Code §§ 211.1(c), 211.3.

[1304] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[1305] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

[1306] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[1307] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1308] Alaska Stat. Ann. § 11.56.807; Ark. Code Ann. § 5-13-301; Conn. Gen. Stat. Ann. § 53a-61aa; Haw. Rev. Stat. Ann. § 707-715; Kan. Stat. Ann. § 21-5415; Ky. Rev. Stat. Ann. § 508.075; Minn. Stat. Ann. § 609.713; Mo. Ann. Stat. § 574.115; N.H. Rev. Stat. Ann. § 631:4; Ohio Rev. Code Ann. § 2903.21; 18 Pa. Stat. and Cons. Stat. Ann. § 2706; Wash. Rev. Code Ann. § 9A.46.020. Like most of the reformed code jurisdictions, the Model Penal Code provides only a single grade for threats. Model Penal Code § 211.3.

nature of threatened conduct.[1309] The particular conduct and harms specified in the offense gradations generally comport with national legal trends. In particular, there are: eleven states that punish threatening bodily harm or serious bodily harm;[1310] nine states that punish threatening to damage or destroy property;[1311] and eight states that punish threatening to commit a crime of violence.[1312]

Second, with respect to the requirement that the defendant "communicate" the threatening message, the RCC appears to be in line with most other jurisdictions. States generally do not provide guidance on whether the offense requires words, or whether it encompasses conduct, as well. Eleven states use the open-ended term, "threatens,"[1313] and an additional four use the term "communicates."[1314] A few states, however, qualify those verbs, by saying that the offense is committed when one "threatens by any means" (one state)[1315], or when one "threatens by words or conduct" (four states).[1316] And two states use other terms.[1317] Therefore, it appears[1318] the use of the word "communicates" is generally in line with the majority of states. And those states that, by statute, specify what type of communications count for threats generally have a broader view of what threats can be. Therefore, the inclusion of "communicates" and the Commentary indicating that the word is intended to include more than just words appears to be in line with national legal trends.

Third, the exclusion of threats to commit low-level property offenses is consistent with national legal trends. First, as noted above, only nine states that punish threatening to

[1309] Ark. Code Ann. § 5-13-301; Ohio Rev. Code Ann. § 2903.21. Most jurisdictions grade the offense on the basis of the threat causing evacuation of public building, or otherwise causing (or intending to cause) disruptions to many people. E.g., Alaska Stat. Ann. § 11.56.807; Conn. Gen. Stat. Ann. § 53a-61aa; Del. Code Ann. tit. 11, § 621; Kan. Stat. Ann. § 21-5415; Ky. Rev. Stat. Ann. § 508.075; Me. Rev. Stat. tit. 17-A, § 210; Mo. Ann. Stat. § 574.115; N.J. Stat. Ann. § 2C:12-3; 18 Pa. Stat. and Cons. Stat. Ann. § 270; Tex. Penal Code Ann. § 22.07.

[1310] Alaska Stat. Ann. § 11.56.810; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Del. Code Ann. tit. 11, § 621; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Ohio Rev. Code Ann. §§ 2903.21, 2903.22; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[1311] Ala. Code § 13A-10-15; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[1312] Ala. Code § 13A-10-15; Conn. Gen. Stat. Ann. § 53a-62; Me. Rev. Stat. tit. 17-A, § 210; Minn. Stat. Ann. § 609.713; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.D. Cent. Code Ann. § 12.1-17-04; 18 Pa. Stat. and Cons. Stat. Ann. § 2706.

[1313] Ark. Code Ann. § 5-13-301; Conn. Gen. Stat. Ann. § 53a-61aa; Del. Code Ann. tit. 11, § 621; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.Y. Penal Law § 490.20; N.D. Cent. Code Ann. § 12.1-17-04; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[1314] Kan. Stat. Ann. § 21-5415; Me. Rev. Stat. tit. 17-A, § 210; Mo. Ann. Stat. § 574.115; Mont. Code Ann. § 45-5-203.

[1315] Ala. Code § 13A-10-15.

[1316] Ariz. Rev. Stat. Ann. § 13-1202; Haw. Rev. Stat. Ann. § 707-715; Wash. Rev. Code Ann. § 9A.46.020.

[1317] Ohio Rev. Code Ann. § 2903.21 ("cause another to believe"). 18 Pa. Stat. and Cons. Stat. Ann. § 2706.

[1318] The CCRC did not research other jurisdiction case law corresponding to this criminal threat language.

damage or destroy property.[1319] Among those states, only three refer generally to property "damage,"[1320] and two of those states require some further criminal intent beyond merely an intent to threaten.[1321] The remaining six states require that the defendant threaten "serious damage"[1322] or "substantial property damage."[1323] Therefore, requiring a higher level of property damage is consistent with the approach taken by states punishing threats against property.

RCC § 22E-1205. OFFENSIVE PHYSICAL CONTACT.

Relation to National Legal Trends. *The offensive physical contact offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, the offensive physical contact offense punishes as a separate offense low-level conduct that previously was not distinguished from more serious assaultive conduct. Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC), 11 have an offense that prohibits offensive physical contact.[1324] Of these 11 jurisdictions, six grade the offensive physical contact offense less severely than assault resulting in bodily injury,[1325] like the RCC. In addition, one of

[1319] Ala. Code § 13A-10-15; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[1320] Ala. Code § 13A-10-15; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07.

[1321] N.H. Rev. Stat. Ann. § 631:4 ("the person threatens to commit any crime against the property of another *with a purpose to coerce or terrorize any person*"); Tex. Penal Code Ann. § 22.07 ("threatens to commit any offense involving violence to any . . . property with intent to . . . *place any person in fear of imminent serious bodily injury*" among other various intents).

[1322] Ariz. Rev. Stat. Ann. § 13-1202; Haw. Rev. Stat. Ann. § 707-715.

[1323] Ark. Code Ann. § 5-13-301; Ky. Rev. Stat. Ann. § 508.080; Utah Code Ann. § 76-5-107.

[1324] Ariz. Rev. Stat. Ann. § 13-1203(A)(3) ("touching another person with the intent to injure, insult, or provoke such person."); Del Code Ann. tit. 11, § 601(a)(1) ("touches another person either with a member of his or her body or with any instrument, knowing that the person is likely to cause offense or alarm to such other person."); 720 Ill. Comp. Stat. Ann. 5/12-3(a)(2) ("makes physical contact of an insulting or provoking nature with an individual."); Ind. Code Ann. § 35-42-2-1(c)(1) ("touches another person in a rude, insolent, or angry manner."); Kan. Stat. Ann. § 21-5413(a)(2) ("causing physical contact with another person when done in a rude, insulting, or angry manner."); Me. Rev. Stat. tit. 17-A, § 207(1)(A) ("causes . . offensive physical contact."); Mo. Ann. Stat. § 565.056(1)(6) ("causes physical contact with another person knowing the other person will regard the contact as offensive or provocative."); Mont. Code Ann. § 45-5-201(1)(c) ("makes physical contact of an insulting or provoking nature with any individual."); N.H. Rev. Stat. Ann. § 631:2-a(I)("cause . . . unprivileged physical contact to another."); Tenn. Code Ann. § 39-13-101(a)(3) ("causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative."); Tex. Penal Code § 22.01(a)(3) ("causes physical contact with another when the person knows or should reasonably believe that the other person will regard the contact as offensive or provocative.").

[1325] Ariz. Rev. Stat. Ann. § 13-1203(A)(B) (making an assault that causes physical injury in subsection (A)(1) either a Class 1 or Class 2 misdemeanor, depending on the defendant's culpable mental state, and making offensive physical contact in subsection (A)(3) a Class 3 misdemeanor); Del Code Ann. tit. 11, §§ 601(c) (making offensive physical contact in subsection (a)(1) an unclassified misdemeanor) and 611(1) (making an assault that causes physical injury a Class A misdemeanor); Ind. Code Ann. § 35-42-2-1(c), (d)(1) (making a battery that results in offensive physical contact under subsection (c)(1) a Class B misdemeanor, but a Class A misdemeanor if it results in bodily injury); Mo. Ann. Stat. § 565.056(2), (3)

these reformed jurisdictions specifically includes causing contact with bodily fluid or excrement[1326] and punishes it more severely than other offensive physical contact.[1327] Several reformed jurisdictions also have assault offenses or gradations that specifically prohibit causing LEOs to come into contact with bodily fluids.[1328]

Second, offensive physical contact is no longer subject to a penalty enhancement for the involvement of a deadly or dangerous weapon as it is under the District's current assault with a dangerous weapon (ADW) offense. Of the 11 reformed jurisdictions that have offensive physical contact offenses or include offensive physical contact in assault, six specifically penalize the conduct if a weapon is involved.[1329] In these jurisdictions, offensive physical contact that involves a weapon is punished the same as bodily injury that is caused by a weapon.[1330] In the RCC, however, offensive physical contact that

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(making an assault that results in "physical injury, physical pain, or illness" a Class A misdemeanor and an assault that results in offensive physical contact a Class C misdemeanor in most situations); ."); Tenn. Code Ann. § 39-13-101(b)(1)(A) (making an assault that results in bodily injury under subsection (a)(1) a Class A misdemeanor, and an assault that results in offensive contact under subsection (a)(3) a Class B misdemeanor in most situations); Tex. Penal Code § 22.01(b), (c) (making an assault that results in bodily injury under subsection (a)(1) a Class A misdemeanor in most situations, and an assault that results in offensive contact under subsection (a)(3) a Class C misdemeanor in most situations).

[1326] Del Code Ann. tit. 11, § 601(a)(2) ("strikes another person with saliva, urine, feces or any other bodily fluid, knowing that the person is likely to cause offense or alarm to such other person.").

[1327] Del Code Ann. tit. 11, § 601(c) (making offensive physical contact an unclassified misdemeanor under subsection (a)(1), but causing contact with bodily fluid a Class A misdemeanor).

[1328] *See, e.g.*, Ark. Code Ann. § 5-13-211(a)(1); Colo. Rev. Stat. Ann. §§ 18-3-203(h), 18-3-204(b); Conn. Gen. Stat. Ann. § 53a-167c(5); N.J. Stat. Ann. § 2C:12-13; Mont. Code Ann. § 45-5-214; Minn. Stat. Ann. § 609.2231(1)(c)(2).

[1329] Ariz. Rev. Stat. Ann. § 13-1203(A)(3) (assault statute prohibiting, in part, "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/12-3(a)(2) and 5/12-3.05(f)(1) (defining battery, in part, as "makes physical contact of an insulting or provoking nature with an individual" and defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. § 35-42-2-1(c)(1), (g)(1), (g)(2) (battery offense prohibiting, in part, "touches another person in a rude, insolent, or angry manner" and making it aggravated battery if committed with a "deadly weapon."); Kan. Stat. Ann. § 21-5413(b)(1)(B, (b)(1)(C) (aggravated battery offense prohibiting, in part, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon"); Tenn. Code Ann. §§ 39-13-101(a)(3) (assault offense prohibiting, in part, causing "physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and 39-13-102(a)(1)(A)(iii) (making "assault as defined in § 39-13-101" aggravated assault if it "involved the use or display of a deadly weapon."); Tex. Penal Code Ann. § 22.01(a)(3) (offense prohibiting, in part, causing "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2), (b) (making "assault as defined in § 22.01" a felony of the second degree in most situations if the defendant "uses or exhibits a deadly weapon during the commission of the assault.").

[1330] Ariz. Rev. Stat. Ann. § 13-1203(A)(1), (A)(3) (assault statute prohibiting, in part, "causing any physical injury to another person" and "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/12-3(a) (defining battery as "causes bodily harm to an individual" and "makes physical contact of an insulting or provoking nature with an individual") and 5/12-3.05(f)(1) (defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. § 35-42-2-1(c)(1) (c)(2), (g)(2) (battery offense prohibiting, in part, "touches another person in a rude, insolent, or angry manner"

involves a deadly or dangerous weapon is still criminalized as offensive physical contact. However, if injury results, or physical force that overpowers is used, there may be liability under the revised assault statute that corresponds with the resulting harm.

Third, the conduct in the revised offensive physical contact offense no longer is a predicate for liability when an assault occurs with intent to commit another crime. In the RCC, 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. None of the reformed jurisdictions have specific offenses for assault with-intent-to commit other offenses. The national legal trends support deleting the AWI offenses.

Fourth, regarding the defendant's ability to claim he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[1331] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[1332] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[1333]

Chapter 13. Sexual Assault and Related Provisions

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and making it aggravated battery if committed with a "deadly weapon); Kan. Stat. Ann. § 21-5413(b)(1)(B), (b)(1)(C), (g)(1)(B) (making it a severity level 7 person felony to cause "bodily harm to another person with a deadly weapon" and cause "physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon"); Tenn. Code Ann. §§ 39-13-101(a)(1), (a)(3) (assault offense prohibiting, in part, causing "bodily injury to another" and "physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and 39-13-102(a)(1)(A)(iii) (making "assault as defined in § 39-13-101" aggravated assault if it "involved the use or display of a deadly weapon."); Tex. Penal Code Ann. §§ 22.01(a)(1), (a)(3) (offense prohibiting, in part, causing "bodily injury to another" and causing "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2), (b) (making "assault as defined in § 22.01" a felony of the second degree in most situations if the defendant "uses or exhibits a deadly weapon during the commission of the assault.").

[1331] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[1332] LAFAVE AT 2 SUBST. CRIM. L. § 9.5.

[1333] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

RCC § 22E-1301. SEXUAL OFFENSE DEFINITIONS.
[Now part of RCC § 22E-701. Index of Definitions.]

For the purposes of this chapter, the term:

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

[No discussion of national legal trends].

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

National Legal Trends. The substantive revision to the current definition of "bodily injury," deleting impairment of a "mental faculty," is well-supported by the criminal codes of the reformed jurisdictions. At least 25 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1334] ("reformed jurisdictions") statutorily define "bodily injury" or a similar term.[1335] Only four[1336] of these 25 reformed jurisdictions specifically

[1334] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1335] Ala. Code § 13A-1-2(12) (defining "physical injury" as "[i]mpairment of physical condition or substantial pain."); Alaska Stat. Ann. § 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ariz. Rev. Stat. Ann. § 13-105(33) (defining "physical injury" as "the impairment of physical condition."); Ark. Code Ann. § 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Conn. Gen. Stat. Ann. § 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Del. Code Ann. tit. 11, § 222(23) (defining "physical injury" as "impairment of physical condition or substantial pain."); Haw. Rev. Stat. Ann. § 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Ind. Code Ann. § 35-31.5-2-29 (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ky. Rev. Stat. Ann. § 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Me. Rev. Stat. tit. 17-A, § 2(5) (defining "bodily injury" as physical pain, physical illness or any impairment of physical condition."); Mo. Ann. Stat. § 556.061(36) (defining "physical injury" as slight impairment of any function of the body or temporary loss of use of any part of the body."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. § 609.02(7) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."); N.J. Stat. Ann. § 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law § 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); N.D. Cent. Code Ann. § 12.1-01-04(4) (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Or. Rev. Stat. Ann. § 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); 18 Pa. Stat. and Cons. Stat. Ann. § 2301 (defining "bodily injury" as "[i]mpairment of physical condition or substantial pain."); Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" as "physical pain, illness,

include psychological distress or injury in the statutory definition of "bodily injury" or similar terms.

In addition, the possible substantive change of deleting "loss or impairment of the function of a bodily member [or] organ" and "physical disfigurement" from the current definition of "bodily injury" is well-supported by the criminal codes of reformed jurisdictions. None of the 25 reformed jurisdictions that statutorily define "bodily injury" or a similar term[1337] includes "loss or impairment of the function of a bodily member [or]

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or any impairment of physical condition."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty."); *Utah* Code Ann. § 76-1-601(3) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. § 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."); Wis. Stat. Ann. § 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition.").

[1336] Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

[1337] Ala. Code § 13A-1-2(12) (defining "physical injury" as "[i]mpairment of physical condition or substantial pain."); Alaska Stat. Ann. § 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ariz. Rev. Stat. Ann. § 13-105(33) (defining "physical injury" as "the impairment of physical condition."); Ark. Code Ann. § 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Conn. Gen. Stat. Ann. § 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Del. Code Ann. tit. 11, § 222(23) (defining "physical injury" as "impairment of physical condition or substantial pain."); Haw. Rev. Stat. Ann. § 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Ind. Code Ann. § 35-31.5-2-29 (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ky. Rev. Stat. Ann. § 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Me. Rev. Stat. tit. 17-A, § 2(5) (defining "bodily injury" as physical pain, physical illness or any impairment of physical condition."); Mo. Ann. Stat. § 556.061(36) (defining "physical injury" as slight impairment of any function of the body or temporary loss of use of any part of the body."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. § 609.02(7) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."); N.J. Stat. Ann. § 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law § 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); N.D. Cent. Code Ann. § 12.1-01-04(4) (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Or. Rev. Stat. Ann. § 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); 18 Pa. Stat. and Cons. Stat. Ann. § 2301 (defining "bodily injury" as "[i]mpairment of physical condition or substantial pain."); Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty."); *Utah* Code Ann. § 76-1-601(3)

organ," "physical disfigurement," or similar language that suggests a comparatively high threshold of physical harm. Like the RCC definition of "bodily injury," the 25 reformed jurisdictions generally require "impairment of physical condition."[1338]

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

(A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E;

(B) Accuse another person of a criminal offense or failure to comply with an immigration law or regulation;

(defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. § 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."); Wis. Stat. Ann. § 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition.").

[1338] Ala. Code § 13A-1-2(12) (defining "physical injury" as "[i]mpairment of physical condition or substantial pain."); Alaska Stat. Ann. § 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ariz. Rev. Stat. Ann. § 13-105(33) (defining "physical injury" as "the impairment of physical condition."); Ark. Code Ann. § 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Conn. Gen. Stat. Ann. § 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Del. Code Ann. tit. 11, § 222(23) (defining "physical injury" as "impairment of physical condition or substantial pain."); Haw. Rev. Stat. Ann. § 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Ind. Code Ann. § 35-31.5-2-29 (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ky. Rev. Stat. Ann. § 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Me. Rev. Stat. tit. 17-A, § 2(5) (defining "bodily injury" as physical pain, physical illness or any impairment of physical condition."); Mo. Ann. Stat. § 556.061(36) (defining "physical injury" as slight impairment of any function of the body or temporary loss of use of any part of the body."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. § 609.02(7) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."); N.J. Stat. Ann. § 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law § 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); N.D. Cent. Code Ann. § 12.1-01-04(4) (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Or. Rev. Stat. Ann. § 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); 18 Pa. Stat. and Cons. Stat. Ann. § 2301 (defining "bodily injury" as "[i]mpairment of physical condition or substantial pain."); Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty."); Utah Code Ann. § 76-1-601(3) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. § 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."); Wis. Stat. Ann. § 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition.").

(C) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute;
(D) Take or withhold action as an official, or cause an official to take or withhold action;
(E) Inflict a wrongful economic injury;
(F) Limit a person's access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person's access to prescription medication; or
(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

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

First, excluding fraud or deception or causing another to believe he or she is property of another from the definition of "coercion" has mixed support in state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1339] (reformed jurisdictions), only six define "coercion" for use in their respective human trafficking offenses.[1340] Of the jurisdictions that define "coercion," half do not include fraud or deception.[1341] None of the jurisdictions that define "coercion" include causing a person to believe that he or she is property of a person or business.

Second, revising the definition of "coercion" to include threatening to "limit a person's access to a controlled substance, as defined in D.C. Code § 48-901.02, or prescription medication" is not supported by state criminal codes. While only five reformed jurisdictions define "coercion" for use in their respective human trafficking offenses, all but one include controlling access to a controlled substance.[1342] However, none of these jurisdictions define "coercion" to include facilitating or controlling a person's access to addictive substance generally.

Generally, several of the reformed jurisdictions prohibit sexual assault by coercion or a similarly broad provision prohibiting threats.[1343]

[1339] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[1340] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5, Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01, Wash. Rev. Code Ann. § 9A.40.010.

[1341] Ala. Code § 13A-6-151; Ind. Code Ann. § 35-42-3.5-0.5; Wash. Rev. Code Ann. § 9A.40.010.

[1342] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.

[1343] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-3-402(1)(a) (sexual assault offense prohibiting sexual activity when the "actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will."); Me. Rev. Stat. Ann. tit. 17-A, § 253(2)(B) (prohibiting a sexual act "by any threat."); Mont. Code Ann. §§ 45-5-503(1), 45-5-501(1)(b)(iii) ("prohibiting sexual intercourse "without consent" and stating that a person is "incapable of consent" if he or she is "overcome by deception, coercion, or surprise."); N.D. Cent. Code Ann. § 12.1-20-04(1), 12.1-20-02(1) (prohibiting a

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

[No discussion of national legal trends].

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

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

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

Relation to National Legal Trends. The Model Penal Code (MPC) has no equivalent definition to "consent," although it does use the term in some provisions.[1344] The American Law Institute (ALI) has recently undertaken a review of the MPC's sexual assault offenses, and has provided a draft definition of "consent"[1345] that is generally consistent with the RCC definitions of "consent" and "effective consent" (which refers to

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

[1344] The clearest example is in the MPC's affirmative consent defense. Model Penal Code § 2.11.

[1345] Model Penal Code: Sexual Assault and Related Offenses § 213.0(3) (Tentative Draft No. 9, September 14, 2018) "'Consent'

(i) "Consent" for purposes of Article 213 means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.

(ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

(iii) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.

(iv) Notwithstanding subsection (d)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in the Sections of this Article applicable to such situations.

(v) Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent."

"consent"), but includes some detailed clarificatory language that is omitted in the RCC definition as unnecessary.[1346] Other states and commentators have definitions that are very similar to the RCC definition.[1347]

Distinguishing offenses using the same principles of consent and "effective consent" is rare in other jurisdictions' statutes. Two states, Texas and Tennessee, codify a definition of "effective consent" for use in property offenses,[1348] and a comparable

[1346] Specifically, subsections (iii) and (v) of the draft ALI definition of "consent" provide clarificatory language regarding the lack of physical or verbal resistance and the revocation or withdrawal of consent. Such clarifications are fully consistent with the RCC definition of "consent" and "effective consent" (which refers to "consent") but may be more confusing than helpful in clarifying the fundamental issue of whether there was effective consent at a given point in time during a sexual encounter.

[1347] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-3-401(1.5) (defining "consent" as "cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part 4. Submission under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the burden of proof in regard to the issue of consent under this part 4."); 720 Ill. Comp. Stat. Ann. 5/11-1.70 (defining "consent" as "a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent."); Minn. Stat. Ann. § 609.341(4) (defining "consent" as "(a) . . . words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act. (b) A person who is mentally incapacitated or physically helpless as defined by this section cannot consent to a sexual act. (c) Corroboration of the victim's testimony is not required to show lack of consent."); Wash. Rev. Code Ann. § 9A.44.010(7) ("Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."). *See also* Stephen J. Schulhofer, *Consent: What it Means and Why It's Time To Require It*, 47 U. PAC. L. REV. 665, 669 (2016). Schulhofer offers a tripartite definition of consent specific to sexual assault. The first part of the definition contains similar language to the RCC definition of consent: "'Consent' means a person's behavior, including words and conduct -- both action and inaction -- that communicates the person's willingness to engage in a specific act of sexual penetration or sexual conduct."

[1348] Texas defines "effective consent" as: "consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." Tex. Penal Code Ann. § 31.01(3). This definition of "effective consent" is specific to the property offenses; Texas also has a general "effective consent" definition that applies broadly to the entire penal code. Tex. Penal Code Ann. § 1.07(19). The only difference between the two definitions is that the property-specific definition does not include "force" subsection (3)(A), and subsection (3)(E) in the property-specific section above is not included in the general definition. Tennessee defines effective consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion; (B) Given by a person the defendant knows is not authorized to act as an agent; (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or (D) Given solely to detect the commission of an offense." Tenn. Code Ann. § 39-11-106(9).

distinction between consent and effective consent is made in Missouri,[1349] and case law in one state has used the distinction in the context of burglary.[1350] The Texas and Tennessee statutes first identify "consent" as a basic foundation for finding effective consent (or in the case of Tennessee, "assent" and then "consent") then the statutes provide a list of circumstances that render consent ineffective. In addition, Texas and Tennessee both state that consent given by certain people (generally, people with disabilities or children) is ineffective.[1351] Also, both Texas and Tennessee address the issue of consent given to detect the commission of an offense.[1352] The RCC does not address the issue of incompetence or consent given to detect the commission of an offense, but otherwise closely resembles these jurisdictions' statutes.

[1349] Mo. Ann. Stat. § 556.061 ("consent or lack of consent may be expressed or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of youth, mental disease or defect, intoxication, a drug-induced state, or any other reason is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) It is induced by force, duress or deception"). Unlike Tennessee and Texas, however, Missouri does not define force, duress, or deception. This gives very little guidance when attempting to ascertain what kinds of pressures may vitiate "consent" in Missouri. For example, will "assent" induced by any deception fail to constitute assent? Will the smallest amount of duress do the same? If not, then what degree of duress or deception is sufficient to meet the law's demand? Ultimately, while Missouri's definition of "consent" is useful, it is also inadequate. The RCC differs from Missouri in that it sets out not only the kinds of pressures render consent ineffective, but also the degree of pressure that must be brought to bear against the victim. The kinds of pressures are identified other in the offense definitions (e.g., deception in fraud, RCC § 22E-2201), or by the definition of effective consent. The degree of pressure is identified in the definitions of force, coercion, and deception themselves.

[1350] Minnesota's burglary offense distinguishes between entries *without consent* and entries made "by using artifice, trick, or misrepresentation to obtain consent to enter." See *State v. Zenanko*, 552 N.W.2d 541, 542 (Minn. 1996) (affirming conviction of defendant who "misrepresented his purpose for being [in the dwelling] and gained entry by ruse") (internal quotations omitted), citing *State v. Van Meveren*, 290 N.W.2d 631, 632 (Minn. 1980) (affirming conviction of defendant who gained entrance to a dwelling by telling the occupant he needed to use the occupant's bathroom, and after entering, immediately began to sexually assault the occupant). *See* Minn. Stat. Ann. § 609.581. By comparison, the RCC says that burglary can be committed without consent and with consent obtained by deception. The RCC also covers burglaries committed with consent obtained by coercion.

[1351] Tex. Penal Code Ann. § 31.01(3)(C) and (3)(E); Tenn. Code Ann. § 39-11-106(9)(C).

[1352] Tex. Penal Code Ann. § 31.01(3)(D); Tenn. Code Ann. § 39-11-106(9)(D). The effect of this provision, it would seem, is to provide complete liability for an offense when a police officer makes a transaction with a criminal in an undercover operation. For example, when attempting to catch a defendant engaged in fraud, a police officer might pose as an innocent and unsuspecting victim. When the defendant tries to deceive the officer into giving money, the officer would clearly be aware of the defendant's deception. If thereafter convicted, the defendant might argue that the officer's consent to the transaction was not "obtained by deception," and therefore, that the defendant is not guilty of fraud. Rather, the defendant would seemingly be at most guilty of attempted theft, because the defendant mistakenly believed the consent *was* induced by the defendant's deception. The definition of effective consent operating in Texas and Tennessee obviate this defense. *See Smith v. States*, 766 S.W.2d 544 (Tex. App. 1989). Similar facts are at work in *Fussell v. United States*, 505 A.2d 72 (D.C. 1986), and the DCCA reversed the defendant's conviction entirely. *Id*. at 73.

The Model Penal Code (MPC) contains a definition of "ineffective consent" in its General Part, in its description of the affirmative consent defense.[1353] But that definition of ineffective consent does not appear to be applied elsewhere in the MPC.

The relative lack statutory or case law use of the conceptual distinction between consent and "effective consent" may be due to the relatively recent origin of scholarly work on the topic.[1354] However, in recent years, use of the conceptual distinction between "effective consent" and simple consent has become widespread among new proposals for substantive criminal law.[1355]

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

[No discussion of national legal trends].

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

[No discussion of national legal trends].

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

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

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

[No discussion of national legal trends].

[1353] Model Penal Code § 2.11(3) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.").

[1354] In large part, the conceptual structure involved in thinking through consent and effective consent—as well as the attendant pressures of force, coercion, and deception—is based on the influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 333 (2004). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

[1355] James Grimmelmann, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1517 (2016) (applying conceptual distinctions in consent to offenses involving computers); Stuart P. Green, *Introduction: Symposium on Thirteen Ways to Steal A Bicycle*, 47 NEW ENG. L. REV. 795 (2013) (discussing the use of differences of consent within the context of property offenses); Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 70 (2012) (using Westen's consent framework to discuss the ethics of prostitution); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016).

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

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

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

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

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

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

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

[No discussion of national legal trends].

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

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement; or

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

Relation to National Legal Trends. The Model Penal Code (MPC) defines "serious bodily injury" for offenses against persons as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[1356] At least 27 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1357] ("reformed jurisdictions") have adopted the MPC definition or have a substantively similar definition.[1358]

[1356] Model Penal Code § 210.0(3).

[1357] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1358] Ala. Code § 13A-1-2(14) (defining "serious physical injury as "[p]hysical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."); Alaska Stat. Ann. § 11.81.900(a)(57) (defining "serious physical injury" as "(A) physical injury caused by an act performed

under circumstances that create a substantial risk of death; or (B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."); Ark. Code Ann. § 5-1-102(21) ("'Serious physical injury' means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ."); Ariz. Rev. Stat. Ann. § 13-105(39) (defining "serious physical injury" as "includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb."); Colo. Rev. Stat. Ann. § 18-1-901(3)(p) (defining "serious bodily injury" as "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); Conn. Gen. Stat. Ann. § 53a-3(4) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ."); Del. Code Ann. tit. 11, § 222(26) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ, or which causes the unlawful termination of a pregnancy without the consent of the pregnant female."); Haw. Rev. Stat. Ann. § 707-700 ("'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Ind. Code Ann. § 35-31.5-2-292 (defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); Ky. Rev. Stat. Ann. § 500.080 (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ" and specifying injuries that constitute "serious physical injury" for a person under the age of 12 years); Me. Rev. Stat. tit. 17-A, § 2(23) (defining "serious bodily injury" as "a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member organ, or extended convalescence necessary for recovery of physical health."); Minn. Stat. Ann. § 609.02(8) (defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm."); Mo. Ann. Stat. § 556.061 (defining "serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); Mont. Code Ann. § 45-2-101(66) (defining "serious bodily injury" as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment."); N.H. Rev. Stat. Ann. § 625:11(VI) (defining "serious bodily injury" as "any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body."); N.J. Stat. Ann. § 2C:11-1(b) (defining "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); N.Y. Penal Law § 10.00(10) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."); N.D. Cent. Code Ann. § 12.1-01-04(27) (defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Ohio Rev. Code Ann. § 2901.01(5) (defining "serious physical harm to persons" as "(a) Any mental illness or condition of such

The revised definition of "serious bodily injury" is substantially similar to the definitions in the MPC and reformed jurisdictions. In addition, the three substantive revisions to the definition of "serious bodily injury," deleting "unconsciousness," "extreme physical pain," and impairment of a "mental faculty" are well supported by the criminal codes of the 29 reformed jurisdictions. Of the 27 reformed jurisdictions with statutory definitions of "serious bodily injury" or a similar term, only three[1359] include unconsciousness in the definition. Only four of these reformed jurisdictions[1360] include extreme pain or similar language in the definition. Only three reformed jurisdictions include psychological distress in the definition,[1361] and two of these jurisdictions require

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gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Or. Rev. Stat. Ann. § 161.015(8) (defining "serious physical injury" as "physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."); 18 Pa. Stat. Stat. Ann. § 2301 (defining "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); S.D. Codified Laws § 22-1-2(44A) (defining "serious bodily injury" as "such injury as is grave and not trivial, and gives rise to apprehension of danger to life, health, or limb."); Tenn. Code Ann. § 39-11-106(34) (defining "serious bodily injury" as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) A broken bone of a child who is twelve (12) years of age or less."); Tex. Penal Code Ann. § 1.07(46) ("'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Utah Code Ann. § 76-6-601(11) ("'Serious bodily injury' means bodily injury that creates serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death."); Wash. Rev. Code Ann. § 9A.04.110 (4)(c) (defining "great bodily harm" as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ."); Wis. Stat. Ann. § 939.22(14) (defining "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.").

[1359] Ind. Code Ann. § 35-31.5-2-292(2) ("unconsciousness."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("unconsciousness."); Tenn. Code Ann. § 39-11-106(34)(B) ("protracted unconsciousness.").

[1360] Ind. Code Ann. § 35-31.5-2-292(3) ("extreme pain."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("extreme pain."); Ohio Rev. Code Ann. § 2901.01(5) ("any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Tenn. Code Ann. § 39-11-106(34)(C) ("extreme physical pain.")

[1361] Mont. Code Ann. § 45-2-101(66) (defining "serious bodily injury" as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment."); Ohio Rev. Code Ann. § 2901.01(5) (defining "serious physical harm to persons" as "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any

mental illness or impairment as opposed to impairment of a "mental faculty."[1362] The third reformed jurisdiction refers to impairment of a "mental faculty."[1363]

(13) "Sexual act" means:

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

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

Relation to National Legal Trends: The American Law Institute (ALI) has recently undertaken a review of the Model Penal Code's (MPC) sexual assault offenses, and has provided draft definitions of "sexual penetration"[1364] and "oral sex."[1365] Neither definition has an intent requirement like subsection (C) of the District's current definition of "sexual act" or the revised definition of "sexual act," but the ALI definition of "sexual penetration" does exclude penetration "except when done for legitimate medical, hygienic, or law enforcement purposes."

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physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Tenn. Code Ann. § 39-11-106(34) (defining "serious bodily injury" as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) A broken bone of a child who is twelve (12) years of age or less.").

[1362] Mont. Code Ann. § 45-2-101(66) (defining "serious bodily injury" as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment."); Ohio Rev. Code Ann. § 2901.01(5) (defining "serious physical harm to persons" as "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.").

[1363] Tenn. Code Ann. § 39-11-106(34) (defining "serious bodily injury" as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) A broken bone of a child who is twelve (12) years of age or less.").

[1364] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(a) (Tentative Draft No. 9, September 14, 2018) (defining "sexual penetration" as "an act involving penetration, however slight, of the anus or genitalia by an object or a body part, except when done for legitimate medical, hygenic, or law-enforcement purposes.").

[1365] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(b) (Tentative Draft No. 9, September 14, 2018) (defining "oral sex" as "a touching of the anus or genitalia of one person by the mouth or tongue of another person.").

There is mixed support in the criminal codes of reformed jurisdictions for requiring an intent "to sexually degrade, arouse, or gratify any person" for all types of penetration in the revised definition of "sexual act," in part because the reformed jurisdictions take a variety of approaches in defining what is required for an act of sexual penetration.

At least 13 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1366] (reformed jurisdictions) define "sexual act" or a similar term that encompasses all types of sexual penetration and oral sex,[1367] but at least 12 other reformed jurisdictions[1368] separately define different types of sexual penetration, such as sexual intercourse and oral sex. Only two of these reformed jurisdictions specify a "purpose" or "intent to" gratify, arouse, etc., like subsection (C) of the current definition of "sexual act" and these reformed jurisdictions limit the "intent to" requirement to the equivalent of subsection (C) in the current definition of "sexual act."[1369] However, several of the reformed

[1366] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1367] Conn. Gen. Stat. Ann. § 53a-65(2) (defining "sexual intercourse."); Haw. Rev. Stat. Ann. § 707-730 (defining "sexual penetration."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual penetration."); Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(C) (defining "sexual act."); Minn. Stat. Ann. § 609.341(1)(12) (defining "sexual penetration."); N.J. Stat. Ann. § 2C:14-1(c) (defining "sexual penetration."); N.D. Cent. Code Ann. § 12.1-20-02(4) (defining "sexual act."); N.H. Rev. Stat. Ann. § 632-A:1(V) (defining "sexual penetration."); Ohio Rev. Code Ann. § 2907.01(A) (defining "sexual conduct."); S.D. Codified Laws § 22-22-2 (defining "sexual penetration."); Tenn. Code Ann. § 39-13-501(7) (defining "sexual penetration."); Wash. Rev. Code Ann. § 9A.44.010(1) (defining "sexual intercourse."); Wis. Stat. Ann. § 940.225(5)(c) (defining "sexual intercourse.")

[1368] Ala. Code Ann. § 13A-6-60(1), (2) (defining "sexual intercourse" and "deviate sexual intercourse."); Ariz. Rev. Stat. Ann. § 13-1401(A)(1), (A)(4) (defining "oral sexual contact" and "sexual intercourse."); Ark. Code Ann. § 5-14-101(1), (12) (defining "deviate sexual activity" and "sexual intercourse."); Colo. Rev. Stat. Ann. § 18-3-401(5), (6) (defining "sexual intrusion" and "sexual penetration."); Del. Code Ann. tit. 11, § 761(b), (c), (g), (i) (defining "cunnilingus," "fellatio," "sexual intercourse," and "sexual penetration."); Ky. Rev. Stat. Ann. § 510.010(1), (8) (defining "deviate sexual intercourse" and "sexual intercourse."); Kan. Stat. Ann. § 21-5501(a), (b) (defining "sexual intercourse" and "sodomy."); Mo. Ann. Stat. § 566.010(3), (7) (defining "deviate sexual intercourse" and "sexual intercourse."); N.Y. Penal Law § 130.00(1), (2)(a), (2)(b) (defining "sexual intercourse," "oral sexual conduct," and "anal sexual conduct."); Or. Rev. Stat. Ann. § 163.305(4), (7) (defining "oral or anal sexual intercourse" and "sexual intercourse."); 18 Pa. Stat. Ann. § 3101 (defining "deviate sexual intercourse" and "sexual intercourse."); Tex. Penal Code Ann. § 21.01(1), (3) (defining "deviate sexual intercourse" and "sexual intercourse.").

[1369] Me. Rev. Stat. tit. 17-A, § 251(1)(C) (defining "sexual act" to include "[a]ny act involving direct physical contact between the genitals or anus of one and an instrument or device manipulated by another person when that act is done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact."); Mo. Ann. Stat. § 566.010(3) (defining "deviate sexual intercourse" as "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the penis, female genitalia, or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any purpose or for the purpose of terrorizing the victim.").

jurisdictions exclude from the definitions penetration for medical purposes[1370] or medical and law-enforcement purposes.[1371]

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

Relation to National Legal Trends: There is strong support in the criminal codes of reformed jurisdictions for limiting the additional intent requirement in the revised definition of "sexual contact" to an intent to "sexually degrade, arouse, or gratify any person" and deleting an intent to "abuse, humiliate, [or] harass" from the current definition. At least 24 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1372] (reformed jurisdictions) define "sexual contact" or a similar term that encompasses sexual touching.[1373] Twenty-one of these reformed jurisdictions specify an additional

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[1370] Ky. Rev. Stat. Ann. § 510.010(1), (8) (stating "deviate sexual intercourse" does not include "penetration of the anus by any body part or a foreign object in the course of the performance of generally recognized health-care practices" and "'sexual intercourse' does not include penetration of the sex organ by any body part or a foreign object in the course of the performance of generally recognized health-care practices."); S.D. Codified Laws § 22-22-2 (stating that "[p]ractitioners of the healing arts lawfully practicing within the scope of their practice . . . are not included within the provisions" of the definition of "sexual penetration."); Wash. Rev. Code Ann. § 9A.44.010(1)(b) (stating that "sexual intercourse" includes "any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes.").

[1371] Kan. Stat. Ann. § 21-5501(a), (b) (stating that "sexual intercourse" does not include "penetration of the female sex organ by a finger or object in the course of the performance of: (1) Generally recognized health care practices; or (2) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto" and that "sodomy" does not include "penetration of the anal opening by a finger or object in the course of the performance of: (1) Generally recognized health care practices; or (2) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto."); 18 Pa. Stat. Ann. § 3101 (stating that "deviate sexual intercourse" includes "penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.");

[1372] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1373] Ala. Code § 13A-6-60(3) (defining "sexual contact" as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party."); Ariz. Rev. Stat. Ann. § 13-1401(A)(3) (defining "sexual contact" as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such conduct."); Ark. Code Ann. § 5-14-102(11) (defining "sexual contact" as "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female."); Colo. Rev. Stat. Ann. § 18-3-401(4) (defining "sexual contact" as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual

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

intent or purpose requirement[1374] or require that the contact can be reasonably construed for a specified intent or purpose.[1375] Of these 21 reformed jurisdictions, two jurisdictions

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

[1374] Ala. Code § 13A-6-60(3) (defining "sexual contact" as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party."); Colo. Rev. Stat. Ann. § 18-3-401(4) (defining "sexual contact" as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."); Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.); Ky. Rev. Stat. Ann. § 510.010(7) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party."); Me. Rev. Stat. tit. 17-A, § 251(1)(D) (defining "sexual contact" as "any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact."); Mo. Ann. Stat. § 566.010(6) (defining "sexual contact" as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim."); Minn. Stat. Ann. § 609.341(11) (specifying various kinds of touching that constitute "sexual contact" for different offenses, but consistently requiring "with sexual or aggressive intent."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); N.Y. Penal Law § 130.00(3) (defining "sexual contact" as any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."); N.D. Cent. Code Ann. § 12.1-20-02(5) (defining "sexual contact" as any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires."); Ohio Rev. Code Ann. § 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh,

include an intent or purpose to abuse[1376] and three jurisdictions include an intent or purpose to humiliate.[1377] None of the 21 reformed jurisdictions specifically include an intent or purpose to "harass," but one of the jurisdictions requires an intent to

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genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."); Or. Rev. Stat. Ann. § 135.305(6) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimidate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party."); 18 Pa. Stat. and Cons. Stat. Ann. § 3101 (defining "indecent contact" as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person."); S.D. Codified Laws § 22-22-7.1 (defining "sexual contact" as "any touching, not amounting to rape, whether or not through clothing or other covering, of the breasts of a female or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of either party. Practitioners of the healing arts lawfully practicing within the scope of their practice, which determination shall be conclusive as against the state and shall be made by the court prior to trial, are not included within the provisions of this section. In any pretrial proceeding under this section, the prosecution has the burden of establishing probable cause."); Tex. Penal Code Ann. § 21.01(2) (defining "sexual contact" as "except as provided by Section 21.11, any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person."); Wash. Rev. Code Ann. § 9A.44.010(2) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."); Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

[1375] Del. Code Ann. tit. 11, § 761(f) (defining "sexual contact" as (1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or (2) Any intentional touching of another person with the defendant's anus, breast, buttocks or genitalia; or (3) Intentionally causing or allowing another person to touch the defendant's anus, breast, buttocks or genitalia which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. "Sexual contact" shall also include touching when covered by clothing."); N.H. Rev. Stat. Ann. § 632-A:1(IV) (defining "sexual contact" as "the intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including emissions, tongue, anus, breasts, and buttocks. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."); Tenn. Code Ann. § 39-13-501(6) (defining "sexual contact" as "includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.").

[1376] Colo. Rev. Stat. Ann. § 18-3-401(4) (defining "sexual contact" as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."); Me. Rev. Stat. tit. 17-A, § 251(1)(D) (defining "sexual contact" as "any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.").

[1377] Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

"terrorize"[1378] and two additional reformed jurisdictions require an "aggressive" intent or the purpose of arousing or satisfying "aggressive desires."[1379]

The 21 reformed jurisdictions generally require an intent or purpose to sexually arouse or gratify, but two jurisdictions do include an intent or purpose to degrade[1380] or sexually degrade.[1381]

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

[Now RCC § 22E-1308. Limitations on Liability for RCC Chapter 13 Offenses.]

Relation to National Legal Trends: It is difficult to discuss merger of sex offenses in other jurisdictions due to the wide variety of statutory organization and penalties. However, there is limited supported in the criminal codes of other jurisdictions for limiting liability for young persons for certain sex offenses. The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and exempts persons under the age of 12 years for liability for sex offenses other than those that involve the use of aggravated force or restraint, a deadly weapon, or infliction of serious bodily injury.[1382] The ALI commentary notes that the "revised Code rests this judgment on the concern that 'physical force' . . . could too easily be read to include the

[1378] Mo. Ann. Stat. § 566.010(6) (defining "sexual contact" as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim.").

[1379] Minn. Stat. Ann. § 609.341(11) (specifying various kinds of touching that constitute "sexual contact" for different offenses, but consistently requiring "with sexual or aggressive intent."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); N.Y. Penal Law § 130.00(3) (defining "sexual contact" as any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."); N.D. Cent. Code Ann. § 12.1-20-02(5) (defining "sexual contact" as any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires.").

[1380] Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person.").

[1381] Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

[1382] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018) (defining "actor.").

kind of tussling among very young children that is far removed from the force appropriately associated with the offense of rape."[1383]

In addition, several of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1384] ("reformed jurisdictions") limit the liability of young complainants for some or all of the jurisdictions' sex offenses. At least two of the 29 reformed jurisdictions statutorily exclude actors younger than 16 years of age or 17 years of age from liability for all age-based sex offenses.[1385] Three additional reformed jurisdictions exclude young actors from all gradations of age-based sexual assault except for the most serious gradation for the youngest complainants.[1386] Finally, two more reformed jurisdictions reserve the most serious penalty for age-based sex offenses for actors that are 18 years of age or older.

RCC § 22E-1303. SEXUAL ASSAULT.
[Now RCC § 22E-1301. Sexual Assault.]

[1383] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018) (defining "actor.") cmt. at 51.

[1384] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1385] Ala. Code §§ 13A-6-61(a)(3), 13A-6-62(a)(1) (requiring that the actor be 16 years of age or older for sexual intercourse with a complainant who is less than 12 years of age, or less than 16 years but more than 12 years of age when the actor is at least 2 years older); Alaska Stat. Ann. §§ 11.41.434(a)(1), 11.41.41.436(a)(1) (requiring that the actor be 16 years of age or older for sexual penetration with a complainant under 13 years of age and the actor be 17 years of age or older for sexual penetration with a complainant that is 13, 14, or 15 years of age and at least four years younger).

[1386] Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), 510.050(1)(a), 510.060(1)(b) (first degree rape offense prohibiting any actor from engaging in sexual intercourse with a complainant that is less than 12 years old, but requiring that the actor be 18 years of age or more for second degree rape [sexual intercourse with a complainant less than 14 years old] and requiring that the actor be 21 years of age or more for third degree rape [sexual intercourse with a complainant less than 16 years of age]); N.Y. Penal Law §§ 130.25(2), 130.30(1), 130.35(3), (4) (offense of third degree rape prohibiting an actor 21 years of age or older from engaging in sexual intercourse with a person less than 17 years of age and second degree rape prohibiting an actor 18 years of age or more from engaging in sexual intercourse with a complainant less than 15 years of age, but first degree rape prohibiting any actor from engaging in sexual intercourse with a complainant less than 11 years old or an actor 18 years of age or more from engaging in sexual intercourse with a complainant less than 13 years of age), 130.96 (offense of predatory sexual assault against a child prohibiting an actor 18 years of age or more from committing first degree rape when the complainant is less than 13 years old); Utah Code Ann. §§ 76-5-401(1), (2)(a), 76-5-402.1(1) (offense of unlawful sexual activity with a minor prohibiting an actor 18 years of age or older from engaging in sexual intercourse with a complainant who is 14 years of age or older but less than 16 years of age, but the offense of rape of a child prohibiting any actor from engaging in sexual intercourse with a complainant under the age of 14 years).

Relation to National Legal Trends. *The revised sexual assault offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[1387]

First, there is strong support in the criminal codes of reformed jurisdictions for first degree and third degree of the revised sexual assault statute prohibiting threats of "significant bodily injury," as well as threats of an "unwanted sexual act." The current first degree[1388] and third degree[1389] sexual abuse statutes prohibit threatening to subject any person to "bodily injury,"[1390] a defined term that differs from the levels of bodily injury codified in the District's current assault statutes. First degree and third degree of the revised sexual assault statute prohibit threats "to commit an unwanted sexual act or cause significant bodily injury to any person." "Significant bodily injury" is defined in RCC § 22E-3001.[1391]

There is strong support in the criminal codes of other jurisdictions for first degree and third degree of the revised sexual assault statute prohibiting threats of "significant bodily injury." Only seven[1392] of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1393] ("reformed jurisdictions") have an intermediate level of physical harm like "significant bodily injury" in current District law. None of these jurisdictions' sex offenses prohibit threats of the intermediate level of physical harm. However, three of these reformed jurisdictions[1394] prohibit threats of "serious bodily injury" or a similar term that requires a

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[1387] Unless otherwise noted, this survey is limited to sex offenses in other jurisdictions that require sexual penetration, not sexual contact or touching. If a jurisdiction has multiple sex offenses for penetration, the offense that includes vaginal intercourse was used. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[1388] D.C. Code § 22-3002(a)(2).

[1389] D.C. Code § 22-3004(2).

[1390] 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.").

[1391] The RCC definition of "significant bodily injury" also clarifies certain injuries are within the scope of the term: "a fracture of a bone; a laceration that is at least one inch in length and at least one quarter inch in depth; a burn of at least second degree severity; a temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation." RCC § 22E-3001

[1392] Haw. Rev. Stat. Ann. § 707-700 ("substantial bodily injury."); Ind. Code Ann. § 35-31.5-2-204.5 ("moderate bodily injury."); Minn. Stat. Ann. § 609.02(7a) ("substantial bodily injury."); N.D. Cent. Code Ann. § 12.1-01-04(29) ("substantial bodily injury."); Utah Code Ann. § 76-1-601(12) ("substantial bodily injury."); Wash. Rev. Code Ann. § 9A.04.110(4)(b) ("substantial bodily harm."); Wis. Stat. Ann. § 939.22(38) ("substantial bodily harm.").

[1393] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1394] Minn. §§ 609.342(1)(c), 609.02(8) (offense of criminal sexual conduct in the first degree including sexual penetration when "circumstances existing at the time of the act case the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another" and defining "great bodily

higher threshold of physical harm than the current definition of "bodily injury"[1395] in the District's current sex offenses. Two of these reformed jurisdictions[1396] prohibit threats of "bodily injury" or "physical injury," and require a similar threshold of physical harm as the current definition of "bodily injury"[1397] in the District's current sex offenses. In the remaining two reformed jurisdictions,[1398] the required level of physical harm is unclear because jurisdictions prohibit threats of "force" or threats of "physical injury," but do not statutorily define these terms.

Of the remaining 22 reformed jurisdictions, six reformed jurisdictions[1399] prohibit threats of "serious bodily injury" or a similar term that requires a higher threshold of

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harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm."); N.D. Cent. Code Ann. §§ 12.1-20-03(1)(a), 12.1-01-04(27) (prohibiting a sexual act when the actor "compels the victim to submit . . . by threat of . . . serious bodily injury . . . to be inflicted on any human being" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Utah Code Ann. §§ 76-5-405(1)(a)(ii), 76-1-601(11) (offense of aggravated sexual assault prohibiting threat of "serious bodily injury to be inflicted imminently on any person" and defining "serious bodily injury" as "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.").

[1395] D.C. Code Ann. § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[1396] Haw. Rev. Stat. Ann. §§ 707-730(1)(a) (offense of first degree sexual assault prohibiting sexual penetration by "strong compulsion" and defining "strong compulsion" to include a threat "that places a person in fear of bodily injury to the individual or another person."), 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. §§ 9A.44.050(1)(a), 9A.44.010(6) (offense of second degree rape prohibiting sexual intercourse "by forcible compulsion" and defining "forcible compulsion" to include "a threat, express or implied, that places a person in fear of . . . physical injury to herself or himself or another person."), 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition.").

[1397] D.C. Code Ann. § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[1398] Ind. Code § 35-42-4-1(1)(a)(1) (prohibiting sexual intercourse by "threat of force."); Wis. Stat. Ann. § 940.22(2)(a) (prohibiting sexual contact or sexual intercourse by "threat of force or violence.").

[1399] Ala. Code §§ 13A-6-61(a)(1), 13A-6-60(8) (offense of first degree rape prohibiting sexual intercourse "by forcible compulsion" and defining "forcible compulsion to include "a threat, express or implied, that places a person in fear of immediate . . . serious physical injury to himself or another person."), 13A-1-2(14) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."); Colo. Rev. Stat. Ann. §§ 18-3-402(4)(b), 18-1-901(3)(p) (making sexual assault a class 3 felony if the "actor causes submission of the victim by threat of imminent . . . serious bodily injury . . . to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats" and defining "serious bodily injury" as "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); Del. Code Ann. tit. 11, §§ 773(a)(2)(b) (offense of first degree rape prohibiting sexual intercourse without consent when "it was facilitated by or occurred during the course of the commission of attempted commission of . . . terroristic

physical harm than the current definition of "bodily injury"[1400] in the District's current sex offenses. Eight[1401] of these 22 reformed jurisdictions prohibit threats of "physical

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threatening."), 621(a)(1) (offense of terroristic threats prohibiting threats "to commit any crime likely to result in death or in serious injury to person."); Me. Rev. Stat. Ann. tit. 17-A, §§ 253(1)(A), 251(E) (offense of gross sexual assault prohibiting a sexual act by "compulsion" and defining "compulsion" to include the use or threat of physical force that "produces in that person a reasonable fear that . . . serious bodily injury . . . might be immediately inflicted upon that person or another human being."), 2(23) (defining "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ, or extended convalescence necessary for recovery of physical health."); S.D. Codified Laws §§ 22-22-1(2), 22-1-2(44) (offense of rape prohibiting sexual penetration by "threats of immediate and great bodily harm against the victim or other persons within the victim's presence" and defining "great bodily harm" as "such injury as is grave and not trivial, and gives rise to apprehension of danger to life, health, or limb."); Tex. Penal Code §§ 22.021(a)(1)(A), (a)(2)(A)(ii), 1.07(a)(46) (offense of aggravated sexual assault prohibiting sexual activity if the actor "by actors or words places the victim in fear that . . . serious bodily injury . . . will be imminently inflicted on any person" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.").

[1400] D.C. Code Ann. § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[1401] Alaska Stat. Ann. §§ 11.41.420(a)(1), 11.41.470(8)(A) (offense of first degree sexual assault prohibiting sexual penetration "without consent" and defining "without consent" to include "express or implied threat of . . . imminent physical injury . . . to be inflicted on anyone."), 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ark. Code Ann. §§ 5-14-103(a)(1), 5-14-101(2) (offense of rape prohibiting sexual activity "by forcible compulsion" and defining "forcible compulsion" to include "a threat, express or implied, of . . . physical injury to . . . any person."), 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Conn. Gen. Stat. Ann. §§ 53a-70(a)(1) (offense of sexual assault in the first degree prohibiting sexual intercourse "by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person."), 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Ky. Rev. Stat. Ann. §§ 510.0401)(a) (offense of rape in the first degree prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include "threat of physical force, express or implied, which places a person in fear of immediate . . . physical injury to self or another person."), 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Mont. Code Ann. §§ 45-5-508(1), 45-5-501(2)(a) (offense of aggravated sexual intercourse without consent prohibiting sexual intercourse without consent with "force" and defining "force" to include "the threatened infliction of bodily injury."), 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); N.J. Stat. Ann. §§ 2C:14-2(c)(1), 2C:14-1(J) (offense of sexual assault prohibiting sexual penetration by "physical force or coercion" and defining "coercion" as "those acts which are defined as criminal coercion in [specified sections of the criminal coercion offense]."), 2C:13-5(a)(1) (offense of criminal coercion including "if, with purpose unlawfully to restrict another's freedom of action to engage in or refrain from engaging in conduct, [the actor] threatens to inflict bodily injury on anyone . . . regardless of the immediacy of the threat."), 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law §§ 130.35(1), 130.00(8)(b) (offense of first degree rape prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include "a threat, express or implied, which places a person in fear of immediate . . . physical injury to himself, herself, of another person."), 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); Or. Rev. Stat. Ann. §§ 163.375(1)(a), 163.305(1)(b) (offense of first degree rape prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include a "threat, express or implied, that places a person in reasonable

injury" or a similar term that require a similar or lower threshold of physical harm the current definition of "bodily injury"[1402] in the District's current sex offenses. In the remaining eight reformed jurisdictions, the required level of physical harm is unclear because jurisdictions prohibit threats of "force" or threats of "physical injury," but do not statutorily define these terms[1403] or the definitions do not specifically include threats.[1404]

Due to the RCC definition of "significant bodily injury," threats of impairment of a "mental faculty" are excluded from first degree and third degree of the revised sexual assault statute.[1405] As is discussed in the commentary, it is unclear to what "mental faculty" refers. Regardless, there is strong support in the criminal codes of the reformed jurisdictions for excluding threats of mental injury or psychological distress from the revised sexual assault statute. Only one of the 29 reformed jurisdictions specifically includes threats of mental injury in its sexual assault offense, and it is limited to threats of "mental illness or impairment."[1406] As previously discussed, eight reformed jurisdictions prohibit threats of "force" or threats of "physical injury," but do not statutorily define

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fear of immediate or future . . . physical injury to self or another person."), 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition.").

[1402] D.C. Code Ann. § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[1403] Ariz. Rev. Stat. Ann. §§ 13-1406(A), 13-1401(A)(7)(a) (offense of sexual assault prohibiting sexual activity "without consent" and defining "without consent" to include the "threatened use of force against a person."); 720 Ill. Comp. Stat. Ann. 11-1.20(a)(1) (offense of criminal sexual assault prohibiting sexual penetration by "threat of force."); Kan. Stat. Ann. §§ 21-5503(a)(1)(A) (offense of rape prohibiting sexual intercourse without consent when the complainant is "overcome by force or fear."); Mo. Ann. Stat. § 566.030(1) (offense of rape in the first degree prohibiting sexual intercourse by the use of "forcible compulsion."); N.H. Rev. Stat. Ann. § 632-A:2(1)(a), (1)(c) (offense of aggravated felonious sexual assault prohibiting sexual penetration "through the actual application of physical force [or] physical violence" or "threatening to use physical violence . . . and the victim believes that the actor has the present ability to execute these threats.").

[1404] Ohio Rev. Code Ann. §§ 2907.02(A)(2), 2901.01(A)(1) (prohibiting sexual conduct by "force or threat of force" and defining "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."); Tenn. Code Ann. §§ 39-13-503(a)(1), 39-13-501(1) (offense of rape prohibiting sexual penetration by "force or coercion" and defining "coercion" as "threat of kidnapping, extortion, force or violence to be performed immediately or in the future."), 39-11-106(a)(12) (defining "force" as "compulsion as "the use of physical power or violence and shall be broadly construed to accomplish the purposes of this title."); 18 Pa. Stat. Ann. § 3121(a)(1), (a)(2), 3101 (prohibiting sexual intercourse by "forcible compulsion" or "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied.").

[1405] The current definition of "bodily injury" includes "injury involving loss or impairment of the function of a . . . mental faculty." D.C. Code § 22-3001(2). By extension, the current first degree and third degree sexual abuse statutes extend to threats that any person will be subjected to such an injury of a "mental faculty."

[1406] Mont. Code Ann. §§ 45-5-508(1), 45-5-501(2)(a) (offense of aggravated sexual intercourse without consent prohibiting sexual intercourse without consent with "force" and defining "force" to include "the threatened infliction of bodily injury."), 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.").

these terms[1407] or the definitions do not specifically include threats.[1408] It is unclear if these jurisdictions' sexual assault statutes extend to threats of mental illness or psychological distress.

Only two of the 29 reformed jurisdictions have sexual assault statutes that specifically prohibit threats of unwanted sexual activity.[1409] However, threats of unwanted sexual activity may fall under threats of physical harm, and at least eight of the reformed jurisdictions prohibit sexual assault by coercion that include threats of unwanted sexual activity.[1410]

[1407] Ariz. Rev. Stat. Ann. §§ 13-1406(A), 13-1401(A)(7)(a) (offense of sexual assault prohibiting sexual activity "without consent" and defining "without consent" to include the "threatened use of force against a person."); 720 Ill. Comp. Stat. Ann. 11-1.20(a)(1) (offense of criminal sexual assault prohibiting sexual penetration by "threat of force."); Kan. Stat. Ann. §§ 21-5503(a)(1)(A) (offense of rape prohibiting sexual intercourse without consent when the complainant is "overcome by force or fear."); Mo. Ann. Stat. § 566.030(1) (offense of rape in the first degree prohibiting sexual intercourse by the use of "forcible compulsion."); N.H. Rev. Stat. Ann. § 632-A:2(1)(a), (1)(c) (offense of aggravated felonious sexual assault prohibiting sexual penetration "through the actual application of physical force [or] physical violence" or "threatening to use physical violence . . . and the victim believes that the actor has the present ability to execute these threats.").

[1408] Ohio Rev. Code Ann. §§ 2907.02(A)(2), 2901.01(A)(1) (prohibiting sexual conduct by "force or threat of force" and defining "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."); Tenn. Code Ann. §§ 39-13-503(a)(1), 39-13-501(1) (offense of rape prohibiting sexual penetration by "force or coercion" and defining "coercion" as "threat of kidnapping, extortion, force or violence to be performed immediately or in the future."), 39-11-106(a)(12) (defining "force" as "compulsion as "the use of physical power or violence and shall be broadly construed to accomplish the purposes of this title."); 18 Pa. Stat. Ann. § 3121(a)(1), (a)(2), 3101 (prohibiting sexual intercourse by "forcible compulsion" or "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied.").

[1409] Del. Code Ann. tit. 11 §§ 772(a)(1), 761(j)(1) (offense of second degree rape prohibiting sexual intercourse without consent and defining "without consent" to include the actor "compelled the victim to submit . . . by any act of coercion as defined in §§ 791 and 792 of this title."), 791(3) ("A person is guilty of coercion when the person compels or induces a person to engage in conduct which the victim has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which the victim has a legal right to engage, by means of instilling in the victim a fear that, if the demand is not complied with, the defendant or another will . . . [e]ngage in other conduct constituting a crime."); Ky. Rev. Stat. Ann. §§ 510.040(1)(a), 510.010(2) (prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include "threat of physical force, express or implied, which places a person in . . . fear of any offense under this chapter."); N.J. Stat. Ann. §§ 2C:14-2(c)(1), 2C:14-1(J) (offense of sexual assault prohibiting sexual penetration by "physical force or coercion" and defining "coercion" as "those acts which are defined as criminal coercion in [specified sections of the criminal coercion offense]."), 2C:13-5(a)(1) (offense of criminal coercion including "if, with purpose unlawfully to restrict another's freedom of action to engage in or refrain from engaging in conduct, [the actor] threatens to . . . commit any other offense.").

[1410] Colo. Rev. Stat. Ann. § 18-3-402(1)(a) (sexual assault offense prohibiting sexual activity when the "actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will."); Me. Rev. Stat. Ann. tit. 17-A, § 253(2)(B) (prohibiting a sexual act "by any threat."); Mont. Code Ann. §§ 45-5-503(1), 45-5-501(1)(b)(iii) ("prohibiting sexual intercourse "without consent" and stating that a person is "incapable of consent" if he or she is "overcome by deception, coercion, or surprise."); N.D. Cent. Code Ann. § 12.1-20-04(1), 12.1-20-02(1) (prohibiting a sexual act or sexual contact when the actor "[c]ompels the other person to submit by any threat or coercion that would render a person reasonably incapable of resisting" and defining "coercion" as "to exploit fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance."); Ohio Rev. Code Ann. § 2907.02(A)(1) (offense prohibiting sexual conduct when the actor

Second, regarding the actor's ability to claim he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[1411] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[1412] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[1413]

Third, there is mixed support in the criminal codes of the reformed jurisdictions for the revised sexual assault statute specifying one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Fifteen[1414] of the 29

"coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution."); 18 Pa. Stat. Ann. § 3121(a)(1), 3101 (prohibiting sexual intercourse by "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied."); S.D. Codified Laws § 22-22-1(1) (offense of rape prohibiting sexual penetration "through the use of coercion."); Tex. Penal Code Ann. §§ 22.011(a)(1), (b)(1) (prohibiting sexual activity without consent and stating that a sexual assault is "without the consent" of the complainant if "the actor compels the other person to submit or participate by the use of . . . coercion."), 1.07(9)(A) (defining "coercion" to include a "threat, however communicated to commit an offense.").

[1411] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[1412] LAFAVE AT 2 SUBST. CRIM. L. § 9.5.

[1413] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[1414] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2),

reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[1415] However, it is not possible to generalize about the sentencing requirements for these penalty enhancements and gradations in these reformed jurisdictions due to the wide differences in sentencing structures.

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

The limited support in the reformed jurisdictions for these revisions is due to the fact that most of the 29 reformed jurisdictions do not have sex offense penalty enhancements based on the age of the complainant. As few as three[1416] of the 29 reformed jurisdictions have age-based penalty enhancements for complainants under the age of 18 years for their general sexual assault statutes. Instead, most of the 29 reformed jurisdictions incorporate sexual assault of complainants under the age of 18 years as

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(b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[1415] Alaska Stat. Ann. § 11.41.410(2).

[1416] A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense or have separate offenses for sexual assault of complainants under the age of 18 years were not considered to have age-based penalty enhancements. Ariz. Rev. Stat. Ann. § 13-1406(A), (B) (making sexual assault a class 2 felony, unless the complainant is under the age of 15, in which case the offense is subject to enhanced penalties under Ariz. Rev. Stat. Ann. § 13-705); Conn. Gen. Stat. Ann. §§ 53a-70(a), (b)(1), (b)(2) (making sexual assault in the first degree a class B felony, unless it is a forcible rape of a complainant under 16 years of age or the complainant is under 13 years of age and the actor is more than two years older, in which case it is a class A felony), 53a-70a(a), (b)(1), (b)(2) (making aggravated sexual assault in the first degree a Class B felony unless the complainant is under the age of 16 years, in which case it is a Class A felony); Mo. Ann. Stat. § 566.030(1), (2), (3) (making rape in the first degree a felony with a term of imprisonment of life or not less than five years unless the complainant is under the age of 12 years, in which case the required term of imprisonment is life imprisonment without eligibility for parole until certain conditions are met).

gradations of the general sexual assault offense, and do not have separate statutes for sexual assault of the youngest complainants.[1417]

Of these three reformed jurisdictions, one jurisdiction has a penalty enhancement for a complainant under the age of 16 years,[1418] a second jurisdiction has an enhancement for a complainant under the age of 15 years,[1419] and the third jurisdiction has a penalty enhancement for a complainant under the age of 12 years.[1420]

Fifth, there is little support in the criminal codes of reformed jurisdictions for the revisions to the age-based sexual assault penalty enhancements for complainants over the age of 65 years and for vulnerable adults. Only two of the 29 reformed jurisdictions' criminal codes have penalty enhancements for the sexual assault of an elderly person.[1421] A third reformed jurisdiction requires a relationship between the complainant and the actor and is limited to "frail" elderly individuals.[1422] None of these reformed jurisdictions specify an age requirement for the actor, and none of them specify required culpable mental states in the penalty enhancement statutes. Only one of the 29 reformed

[1417] Citations indicate the subsections that codify gradations for complainants under the age of 18 years in the general sexual assault offense. Ala. Code §§ 13A-6-61(a)(3), 13A-6-62(a)(1); Ark. Code Ann. §§ 5-14-103(a)(3)(A), 5-14-127(a)(1)(A); Colo. Rev. Stat. Ann. § 13-3-402(1)(d), (1)(e); Conn. Gen. Stat. Ann. §§ 53a-70(a)(2), 53a-71(a)(1), Del. Code Ann. tit. 11, §§ 770(a)(1), 771(a)(1), 773(a)(5); Haw. Rev. Stat. Ann. §§ 707-730(b), (c); Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), 510.050(1)(a), 510.060(1)(b); Kan. Stat. Ann. § 21-5503(a)(3); Me. Rev. Stat. Ann. tit. 17-A, § 253(1)(B), (1)(C); Mont. Code Ann. § 45-5-503(3), (4), (5); Minn. Stat. Ann. §§ 609.342(1)(a), (1)(b), (1)(g), (1)(h), 609.344(1)(a), (1)(b); N.J. Stat. Ann. § 2C:14-2(a)(1), (c)(4); N.Y. Penal Law §§ 130.25(2), 130.30(1), 130.35(3), (4), 130.96; N.D. Cent. Code Ann. § 12.1-20-03(1)(d); N.H. Rev. Stat. Ann. § 632-A:2(l); Ohio Rev Code Ann. § 2907.02(A)(1)(b); Or. Rev. Stat. Ann. §§ 163.355, 163.365, 163.366(1)(b); 18 Pa. Stat. Ann. § 3121(c); S.D. Codified Laws § 22-22-1(1), (5); Tex. Penal Code Ann. §§ 22.011(a)(2), (c)(1), 22.021(a)(1)(B), (a)(2)(b), (b)(1).

[1418] Conn. Gen. Stat. Ann. §§ 53a-70(a), (b)(1), (b)(2) (making sexual assault in the first degree a class B felony, unless it is a forcible rape of a complainant under 16 years of age or the complainant is under 13 years of age and the actor is more than two years older, in which case it is a class A felony), 53a-70a(a), (b)(1), (b)(2) (making aggravated sexual assault in the first degree a Class B felony unless the complainant is under the age of 16 years, in which case it is a Class A felony).

[1419] Ariz. Rev. Stat. Ann. § 13-1406(A), (B) (making sexual assault a class 2 felony, unless the complainant is under the age of 15, in which case the offense is subject to enhanced penalties under Ariz. Rev. Stat. Ann. § 13-705).

[1420] Mo. Ann. Stat. § 566.030(1), (2), (3) (making rape in the first degree a felony with a term of imprisonment of life or not less than five years unless the complainant is under the age of 12 years, in which case the required term of imprisonment is life imprisonment without eligibility for parole until certain conditions are met).

[1421] 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(5) (offense of aggravated criminal sexual assault prohibiting criminal sexual assault "when the victim is 60 years of age or older."); Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(C), (b)(2) (aggravated sexual assault offense prohibiting sexual activity when the complainant is "an elderly individual" [person 65 years of age or older].").

[1422] Wash. Rev. Code Ann. §§ 9A.44.050(1)(f) (offense of rape in the second degree prohibiting sexual intercourse with a "frail elder or vulnerable adult" when the actor had a "significant relationship" with the complainant or "was providing transportation, within the course of his or her employment, to the victim at the time of the offense."), 9A.44.010(16) (defining "frail elder or vulnerable adult" as a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.").

jurisdictions' criminal codes has a penalty enhancement for the sexual assault of a vulnerable adult and does not statutorily specify a culpable mental state.[1423]

Sixth, there is strong support in the criminal codes of the reformed jurisdictions for the revised sexual assault penalty enhancement for weapons requiring that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[1424] In contrast, the revised sexual assault penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" a dangerous weapon or imitation weapon. Fourteen of the 29 reformed jurisdictions have sex-offense specific penalty enhancements for the use of dangerous weapons during sexual assault.[1425] There is strong support for requiring a causation

[1423] Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(C), (b)(3) (aggravated sexual assault offense prohibiting sexual activity when the complainant is "a disabled individual" and defining "disabled individual" as "a person older than 13 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self.").

[1424] D.C. Code § 22-3020(a)(6).

[1425] Colo. Rev. Stat. Ann. § 18-3-402(5)(III) (making sexual assault a class 2 felony if the "actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim."); Conn. Gen. Stat. Ann. § 53a-70a(a)(1) (offense of aggravated sexual assault in the first degree prohibiting committing sexual assault in the first degree and "in the commission of such offense such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a deadly weapon."); Del. Code Ann. tit. 11, § 773(a)(3) (first degree rape prohibiting sexual intercourse when "[i]n the course of the commission of rape in the second, third or fourth degree, or while in the immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon or represents by word or conduct that the person is in possession of or control of a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1) (offense of aggravated criminal sexual assault prohibiting committing criminal sexual assault and during the commission of the offense the actor "displays, threatens to use, or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon."); Ind. Code Ann. § 35-42-41 (b)(2) (making rape a Level 1 felony if "it is committed while armed with a deadly weapon."); Mo. Ann. Stat. §§ 566.010(1)(b) (defining "aggravated sexual offense" as "any sexual offense, in the course of which, the actor displays a deadly weapon or dangerous instrument in a threatening manner."); Minn. Stat. Ann. § 609.342(1)(d) (offense of criminal sexual conduct in the first degree prohibiting sexual penetration when "the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit."); N.J. Stat. Ann. § 2C:14-2(a)(4) (offense of aggravated sexual assault prohibiting sexual penetration when the "actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object."); N.Y. Penal Law § 130.95(1)(b) (offense of predatory sexual assault prohibiting committing specified sex offenses when "in the course of the commission of the crime or the immediate flight therefrom" the actor "uses or threatens the immediate use of a dangerous instrument."); Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(A)(iv) (offense of aggravated sexual assault prohibiting sexual activity without consent when the actor "uses or exhibits a deadly weapon in the course of the same criminal episode."); Tenn. Code Ann. § 39-13-502(a)(1) (offense of aggravated rape prohibiting sexual penetration when "[f]orce or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a

requirement in the revised enhancement. Three of the 14 reformed jurisdictions explicitly require that the use or display of the dangerous weapon cause the sexual conduct[1426] and an additional eight of these reformed jurisdictions require the use or display of the weapon during the course of the sexual assault,[1427] which includes causation. The remaining three of these jurisdictions require that the actor was "armed with" the dangerous weapon and the scope of the enhancement and any causation requirement is unclear. [1428] Eight of the 14 reformed jurisdictions specifically include

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manner to lead the victim reasonably to believe it to be a weapon."); Utah Code Ann. § 76-5-405(1)(a)(i) (offense of aggravated sexual assault prohibiting, in the course of committing specified sex offenses, "the actor uses, or threatens the victim with the use of, a dangerous weapon."); Wash. Rev. Code Ann. § 9A.44.045(1)(a) (offense of rape in the first degree prohibiting sexual intercourse by forcible compulsion when the actor "[u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon."); Wis. Stat. Ann. § 940.225(1)(b) (offense of first degree sexual assault prohibiting sexual contact or sexual intercourse without consent "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon.").

[1426] Colo. Rev. Stat. Ann. § 18-3-402(5)(III) (making sexual assault a class 2 felony if the "actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim."); Minn. Stat. Ann. § 609.342(1)(d) (offense of criminal sexual conduct in the first degree prohibiting sexual penetration when "the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit."); Wis. Stat. Ann. § 940.225(1)(b) (offense of first degree sexual assault prohibiting sexual contact or sexual intercourse without consent "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon.").

[1427] Conn. Gen. Stat. Ann. § 53a-70a(a)(1) (offense of aggravated sexual assault in the first degree prohibiting committing sexual assault in the first degree and "in the commission of such offense such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a deadly weapon."); Del. Code Ann. tit. 11, § 773(a)(3) (first degree rape prohibiting sexual intercourse when "[i]n the course of the commission of rape in the second, third or fourth degree, or while in the immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon or represents by word or conduct that the person is in possession of or control of a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1) (offense of aggravated criminal sexual assault prohibiting committing criminal sexual assault and during the commission of the offense the actor "displays, threatens to use, or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon."); Mo. Ann. Stat. §§ 566.010(1)(b) (defining "aggravated sexual offense" as "any sexual offense, in the course of which, the actor displays a deadly weapon or dangerous instrument in a threatening manner."); N.Y. Penal Law § 130.95(1)(b) (offense of predatory sexual assault prohibiting committing specified sex offenses when "in the course of the commission of the crime or the immediate flight therefrom" the actor "uses or threatens the immediate use of a dangerous instrument."); Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(A)(iv) (offense of aggravated sexual assault prohibiting sexual activity without consent when the actor "uses or exhibits a deadly weapon in the course of the same criminal episode."); Utah Code Ann. § 76-5-405(1)(a)(i) (offense of aggravated sexual assault prohibiting, in the course of committing specified sex offenses, "the actor uses, or threatens the victim with the use of, a dangerous weapon."); Wash. Rev. Code Ann. § 9A.44.045(1)(a) (offense of rape in the first degree prohibiting sexual intercourse by forcible compulsion where the actor "[u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon.").

[1428] Ind. Code Ann. § 35-42-41(b)(2) (making rape a Level 1 felony if "it is committed while armed with a deadly weapon."); N.J. Stat. Ann. § 2C:14-2(a)(4) (offense of aggravated sexual assault prohibiting sexual penetration when the "actor is armed with a weapon or any object fashioned in such a manner as to lead the

imitation weapons in the weapon enhancement. None 14 reformed jurisdictions specify a culpable mental state in the sex offense weapon enhancement.

Seventh, there is strong support in the criminal codes of the 29 reformed jurisdictions for omitting "extreme physical pain," rendering a complainant "unconscious," and causing impairment of a "mental faculty" from the revised penalty enhancement for causing serious bodily injury. At least 18 of the 29 reformed jurisdictions, require either serious bodily injury[1429] or a lower threshold of bodily

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victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object."); Tenn. Code Ann. § 39-13-502(a)(1) (offense of aggravated rape prohibiting sexual penetration when "[f]orce or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon.").

[1429] Alaska Stat. Ann. §§ 11.41.410(a)(2), 11.81.900(a)(57 (offense of sexual assault in the first degree prohibiting engaging in sexual penetration and causing "serious physical injury" and defining "serious physical injury" as "(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or (B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."); Ariz. Rev. Stat. Ann. §§ 13-1406(D), 13-105(39) (enhancing the sentence for sexual assault if the actor inflicted "serious physical injury" and defining "serious physical injury" as "includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb."); Colo. Rev. Stat. Ann. §§ 18-3-402(5)(a)(II), 18-1-901(3)(p) (elevating the penalty for sexual assault if the complainant suffers "serious bodily injury" and defining "serious bodily injury" as "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); Conn. Gen. Stat. Ann. §§ 53a-70a(a)(3), 53a-3(4) (aggravated sexual assault requiring "under circumstances evincing an extreme indifference to human life [the actor] recklessly engages in conduct which creates a risk of death to the [complainant], and thereby causes serious physical injury to such [complainant]" and defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ."); Del. Code Ann. tit. 11, § 773(a)(1) (offense of first degree rape requiring "physical injury or serious mental or emotional injury" to the complainant); Ind. Code Ann. §§ 34-42-4-1(b)(3), 35-31.5-2-292 (elevating the penalty for rape if it results in "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); Mo. Ann. Stat. §§ 566.010(1)(a), 556.061 (defining "aggravated sexual offense" as any sexual offense, where, in the course of the offense, the actor inflicts "serious physical injury" on the complainant and defining "serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); N.J. Stat. Ann. §§ 2C:14-2(c)(6), 2C:14-1(f) (offense of aggravated sexual assault requiring "severe personal injury" and defining "severe personal injury" as "severe bodily injury, disfigurement, disease, incapacitating mental anguish or chronic pain."); N.Y. Penal Law §§ 130.95(1)(a), 10.00(10) (offense of rape in the first degree requiring "serious physical injury" and defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."); N.D. Cent. Code Ann. §§ 12.1-20-03(3)(a), 12.1-01-04(27) (elevating the penalty for sexual assault if the actor inflicts "serious bodily injury" on the complainant and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Tex. Penal Code Ann. §§ 22.021(a)(2)(i), § 1.07(46) (offense of aggravated sexual assault requiring "serious bodily injury" and

injury[1430] for a sexual assault offense or gradation. Of these 18 jurisdictions, three include rendering the complainant unconscious[1431] and two jurisdictions include extreme pain.[1432] Of the 29 reformed jurisdictions, five include some kind of mental distress or mental injury in their sexual assault offenses.[1433]

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

[1430] 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(2), 5/11-0.1 (offense of aggravated criminal sexual assault requiring "bodily harm" to the complainant and defining "bodily harm" as "physical harm, and includes, but is not limited to, sexually transmitted disease, pregnancy, and impotence."); Mont. Code Ann. §§ 45-5-503(3)(a), 45-2-101(5) (elevating the punishment for sexual intercourse without consent if the actor inflicts "bodily injury" on anyone and defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. §§ 609.342(1)(e), 609.341(1)(8) (offense of criminal sexual conduct in the first degree requiring that the actor cause "personal injury" to the complainant and defining "personal injury" as "bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy."); Tenn. Code Ann. §§ 39-13-502(a)(2), 39-11-106(a)(2) (offense of aggravated rape requiring "bodily injury" to the complainant and defining "bodily injury" as "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

[1431] Ind. Code Ann. §§ 34-42-4-1(b)(3), 35-31.5-2-292 (elevating the penalty for rape if it results in "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); N.D. Cent. Code Ann. §§ 12.1-20-03(3)(a), 12.1-01-04(27) (elevating the penalty for sexual assault if the actor inflicts "serious bodily injury" on the complainant and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Wash. Rev. Code Ann. § 9A.44.040(1)(c) (offense of first degree rape requiring "serious physical injury, including but not limited to physical injury which renders the [complainant] unconscious.").

[1432] Ind. Code Ann. §§ 34-42-4-1(b)(3), 35-31.5-2-292 (elevating the penalty for rape if it results in "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); N.D. Cent. Code Ann. §§ 12.1-20-03(3)(a), 12.1-01-04(27) (elevating the penalty for sexual assault if the actor inflicts "serious bodily injury" on the complainant and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs.")

[1433] Del. Code Ann. tit. 11, § 773(a)(1) (offense of first degree rape requiring "physical injury or serious mental or emotional injury" to the complainant); N.J. Stat. Ann. §§ 2C:14-2(c)(6), 2C:14-1(f) (offense of aggravated sexual assault requiring "severe personal injury" and defining "severe personal injury" as "severe bodily injury, disfigurement, disease, incapacitating mental anguish or chronic pain."); Mont. Code Ann. §§ 45-5-503(3)(a), 45-2-101(5) (elevating the punishment for sexual intercourse without consent if

RCC § 22E-1304. SEXUAL ABUSE OF A MINOR.
[Now RCC § 22E-1302. Sexual Abuse of a Minor.]

Relation to National Legal Trends. *The revised sexual abuse of a minor offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[1434]

First, there is strong support in the criminal codes of other jurisdictions for separate gradations for a complainant under the age of 12 years when the actor is at least four years older. When compared to the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1435] ("reformed jurisdictions"), the District's current child sexual abuse statutes are an outlier in having only one gradation for complainants under the age of 16 years.[1436] Of these 29 reformed jurisdictions,[1437] only three reformed jurisdictions' sex offenses are limited to one gradation for the age of a complainant under 16 years.[1438] Fifteen of the 29 reformed jurisdictions have two gradations for the age of a complainant under 16 years in their sex offenses.[1439] Eight of the reformed jurisdictions have three gradations for the

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the actor inflicts "bodily injury" on anyone and defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. §§ 609.342(1)(e), 609.341(1)(8) (offense of criminal sexual conduct in the first degree requiring that the actor cause "personal injury" to the complainant and defining "personal injury" as "bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy."); Tenn. Code Ann. §§ 39-13-502(a)(2), 39-11-106(a)(2) (offense of aggravated rape requiring "bodily injury" to the complainant and defining "bodily injury" as "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

[1434] Unless otherwise noted, this survey is limited to sex offenses that require sexual penetration, not sexual contact or touching. If a jurisdiction has multiple sex offenses for penetration, the offense that includes vaginal intercourse was used. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[1435] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1436] 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.").

[1437] This survey only includes gradations based solely on the age of the complainant. This survey counted the number of different age categories, even if the penalties did not change, or if the penalties varied with the age of the actor or the age gap between the actor and the complainant.

[1438] Ariz. Rev. Stat. Ann. § 13-1405(A), (B) (prohibiting sexual intercourse with a complainant under 18 years of age and making it a class 6 felony if the complainant is at least 15 years of age but under 18 years of age); N.D. Cent. *Code Ann. § 12.1-20-03(1)(d), (3) (making it class A felony to engage in a sexual act with a complainant under the age of 15 years and a class AA felony if the actor is at least 21 years of age);* Tex. Penal Code § 22.021(a)(1)(B), (a)(2)(B), (e) (making it a first degree felony to engage in sexual activity with a complainant that is under the age of 14 years).

[1439] *Ala. Code §§ 13A-6-61(a)(3), (b) (making it a Class A felony for an actor 16 years of age or older to engage in sexual intercourse with a complainant under the age of 12 years), 13A-6-62(a)(1), (b) (making it*

a Class B felony for an actor 16 years of age or older to engage in sexual intercourse with a complainant under the age of 16 years but more than 12 years old); Alaska Stat. Ann. §§ 11.41.434(a)(1), (b) (making it an unclassified felony for an actor 16 years of age or older to engage in sexual penetration with a complainant that is under the age of 13 years), 11.41.436(a)(1), (b) (making it a Class B felony for an actor 17 years of age or older to engage in sexual penetration with a complainant that is 13, 14, or 15 years of age and at least four years younger than the actor); Ark. Code Ann. §§ 5-14-103(a)(3)(A), (c)(1) (making it a Class Y felony to engage in sexual activity with a complainant who is under 14 years of age), 5-14-127(a)(1)(A)(i), (b)(1) (making it a Class D felony for an actor that is 20 years of age or older to engage in sexual activity with a complainant that is under 16 years of age); Colo. Rev. Stat. Ann. §§ 18-1.3-402(1)(e), (1)(f) (2), (3) (making it a class 4 felony to engage in sexual intrusion or sexual penetration when the complainant is less than 15 years of age and the actor is at least four years older than the complainant and a class 1 misdemeanor with special sentencing requirements if the complainant is at least 15 years of age but less than 17 years of age and the actor is at least 10 years older than the complainant); Conn. Gen. Stat. Ann. §§ 53a-70(a)(2), (b)(1) (making it a Class A felony to engage in *sexual intercourse with a complainant under the age of 13 years when the actor is more than two years older than the complainant),* 53a-71(a)(1), (b) (*making it a Class B felony to engage in sexual intercourse when the complainant is 13 years of age or older but under 16 years of age and the actor is more than three years older than the complainant);* Haw. Rev. Stat. Ann. §§ 707-730(1)(b), (1)(c) (making it a Class A felony to engage in sexual penetration with a complainant that is under 14 years old or with a complainant that is at least 14 years old but less than 16 years old if the actor "is not less than five years older than the minor."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(b)(i), (d)(1) (making it a Class X felony for an actor that is under the age of 17 years to engage in sexual penetration with a complainant that is under the age of 9 years), 5/11-1.40(a)(1), (b)(1) (making it a Class X felony with a term of imprisonment of not less than 6 years and not more than 60 years for an actor 17 years of age or older to engage in sexual penetration with a complainant under the age of 13 years); Ind. Code Ann. §§ 35-42-4-3(a), (a)(1) (making it a Level 3 felony to engage in sexual intercourse or other sexual conduct with a complainant under 14 years of age and a Level 1 felony is the actor is at least 21 years of age), 35-42-4-9(a), (a)(1) (making it a Level 5 felony to engage in sexual intercourse or other sexual conduct with a complainant at least 14 years of age but less than 16 years of age and a Level 4 felony if the actor is at least 21 years of age); Mo. Ann. Stat. §§ 566.030(2)(3) (requiring life imprisonment without eligibility for probation or parole unless certain conditions are met for engaging in sexual intercourse with a complainant under the age of 12 years), 566.032 (requiring a life imprisonment or a term of imprisonment of not less than five years for engaging in sexual intercourse with a complainant that is under 14 years of age and requiring life imprisonment or a term of imprisonment of not less than 10 years if the complainant is less than 12 years of age); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(l), 632-A:10-a(I)(a) (requiring a maximum sentence of 20 years with a minimum not to exceed half the maximum for engaging in sexual penetration with a complainant under the age of 13 years), 632-A:3(II) (making it a class B felony to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is four or more years older), 632-A:4(I)(c) (making it a class A misdemeanor to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is less than four years older); N.J. Stat. Ann. § 2C:14-2(a)(1), (c)(4) (making it a crime of the first degree to engage in sexual penetration with a complainant that is under the age of 13 years and a crime in the second degree to engage in sexual penetration with a complainant that is at least 13 years of age but less than 16 years of age when the actor is at least four years older than the complainant); Ohio Rev. Code Ann. §§ 2907.02(A)(1)(b) (making it a felony of the first degree to engage in sexual conduct with a complainant that is under the age of 13 years, with a penalty other than life imprisonment if the actor was less than 16 years of age and other conditions are met), 2907.04(A), (B)(1) (making it a fourth degree felony for an actor 18 years of age or older to engage in sexual conduct with a complainant that is 13 years of age or older but less than 16 years of age, a first degree misdemeanor if the actor is less than four years older than the complainant, and a third degree felony if the actor is 10 or more years older than the complainant); 18 Pa. Sta. Ann. §§ 3121(c) (making it a first degree felony to engage in sexual intercourse with a complainant under the age of 13 years), 3122.1(a), (b) (making it a felony of the second degree to engage in sexual intercourse with a complainant that is under the age of 16 years when the actor is either four years older but less than eight years older than the complainant or is eight years older

age of a complainant under 16 years in their sex offenses.[1440] Two jurisdictions have four gradations for the age of a complainant under 16 years in their sex offenses[1441] and one

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but less than 11 years older than the complainant, and making it a felony of the first degree to engage in sexual intercourse with a complainant under the age of 16 years when the actor is 11 or more years older than the complainant); S.D. Codified Laws § 22-22-1(1) (making it a Class C felony to engage in sexual penetration with a complainant that is under 13 years of age and a Class 3 felony if the complainant is 13 years of age, but less than 16 years of age, and the actor is at least three years older than the complainant); Utah Code Ann. §§ 76-5-401(1), (2)(A), (3)(A)(a) (making it a third degree felony for an actor 18 years of age or older to engage in sexual intercourse or sexual penetration with a complainant that is 14 years of age or older, but younger than 16 years of age, but a class B misdemeanor if the actor establishes by a preponderance of the evidence that the actor is less than four years older), 76-5-402.1(1), (2)(a), (4) (requiring a term of imprisonment of not less than 25 years and up to life for engaging in sexual intercourse with a complainant that is under the age of 14 years, with a lesser penalty if the actor is younger than 21 years of age and other conditions are met).

[1440] *Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), (2) (making it a Class A felony to engage in sexual intercourse with a complainant under the age of 12 years), 510.050(1)(a), (2) (making it a Class C felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under the age of 14 years), 510.060(1)(b), (2) (making it a Class D felony for an actor 21 years of age or older to engage in sexual intercourse with a complainant under the age of 16 years);* Kan. Stat. Ann. §§ 21-5503(a)(3), (b)(1)(B), (b)(2) (making it a severity level 1, person felony to engage in sexual intercourse with a complainant under the age of 14 years, unless the actor is 18 years of age or older, in which case it is an off-grid person felony); 21-5506(b)(1), (c)(2)(A) (aggravated indecent liberties offense making it a severity level 3, person felony to engage in sexual intercourse with a complainant that is 14 or more years of age but less than 16 years of age); 21-5507(a)(1)(A), (2), (b)(1) (making it a severity level 8, person felony for an actor under 19 years of age and less than four years older than the complainant to engage in "voluntary sexual intercourse" with a complainant that is 14 or more years of age but less than 16 years of age); Me. Rev. Stat. Ann. tit. 17-A, §§ 253(B), (C) (making it a Class A crime to engage in a sexual act with a complainant under the age of 14 years or under the age of 12 years), § 254(1)(A), (1)(A-2) (making it a Class D crime for an actor at least 5 years older than the complainant to engage in a sexual act with a complainant that is 14 or 15 years of age and making it a Class C crime if the actor is at least 10 years older); Mont. Code Ann. §§ 45-5-501(b)(iv) (stating that a complainant is incapable of consent if he or she is under 16 years of age), 45-5-503(1), (3), (4), (5) (prohibiting sexual intercourse with a complainant incapable of consent, and requiring different penalties if the complainant is under 16 years of age and the actor is four or more years older, if the complainant was 12 years of age or younger and the actor was 18 years of age or older, and if the complainant is at least 14 years of age and the actor is 18 years of age or younger); Minn. Stat. Ann. § 609.342(1)(a), (2)(a) (requiring a term of imprisonment of not more than 30 years if an actor more than 36 months older than the complainant engages in sexual penetration with a complainant under the age of 13 years), 609.344(1)(a), (1)(b) (2) (requiring a term of imprisonment of not more than 15 years if the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant or if the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 24 months older than the complainant, but requiring a term of imprisonment of not more than five years if the actor was no more than 48 months but more than 24 months older than a complainant at least 13 years of age but under 16 years of age); Or. Rev. Stat. Ann. §§ 163.55 (making it a Class C felony to engage in sexual intercourse with a complainant under 16 years of age), 163.365 (making it a Class B felony to engage in sexual intercourse with a complainant under 14 years of age), 163.375(1)(b), (2) (making it a Class A felony to engage in sexual intercourse with a complainant that is under the age of 12 years); Tenn. Code Ann. § 39-13-506(a), (d)(1) (making it a Class E felony to engage in sexual penetration when the complainant is at least 15 years of age but less than 18 years of age and the actor is at least four but not more than five years older than the complainant), (b), (d)(2) (making it a Class E felony to engage in sexual penetration with a complainant that is at least 13 years of age but less than 15 years of age when the actor is at least four years but less than 10 years older than the complainant or when the complainant is at least 15 years of age but less than 18 years of age and the actor is more than five years but less than 10 years older than the complainant), (c), (d)(3) (making it a Class D felony to engage in sexual penetration when the

jurisdiction has five gradations for the age of a complainant under 16 years in their sex offenses.[1442]

The basis for the four year age gap between the actor and a complainant under the age of 12 years in the revised sexual abuse of a minor statute is the District's current child sexual abuse statutes,[1443] which require at least a four year age gap between the actor and a complainant under the age of 16 years. However, there is strong support in the criminal codes of the 29 reformed jurisdictions for requiring an age gap between the actor and the complainant in the gradation with the youngest complainant, although the number of years required varies. Eight of the 29 reformed jurisdictions require an age gap between the actor and the complainant in the gradation or sex offense with the youngest complainant.[1444] An additional six reformed jurisdictions sentence the offense

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complainant is at least 13 years of age but less than 18 years of age and the actor is at least 10 years older than the complainant); Wash. Rev. Code Ann. §§ 9A.44.073 (making it a class A felony to engage in sexual intercourse with a complainant that is under 12 years when he actor is at least 24 months older than the complainant), 9A.44.076 (making it a Class A felony to engage in sexual intercourse with a complainant is at least 12 years old but less than 14 years old and the actor is at least 36 months older than the complainant), 9A.44.079 (making it a class C felony to engage in sexual intercourse with a complainant that is at least 14 years old but less than 16 years old when the actor is at least 48 months older than the complainant).

[1441] *Del. Code Ann. tit. 11, §§ 770(a)(1) (making it a class C felony to engage in sexual intercourse with a complainant under the age of 16 years), 771(a)(1) (making it a class B felony to engage in sexual intercourse with a complainant under the age of 16 years when the actor is at least 10 years older than the complainant or with a complainant that is under the age of 14 years when the actor "has reached [his or her] nineteenth birthday and is not otherwise subject to prosecution pursuant to § 772 or § 773 of this title."),* 773(a)(5) (making it a Class A felony to engage in sexual intercourse with a complainant that is under 12 years of age when the actor is at least 18 years of age); N.Y. Penal Law §§ 130.30(1) (making it a class D felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under 15 years of age), 130.35(3), (4) (making it a class B felony to engage in sexual intercourse with a complainant under the age of 11 years or with a complainant under the age of 13 years when the actor is 18 years of age or more), 130.96 (making it a class A-II felony to commit rape in the first degree as codified in N.Y. Penal Law § 130.35 when the complainant is under 13 years of age).

[1442] Wis. Stat. Ann. §§ 948.02(1)(b), (1)(e) (making it a class B felony to engage in sexual intercourse with a complainant that is under 12 years of age or under 13 years of age), (2) (making it a Class C felony to engage in sexual intercourse with a complainant that is under 16 years of age), 948.093 (making it a class A misdemeanor for an actor that is under 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 15 years), 948.09 (making it a Class A misdemeanor for an actor that has attained the age of 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 16 years).

[1443] *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.").*

[1444] *Ala. Code § 13A-6-61(a)(3), (b) (making it a Class A felony for an actor 16 years of age or older to engage in sexual intercourse with a complainant under the age of 12 years); Alaska Stat. Ann. § 11.41.434(a)(1), (b) (making it an unclassified felony for an actor 16 years of age or older to engage in sexual penetration with a complainant that is under the age of 13 years);* Colo. Rev. Stat. Ann. §§ 18-1.3-402(1)(e) (making it a class 4 felony to engage in sexual intrusion or sexual penetration when the complainant is less than 15 years of age and the actor is at least four years older than the complainant); Conn. Gen. Stat. Ann. § 53a-70(a)(2), (b)(1) (making it a Class A felony to engage in *sexual intercourse with a complainant under the age of 13 years when the actor is more than two years older than the complainant);* Mont. Code Ann. §§ 45-5-501(b)(iv) (stating that a complainant is incapable of consent if he or she is under 16 years of age), 45-5-503(1), (4)(a) (requiring a term of imprisonment of 100 years for an actor 18 years of age or older engaging in sexual intercourse with a complainant 12 years of age or

more leniently if there is an age gap between the actor the youngest complainant.[1445] Eleven of the reformed jurisdictions require an age gap between the actor and the complainant only in the gradations for comparatively older complainants.[1446] The

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younger); Tenn. Code Ann. § 39-13-506(b), (d)(2) (making it a Class E felony to engage in sexual penetration with a complainant that is at least 13 years of age but less than 15 years of age when the actor is at least four years but less than 10 years older than the complainant); *Del. Code Ann. tit. 11, §* 773(a)(5) (making it a Class A felony to engage in sexual intercourse with a complainant that is under 12 years of age when the actor is at least 18 years of age); Wash. Rev. Code Ann. §§ 9A.44.073 (making it a class A felony to engage in sexual intercourse with a complainant that is under 12 years when he actor is at least 24 months older than the complainant).

[1445] *N.D. Cent. Code Ann. § 12.1-20-03(1)(d), (3) (making it class A felony to engage in a sexual act with a complainant under the age of 15 years and a class AA felony if the actor is at least 21 years of age);* Ind. Code Ann. § 35-42-4-3(a), (a)(1) (making it a Level 3 felony to engage in sexual intercourse or other sexual conduct with a complainant under 14 years of age and a Level 1 felony is the actor is at least 21 years of age);); Ohio Rev. Code Ann. § 2907.02(A)(1)(b) (making it a felony of the first degree to engage in sexual conduct with a complainant that is under the age of 13 years, with a penalty other than life imprisonment if the actor was less than 16 years of age and other conditions are met); Utah Code Ann. § 76-5-402.1(1), (2)(a), (4) (requiring a term of imprisonment of not less than 25 years and up to life for engaging in sexual intercourse with a complainant that is under the age of 14 years, with a lesser penalty if the actor is younger than 21 years of age and other conditions are met); Kan. Stat. Ann. §§ 21-5503(a)(3), (b)(1)(B), (b)(2) (making it a severity level 1, person felony to engage in sexual intercourse with a complainant under the age of 14 years, unless the actor is 18 years of age or older, in which case it is an off-grid person felony); Minn. Stat. Ann. § 609.342(1)(a), (2)(a) (requiring a term of imprisonment of not more than 30 years if an actor more than 36 months older than the complainant engages in sexual penetration with a complainant under the age of 13 years).

[1446] Ark. Code Ann. §§ 5-14-103(a)(3)(A), (c)(1) (making it a Class Y felony to engage in sexual activity with a complainant who is under 14 years of age), 5-14-127(a)(1)(A)(i), (b)(1) (making it a Class D felony for an actor that is 20 years of age or older to engage in sexual activity with a complainant that is under 16 years of age); Haw. Rev. Stat. Ann. §§ 707-730(1)(b), (1)(c) (making it a Class A felony to engage in sexual penetration with a complainant that is under 14 years old or with a complainant that is at least 14 years old but less than 16 years old if the actor "is not less than five years older than the minor."); that is at least 14 years old but less than 16 years old if the actor "is not less than five years older than the minor."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(b)(i), (d)(1) (making it a Class X felony for an actor that is under the age of 17 years to engage in sexual penetration with a complainant that is under the age of 9 years), 5/11-1.40(a)(1), (b)(1) (making it a Class X felony with a term of imprisonment of not less than 6 years and not more than 60 years for an actor 17 years of age or older to engage in sexual penetration with a complainant under the age of 13 years); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(l), 632-A:10-a(I)(a) (requiring a maximum sentence of 20 years with a minimum not to exceed half the maximum for engaging in sexual penetration with a complainant under the age of 13 years), 632-A:3(II) (making it a class B felony to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is four or more years older), 632-A:4(I)(c) (making it a class A misdemeanor to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is less than four years older); N.J. Stat. Ann. § 2C:14-2(a)(1), (c)(4) (making it a crime of the first degree to engage in sexual penetration with a complainant that is under the age of 13 years and a crime in the second degree to engage in sexual penetration with a complainant that is at least 13 years of age but less than 16 years of age when the actor is at least four years older than the complainant); 18 Pa. Sta. Ann. §§ 3121(c) (making it a first degree felony to engage in sexual intercourse with a complainant under the age of 13 years), 3122.1(a), (b) (making it a felony of the second degree to engage in sexual intercourse with a complainant that is under the age of 16 years when the actor is either four years older but less than eight years older than the complainant or is eight years older but less than 11 years older than the complainant, and making it a felony of the first degree to engage in sexual intercourse with a complainant under the age of 16 years when the actor is 11 or more years older than the complainant); S.D. Codified Laws § 22-22-1(1) (making it a Class C felony to engage in sexual penetration with a complainant that is under 13 years of age and a Class 3

remaining four reformed jurisdictions do not have a required age gap in any gradation for complainants under the age of 16 years.[1447]

Second, there is mixed support in the criminal codes of reformed jurisdictions for third degree and sixth degree of the revised sexual abuse of a minor statute requiring a four year age gap between the complainant and applying strict liability to this gap. Third degree and sixth degree of the revised sexual abuse of a minor statute require a four year gap to match the current child sexual abuse statutes[1448] and the other gradations of the revised sexual abuse of a minor statute. There is mixed support in the reformed jurisdictions for requiring this age gap in third degree and sixth degree of the revised offense. At least 14 of the 29 reformed jurisdictions have gradations in their sex offenses for a complainant under the age of 18 years when the actor is in a position of trust with or authority over the complainant.[1449] Five of these 14 reformed jurisdictions require an age

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felony if the complainant is 13 years of age, but less than 16 years of age, and the actor is at least three years older than the complainant); *Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), (2) (making it a Class A felony to engage in sexual intercourse with a complainant under the age of 12 years), 510.050(1)(a), (2) (making it a Class C felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under the age of 14 years), 510.060(1)(b), (2) (making it a Class D felony for an actor 21 years of age or older to engage in sexual intercourse with a complainant under the age of 16 years);* Me. Rev. Stat. Ann. tit. 17-A, §§ 253(B), (C) (making it a Class A crime to engage in a sexual act with a complainant under the age of 14 years or under the age of 12 years), § 254(1)(A), (1)(A-2) (making it a Class D crime for an actor at least 5 years older than the complainant to engage in a sexual act with a complainant that is 14 or 15 years of age and making it a Class C crime if the actor is at least 10 years older); Wis. Stat. Ann. §§ 948.02(1)(b), (1)(e) (making it a class B felony to engage in sexual intercourse with a complainant that is under 12 years of age or under 13 years of age), (2) (making it a Class C felony to engage in sexual intercourse with a complainant that is under 16 years of age), 948.093 (making it a class A misdemeanor for an actor that is under 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 15 years), 948.09 (making it a Class A misdemeanor for an actor that has attained the age of 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 16 years); N.Y. Penal Law §§ 130.30(1) (making it a class D felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under 15 years of age), 130.35(3), (4) (making it a class B felony to engage in sexual intercourse with a complainant under the age of 11 years or with a complainant under the age of 13 years when the actor is 18 years of age or more), 130.96 (making it a class A-II felony to commit rape in the first degree as codified in N.Y. Penal Law § 130.35 when the complainant is under 13 years of age).

[1447] Tex. Penal Code § 22.021(a)(1)(B), (a)(2)(B), (e) (making it a first degree felony to engage in sexual activity with a complainant that is under the age of 14 years); Ariz. Rev. Stat. Ann. § 13-1405(A), (B) (prohibiting sexual intercourse with a complainant under 18 years of age and making it a class 6 felony if the complainant is at least 15 years of age but under 18 years of age); Mo. Ann. Stat. §§ 566.030(2)(3) (requiring life imprisonment without eligibility for probation or parole unless certain conditions are met for engaging in sexual intercourse with a complainant under the age of 12 years), 566.032 (requiring a life imprisonment or a term of imprisonment of not less than five years for engaging in sexual intercourse with a complainant that is under 14 years of age and requiring life imprisonment or a term of imprisonment of not less than 10 years if the complainant is less than 12 years of age); Or. Rev. Stat. Ann. §§ 163.55 (making it a Class C felony to engage in sexual intercourse with a complainant under 16 years of age), 163.365 (making it a Class B felony to engage in sexual intercourse with a complainant under 14 years of age), 163.375(1)(b), (2) (making it a Class A felony to engage in sexual intercourse with a complainant that is under the age of 12 years).

[1448] 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.").

[1449] This survey was limited to offenses that required as an element that the complainant is under the age of 18 years. Alaska Stat. Ann. §§ 11.41.434(a)(2) (prohibiting an actor 18 years of age or older from engaging in

sexual penetration with a complainant under 18 years of age when the actor is the complainant's nature parent, stepparent, adopted parent, or legal guardian), 11.41.436(a)(6) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant that is 16 or 17 years of age and at least three years younger than the actor when the actor is in a "position of authority in relation" to the complainant); Ariz. Rev. Stat. Ann. § 13-1404 (prohibiting sexual intercourse with a complainant under 18 years of age and making it a class 6 felony if the complainant is at least 15 years of age but under 18 years of age and a class 2 felony if the complainant is under 15 years of age and the actor is in a position of trust); Ark. Code Ann. §§ 5-14-103(a)(4)(A) (prohibiting sexual intercourse or deviate sexual activity with a complainant under the age of 18 years when the actor is the complainant's guardian or specified family member), 5-14-101(6) (defining "minor" as "a person who is less than eighteen (18) years of age."); Conn. Gen. Stat. Ann. § 53a-71(a)(4) (prohibiting sexual intercourse when the complainant is less than 18 years of age and the actor is the complainant's guardian or otherwise responsible for the general supervision of the complainant's welfare), (a)(9)(B) (prohibiting sexual intercourse when the actor is a coach or individual who provides "intensive, ongoing instruction" and the complainant is under the age of 18 years), (a)(10) (prohibiting sexual intercourse when the actor is 20 years of age or older and "stands in a position of power, authority or supervision" over the complainant and the complainant is under the age of 18 years); Del. Code Ann. tit. 11, § 778(3), (4), (subsection (3) prohibiting sexual intercourse or sexual penetration with "a child who has reached that child's own sixteenth birthday but has not yet reached that child's own eighteenth birthday" when the actor is at least four years older than the complainant and the actor "stands in a position of trust, authority, or supervision" over the complainant and subsection (4) prohibiting the same conduct as in subsection (3) but not requiring an age gap between the actor and the complainant); 720 Ill. Comp. Stat. Ann. 5/11-1.20(a)(3), (a)(4) (prohibiting sexual penetration when the actor is a family member of the complainant and the complainant is under the age of 18 years or the actor is 17 years of age or older and "holds a position of trust, authority, or supervision in relation" to the complainant and the complainant is at least 13 years of age but under 18 years of age); Ind. Code Ann. § 35-42-4-7(m) (prohibiting a person at least 18 years of age who is a guardian, child care worker, custodian, or specified family member from engaging in sexual intercourse or other sexual conduct with a complainant at least 16 years of age but less than 18 years of age), (n) (prohibiting a person who has or had a "professional relationship" with a complainant at least 16 years of age but less than 18 years when the actor uses or exerts the "professional relationship" to engage in sexual intercourse or other sexual conduct); Ky. Rev. Stat. Ann. § 510.060(1)(c) (prohibiting sexual intercourse when the actor is in a "position of authority or position of special trust" with a complaint under the age of 18 years with whom the actor comes into contact as a result of that position); Me. Rev. Stat. Ann. tit. 17-A, § 253(G), (H) (prohibiting an actor who has "instructional, supervisory or disciplinary authority" over a complainant under the age of 18 years or who is a parent, guardian, or other similar person from engaging in a sexual act with a complainant under the age of 18 years); Minn. Stat. Ann. § 609.344(1)(e) (prohibiting sexual penetration when the complainant is at least 16 years of age but under 18 years of age and the actor is more than 48 months older than the complainant and "in a position of authority" over the complainant), (1)(f) (prohibiting sexual penetration when the actor had a "significant relationship" to the complainant and the complainant was at least 16 years but under 18 years of age); N.J. Stat. Ann. § 2C:14-2(c)(3) (prohibiting sexual penetration when the complainant is at least 16 years of age but under 18 years of age and the actor is a specified family member, guardian or other similar individual, or has "supervisory or disciplinary power of any nature or in any capacity over" the complainant); N.H. Rev. Stat. Ann. § 632-A:2(I)(k) (prohibiting sexual penetration when the complainant is 13 years of age or older but under 18 years of age and the actor is in "a position of trust or authority over" the complainant and uses that authority to coerce the complainant); 18 Pa. Stat. Ann. §§ 3124.2(a.1) (prohibiting actors that are employees or agents at specified institutions from engaging in sexual intercourse or deviate sexual intercourse with complainants under the age of 18 years), 3124.3(a) (prohibiting sports officials from engaging in sexual intercourse or deviate sexual intercourse with a complainant under the age of 18 years); Tenn. Code Ann. § 39-13-532(a) (prohibiting sexual penetration when the complainant is at least 13 years of age but less than 18 years of age, the actor is at least four years older than the complainant, and the actor was in a "position of trust or had supervisory or disciplinary power" over the complainant or "parental or custodial authority" over the complainant and used the power or authority to accomplish the sexual penetration).

gap between the actor and the complainant in at least one of the offenses or gradations[1450] and one jurisdiction makes the age gap an affirmative defense.[1451] An additional jurisdiction narrows the offense not by an age gap requirement, but by requiring that the actor use the position of authority to coerce the complainant.[1452]

None of the five reformed jurisdictions that require an age gap between the actor and a complainant under the age of 18 years specifies in the sex offense statutes whether there is a culpable mental state for the required age gap. However, one jurisdiction has an affirmative defense for mistake of the complainant's age which may extend to a mistake as to the required age gap[1453] and another jurisdiction provides that mistake as to the complainant's age is not a defense, which may suggest strict liability for the age gap.[1454]

Third, there is mixed support in the criminal codes of the reformed jurisdictions for codifying an affirmative defense for a reasonable mistake of age when the complainant is under the age of 16 years or 18 years. Current District law applies strict

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[1450] Alaska Stat. Ann. §§ 11.41.434(a)(2), (b) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant under 18 years of age when the actor is the complainant's nature parent, stepparent, adopted parent, or legal guardian), 11.41.436(a)(6) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant that is 16 or 17 years of age and at least three years younger than the actor when the actor is in a "position of authority in relation" to the complainant); Conn. Gen. Stat. Ann. § 53a-71(a)(4) (prohibiting sexual intercourse when the complainant is less than 18 years of age and the actor is the complainant's guardian or otherwise responsible for the general supervision of the complainant's welfare), (a)(9)(B) (prohibiting sexual intercourse when the actor is a coach or individual who provides "intensive, ongoing instruction" and the complainant is under the age of 18 years), (a)(10) (prohibiting sexual intercourse when the actor is 20 years of age or older and "stands in a position of power, authority or supervision" over the complainant and the complainant is under the age of 18 years); Del. Code Ann. tit. 11, § 778(3), (4), (subsection (3) prohibiting sexual intercourse or sexual penetration with "a child who has reached that child's own sixteenth birthday but has not yet reached that child's own eighteenth birthday" when the actor is at least four years older than the complainant and the actor "stands in a position of trust, authority, or supervision" over the complainant and subsection (4) prohibiting the same conduct as in subsection (3) but not requiring an age gap between the actor and the complainant); Minn. Stat. Ann. § 609.344(1)(e) (prohibiting sexual penetration when the complainant is at least 16 years of age but under 18 years of age and the actor is more than 48 months older than the complainant and "in a position of authority" over the complainant), (1)(f) (prohibiting sexual penetration when the actor had a "significant relationship" to the complainant and the complainant was at least 16 years but under 18 years of age); Tenn. Code Ann. § 39-13-532(a) (prohibiting sexual penetration when the complainant is at least 13 years of age but less than 18 years of age, the actor is at least four years older than the complainant, and the actor was in a "position of trust or had supervisory or disciplinary power" over the complainant or "parental or custodial authority" over the complainant and used the power or authority to accomplish the sexual penetration).

[1451] Ark. Code Ann. § 5-14-103(a)(4)(B) ("It is an affirmative defense to a prosecution under subdivision (a)(4)(A) of this section that the actor was not more than three (3) years older than the victim.").

[1452] N.H. Rev. Stat. Ann. § 632-A:2(I)(k) (prohibiting sexual penetration when the complainant is 13 years of age or older but under 18 years of age and the actor is in "a position of trust or authority over" the complainant and uses that authority to coerce the complainant);

[1453] Alaska Stat. Ann. § 11.41.445(b) ("In a prosecution under AS 11.41.410--11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older.).

[1454] Minn. Stat. Ann. § 609.344(1)(e) ("Neither mistake as to the complainant's age . . . is a defense."), (1)(f) ("Neither mistake as to the complainant's age . . . is a defense.");

liability to the age of complainants under the age of 16 years[1455] and complainants under the age of 18 years.[1456] 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.[1457] The revised sexual abuse of a minor statute codifies an affirmative defense for a reasonable mistake of age when the complainant is under the age of 16 years or 18 years.

There is mixed support in the 29 reformed jurisdictions for codifying a defense for mistake of age for complainants under the age of 18 years, particularly for the comparatively older complainants. One reformed jurisdiction codifies as an affirmative defense for mistake of age in all gradations, regardless of the age of the complainant.[1458] An additional twelve reformed jurisdictions codify an affirmative defense for mistake of age for all age categories except the lowest age.[1459] Instead of a defense, another

[1455] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes. In addition to D.C. Code § 22-3012, D.C. Code § 22-3011 states that "mistake of age" is not a defense to child sexual abuse. D.C. Code § 22-3011(a).

[1456] 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).

[1457] *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)").

[1458] Alaska Stat. Ann. § 11.41.445(b) ("In a prosecution under AS 11.41.410--11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older.).

[1459] Ariz. Rev. Stat. Ann. § 13-1407(B) ("It is a defense to a prosecution pursuant to §§ 13-1404 and 13-1405 in which the victim's lack of consent is based on incapacity to consent because the victim was fifteen, sixteen or seventeen years of age if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim."); Ark. Code Ann. § 5-14-102 (d) ("(1) When criminality of conduct depends on a child's being below a critical age older than fourteen (14) years, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above. (2) However, the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be."); Ind. Code Ann. §§ 35-42-4-3(d) ("It is a defense to a prosecution under this section that the accused person reasonably believed that the child was sixteen (16) years of age or older at the time of the conduct, unless: (1) the offense is committed by using or threatening the use of deadly force or while armed with a deadly weapon; (2) the offense results in serious bodily injury; or (3) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge."), 35-42-4-9(c) ("It is a defense that the accused person reasonably believed that the child was at least sixteen (16) years of age at the time of the conduct. However, this subsection does not apply to an offense described in subsection (a)(2) or (b)(2) [the offense is committed by the use of deadly force or while armed with a deadly weapon or if serious bodily injury occurs or the complainant is involuntary intoxicated]."); Ky. Rev. Stat. Ann. § 510.030 ("In any prosecution under this chapter in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was, at the time of the

reformed jurisdiction requires that the actor know the age of a complainant that is at least 13 years of age but under 16 years of age or is reckless in that regard.[1460] Only two of the reformed jurisdictions statutorily codify that strict liability applies to the age of the complainant.[1461]

Fourth, there is mixed support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised sexual abuse of a minor statute. Current D.C. Code § 22-3020 specifies aggravators that

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

Arkansas also has a limited defense for the lowest age requirement. Ark. Code Ann. § 5-14-102(c) "(1)When criminality of conduct depends on a child's being below fourteen (14) years of age and the actor is under twenty (20) years of age, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above. (2) However, the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be.")."

[1460] Ohio Rev. Code Ann. § 2907.04(A). Ohio codifies strict liability for the age of a complainant that is under 13 years of age. Ohio Rev. Code Ann. § 2907.03(A)(1)(b).

[1461] N.J. Stat. Ann. § 2C:14-5(c) ("It shall be no defense to a prosecution for a crime under this chapter that the actor believed the victim to be above the age stated for the offense, even if such a mistaken belief was reasonable."); *Tex. Penal Code §§ 22.011(a)(2), (c)(1) (prohibiting sexual activity with a complainant under the age of 17 years "regardless of whether [the actor] knows the age of [the complainant] at the time of the offense."), 22.021(a)(1)(B), (2)(B) (prohibiting sexual activity with a complainant that is under the age of 14 years "regardless of whether [the actor] knows the age of the child at the time of the offense.").*

apply to all of the current sex offense statutes,[1462] D.C. Code § 22-3611 provides a separate penalty enhancement for committing child sexual abuse against complainants under the age of 18 years,[1463] 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.[1464] The revised sexual abuse of a minor statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC.

There is mixed support in the criminal codes of reform jurisdictions for so limiting the application of penalty enhancements to the revised sexual abuse of a minor offense. Fifteen[1465] of the 29 reformed jurisdictions have sex-offense specific penalty

[1462] 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.

[1463] D.C. Code §§ 22-3611(a), (c); 23-1331(4) (defining "crime of violence" to include child sexual abuse).

[1464] D.C. Code § 22-4502.

[1465] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

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

enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[1466] Six of these reformed jurisdictions apply a weapons enhancement[1467] to sexual assault of a minor. Five of these reformed jurisdictions apply an accomplices enhancement to sexual assault of a minor.[1468] Six of these reformed jurisdictions apply an enhancement for serious bodily injury to sexual assault of a minor.[1469]

Just three[1470] of these reformed jurisdictions have age-based penalty enhancements for complainants under the age of 18 years for their general sexual assault statutes. None of these 15 reformed jurisdictions apply the age-based enhancement to their sexual assault of a minor offenses.

RCC § 22E-1305. SEXUAL EXPLOITATION OF AN ADULT.
[Now RCC § 22E-1303. Sexual Exploitation of an Adult.]

Relation to National Legal Trends. *The RCC sexual exploitation of an adult offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[1471]

First, there is strong support in the criminal codes of the reformed jurisdictions for limiting the RCC sexual exploitation of an adult statute to actors that are "healthcare provider[s] or member[s] of the clergy," or actors who "purport[] to be a healthcare

[1466] Alaska Stat. Ann. § 11.41.410(2).

[1467] Colo. Rev. Stat. Ann. § 18-3-402(5)(a)(III); Conn. Gen. Stat. Ann. § 53a-70a(a)(1); Mo. Ann. Stat. § 566.010(1)(b); N.Y. Penal Law § 130.95(1)(b); Tex. Penal Code Ann. § (a)(2)(A)(iv); Utah Code Ann. § 76-5-405(1)(a)(i).

[1468] Colo. Rev. Stat. Ann. § 18-3-402(5)(a)(I); Conn. Gen. Stat. Ann. § 53a-70a(a)(4); Mo. Ann. Stat. §§ 566.010(1)(1)(c); Tex. Penal Code Ann. § 22.021(a)(2)(A)(v); Utah Code Ann. § 76-5-405(1)(a)(iii).

[1469] Colo. Rev. Stat. Ann. § 18-3-402(5)(a)(II); Conn. Gen. Stat. Ann. § 53a-70a(a)(2), (a)(3); Mo. Ann. Stat. § 566.010(1)(a); N.Y. Penal Law § 130.95(1)(a); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i); Wash. Rev. Code Ann. § 9A.44.045(1)(c).

[1470] A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense or have separate offenses for sexual assault of complainants under the age of 18 years were not considered to have age-based penalty enhancements. Ariz. Rev. Stat. Ann. § 13-1406(A), (B) (making sexual assault a class 2 felony, unless the complainant is under the age of 15, in which case the offense is subject to enhanced penalties under Ariz. Rev. Stat. Ann. § 13-705); Conn. Gen. Stat. Ann. §§ 53a-70(a), (b)(1), (b)(2) (making sexual assault in the first degree a class B felony, unless it is a forcible rape of a complainant under 16 years of age or the complainant is under 13 years of age and the actor is more than two years older, in which case it is a class A felony), 53a-70a(a), (b)(1), (b)(2) (making aggravated sexual assault in the first degree a Class B felony unless the complainant is under the age of 16 years, in which case it is a Class A felony); Mo. Ann. Stat. § 566.030(1), (2), (3) (making rape in the first degree a felony with a term of imprisonment of life or not less than five years unless the complainant is under the age of 12 years, in which case the required term of imprisonment is life imprisonment without eligibility for parole until certain conditions are met).

[1471] Unless otherwise noted, this survey is limited to sex offenses that require sexual penetration, not sexual contact or touching. If a jurisdiction has multiple sex offenses for penetration, the offense that includes vaginal intercourse was used. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

provider or member of the clergy." The current first and second degree sexual abuse of a patient or client statutes apply to any person who "purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature" or is "otherwise in a professional relationship of trust" with the complainant.[1472] Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1473] ("reformed jurisdictions"), 16 of the 29 reformed jurisdictions have patient-client sex offenses or gradations[1474] or include the patient-client relationship in the definition of "without

[1472] 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).

[1473] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1474] Ariz. Rev. Stat. Ann. § 13-1418(A) (prohibiting a "behavioral health professional," psychiatrist, or psychologist from engaging in sexual intercourse with a current patient); Ark. Code Ann. § 5-14-126(a)(1)(D) (prohibiting a mandated reporter or member of the clergy who is in a "position of trust or authority over" the complainant and uses the position to engage in sexual intercourse or deviate sexual activity); Colo. Rev. Stat. Ann. § 18-3-405.5(1)(a)(I), (1)(a)(II) (prohibiting a psychotherapist from committing sexual penetration or sexual intrusion on a client, including when done by "therapeutic deception."); Conn. Gen. Stat. Ann. § 53a-71(a)(6) (prohibiting a psychotherapist from engaging in sexual intercourse with another person when the other person is "(A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception."); Me. Rev. Stat. tit. 17-A, § 253(2)(I) (prohibiting a sexual act when the actor is a psychiatrist, a psychologist, or licensed as a social worker or purports to be a psychiatrist, a psychologist, or licensed social worker and the complainant is a current patient or client); Minn. Stat. Ann. § 609.344(h), (i), (j) (prohibiting sexual penetration when "the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session or outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists," when the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist," or when the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception."); 609.344(l) (prohibiting sexual penetration when the actor is a member of, or purports to be a member of, the clergy "during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private" or "during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."); N.D. Cent. Code Ann. § 12.1-20-06.1 (prohibiting "any person who holds oneself out to be a therapist" from engaging in sexual contact "with a patient or client during any treatment, consultation, interview, or examination."); N.H. Rev. Stat. Ann. § 632-A:2(I)(g) (prohibiting sexual penetration "[w]hen the actor provides therapy, medical treatment or examination of the victim and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship: (1) Acts in a manner or for purposes which are not professionally recognized or acceptable; or (2) uses this position as such provider to coerce the victim to submit."); Ohio Rev. Code Ann. § 2907.03(A)(10) (prohibiting sexual penetration when the actor is a "mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes."); S.D. Codified Laws § 22-22-29 (prohibiting a psychotherapist from engaging in sexual penetration with a "patient who is emotionally dependent on the psychotherapist" at the time of the act); Wash. Rev. Code Ann. § 9A.44.050(1)(d)

consent."[1475] All 16 of these reformed jurisdictions are limited to healthcare professionals or therapists or healthcare professionals, therapists, and clergy.

Second, there is strong support in the criminal codes of the reformed jurisdictions for the RCC sexual exploitation of an adult statute no longer prohibiting "the actor falsely represents that he or she is licensed as a particular kind of professional." The current first and second degree sexual abuse of a patient or client statutes prohibit an actor from "represent[ing] falsely that he or she is licensed as a particular type of professional."[1476] In contrast, the RCC sexual exploitation of an adult statute does not specifically criminalize sexual conduct when the actor falsely represented that he or she is licensed as a particular kind of professional. None of the 16 reformed jurisdictions that have patient-client sex offenses or gradations[1477] or include the patient-client relationship in the definition of "without consent"[1478] have a similar provision.

(prohibiting a health care provider from engaging in sexual intercourse with a client or patient during a treatment session, consultation, interview, or examination."); Wis. Stat. Ann. § 940.22(2) (prohibiting a therapist or an actor that purports to be a therapist from engaging in sexual contact "with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination.").

[1475] Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1) (including in second degree rape sexual intercourse "without the victim's consent" and defining "without consent" to include "the defendant is a health professional, as defined herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling . . .and the acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."); N.Y. Penal Law §§ 130.05(3)(h), 130.25(1) (including in third degree rape "engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old" and stating a person is incapable of consenting when he or she "is a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree" and the sexual conduct "occurs during a treatment session, consultation, interview, or examination."); Tex. Penal Code Ann. § 22.011(a)(1) (b)(9), (b)(10) (prohibiting sexual activity "without consent" and defining "without consent" to include when "the actor is a mental health services provider or a health care services provider who causes the other person, who is a former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor" or "the actor is a clergyman who causes the other person to submit to or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12) (defining rape as sexual intercourse "without the victim's consent" and stating "without consent" includes "the actor is a health professional or religious counselor . . . the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.");

[1476] D.C. Code §§ 22-3015; 22-3016.

[1477] Ariz. Rev. Stat. Ann. § 13-1418(A) (prohibiting a "behavioral health professional," psychiatrist, or psychologist from engaging in sexual intercourse with a current patient); Ark. Code Ann. § 5-14-126(a)(1)(D) (prohibiting a mandated reporter or member of the clergy who is in a "position of trust or authority over" the complainant and uses the position to engage in sexual intercourse or deviate sexual activity); Colo. Rev. Stat. Ann. § 18-3-405.5(1)(a)(I), (1)(a)(II) (prohibiting a psychotherapist from committing sexual penetration or sexual intrusion on a client, including when done by "therapeutic deception."); Conn. Gen. Stat. Ann. § 53a-71(a)(6) (prohibiting a psychotherapist from engaging in sexual intercourse with another person when the other person is "(A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the

actor and the sexual intercourse occurs by means of therapeutic deception."); Me. Rev. Stat. tit. 17-A, § 253(2)(I) (prohibiting a sexual act when the actor is a psychiatrist, a psychologist, or licensed as a social worker or purports to be a psychiatrist, a psychologist, or licensed social worker and the complainant is a current patient or client); Minn. Stat. Ann. § 609.344(h), (i), (j) (prohibiting sexual penetration when "the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session or outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists," when the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist," or when the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception."); 609.344(l) (prohibiting sexual penetration when the actor is a member of, or purports to be a member of, the clergy "during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private" or "during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."); N.D. Cent. Code Ann. § 12.1-20-06.1 (prohibiting "any person who holds oneself out to be a therapist" from engaging in sexual contact "with a patient or client during any treatment, consultation, interview, or examination."); N.H. Rev. Stat. Ann. § 632-A:2(I)(g) (prohibiting sexual penetration "[w]hen the actor provides therapy, medical treatment or examination of the victim and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship: (1) Acts in a manner or for purposes which are not professionally recognized or acceptable; or (2) uses this position as such provider to coerce the victim to submit."); Ohio Rev. Code Ann. § 2907.03(A)(10) (prohibiting sexual penetration when the actor is a "mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes."); S.D. Codified Laws § 22-22-29 (prohibiting a psychotherapist from engaging in sexual penetration with a "patient who is emotionally dependent on the psychotherapist" at the time of the act); Wash. Rev. Code Ann. § 9A.44.050(1)(d) (prohibiting a health care provider from engaging in sexual intercourse with a client or patient during a treatment session, consultation, interview, or examination."); Wis. Stat. Ann. § 940.22(2) (prohibiting a therapist or an actor that purports to be a therapist from engaging in sexual contact "with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination.").

[1478] Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1) (including in second degree rape sexual intercourse "without the victim's consent" and defining "without consent" to include "the defendant is a health professional, as defined herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling . . .and the acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."); N.Y. Penal Law §§ 130.05(3)(h), 130.25(1) (including in third degree rape "engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old" and stating a person is incapable of consenting when he or she "is a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree" and the sexual conduct "occurs during a treatment session, consultation, interview, or examination."); Tex. Penal Code Ann. § 22.011(a)(1) (b)(9), (b)(10) (prohibiting sexual activity "without consent" and defining "without consent" to include when "the actor is a mental health services provider or a health care services provider who causes the other person, who is a former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor" or "the actor is a clergyman who causes the other person to submit to or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12) (defining rape as sexual intercourse "without the victim's consent" and stating "without consent" includes "the actor is a health professional or religious counselor . . . the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably

Third, there is strong support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the RCC sexual exploitation of an adult statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[1479] The RCC sexual exploitation of an adult statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is strong support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the RCC sexual exploitation of an adult statute. Fifteen[1480] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious

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believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.").

[1479] 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.

[1480] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

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

bodily injury into a higher gradation of the sex offenses.[1481] Of these 16 reformed jurisdictions, nine have patient-client sex offenses or gradations[1482] or include the patient-client relationship in the definition of "without consent"[1483] have a similar provision. Only two of these reformed jurisdictions apply the enhancements to the patient-client sex offenses or gradations.[1484]

[1481] Alaska Stat. Ann. § 11.41.410(2).

[1482] Ariz. Rev. Stat. Ann. § 13-1418(A) (prohibiting a "behavioral health professional," psychiatrist, or psychologist from engaging in sexual intercourse with a current patient); Colo. Rev. Stat. Ann. § 18-3-405.5(1)(a)(I), (1)(a)(II) (prohibiting a psychotherapist from committing sexual penetration or sexual intrusion on a client, including when done by "therapeutic deception."); Conn. Gen. Stat. Ann. § 53a-71(a)(6) (prohibiting a psychotherapist from engaging in sexual intercourse with another person when the other person is "(A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception."); Minn. Stat. Ann. § 609.344(h), (i), (j) (prohibiting sexual penetration when "the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session or outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists," when the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist," or when the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception."); 609.344(l) (prohibiting sexual penetration when the actor is a member of, or purports to be a member of, the clergy "during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private" or "during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."); Wash. Rev. Code Ann. § 9A.44.050(1)(d) (prohibiting a health care provider from engaging in sexual intercourse with a client or patient during a treatment session, consultation, interview, or examination.").

[1483] Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1) (including in second degree rape sexual intercourse "without the victim's consent" and defining "without consent" to include "the defendant is a health professional, as defined herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling . . .and the acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."); N.Y. Penal Law §§ 130.05(3)(h), 130.25(1) (including in third degree rape "engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old" and stating a person is incapable of consenting when he or she "is a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree" and the sexual conduct "occurs during a treatment session, consultation, interview, or examination."); Tex. Penal Code Ann. § 22.011(a)(1) (b)(9), (b)(10) (prohibiting sexual activity "without consent" and defining "without consent" to include when "the actor is a mental health services provider or a health care services provider who causes the other person, who is a former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor" or "the actor is a clergyman who causes the other person to submit to or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12) (defining rape as sexual intercourse "without the victim's consent" and stating "without consent" includes "the actor is a health professional or religious counselor . . . the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.").

[1484] Both jurisdictions, Delaware and Utah, include the patient-client relationship in the definition of without consent. Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1); Utah Code Ann. §§ 76-5-402(1), 76-5-

RCC § 22E-1306. SEXUALLY SUGGESTIVE CONDUCT WITH A MINOR.
[Now RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.]

Relation to National Legal Trends. *The revised sexually suggestive conduct with a minor offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[1485]

First, there is strong support in the reformed jurisdictions' criminal codes for requiring "intent to cause the sexual arousal or sexual gratification of any person." The current MSACM statute prohibits specified conduct that is "intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[1486] In contrast, the revised sexually suggestive conduct with a minor statute requires "with intent to cause the sexual arousal or sexual gratification of any person." At least six of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1487] ("reformed jurisdictions") prohibit conduct that is comparable to touching the complainant "inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks"[1488] in the current MSACM

406(12). Delaware applies the penalty enhancements when the actor "engages in sexual intercourse," Del. Code Ann. tit. 11, § 773, which seems to include the offense of rape in Del. Code Ann. tit. 11, § 772 (sexual intercourse "without consent."). Utah defines rape as sexual intercourse without the complainant's consent, Utah Code Ann. § 76-5-402(1), and applies the penalty enhancements to the offense of rape in Utah Code Ann. § 76-5-405.

[1485] This survey excluded offenses with statutorily undefined terms such as "intimate parts" or "genital area." In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[1486] D.C. Code § 22-3010.01(b).

[1487] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1488] Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4) (defining "intimate parts" as "the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person" and "sexual contact" as the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."), 18-3-405(1) (prohibiting sexual contact with a complainant that is less than 15 years of age when the actor is at least four years older), 18-3-405.3(1), (2)(a), (3) (prohibiting sexual contact when the actor is "in a position of trust" with the complainant if the complainant is less than 18 years of age, with different penalties depending on the age of the complainant); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of . . . any part of the body of a child under 13 years of age, . . . for the purpose of sexual gratification or arousal of the victim or the accused."), 5/11-1.50(b) (prohibiting an actor who is under 17 years of age from committing an act of sexual conduct with a complainant who is at least nine years of age but under 17 years of age), 5/11-1.60(c)(1)(i), (c)(2)(i) (prohibiting an actor that is 17 years of age or older from committing an act of sexual conduct with a complainant under the age of 13 years and an actor that is under 17 years of age from committing an act of sexual conduct with a complainant that is under the age of nine years); Ind. Code Ann. §§ 35-42-4-3(b) (prohibiting an actor with a complainant under the age of 14 years from "peform[ing] or

statute.[1489] An additional reformed jurisdiction prohibits conduct comparable to placing the actor's tongue "inside the mouth of the complainant"[1490] in the current MSACM statute.[1491] None of these reformed jurisdictions specifically prohibit conduct that is comparable to touching a complainant "inside his or her clothing" in the current MSACM statute. [Conduct comparable to touching genitalia in the sight of the complainant in the current MSACM statute will be surveyed when revising current D.C. Code § 22-1312 (indecent proposals to minors)].

Of these seven reformed jurisdictions that specifically prohibit conduct comparable to the current MSACM statute, five of them require an intent or purpose to sexually arouse or gratify.[1492] The sixth jurisdiction consistently requires "an intent to

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submit[ing] to any fondling or touching" of either the complainant or the actor, with the "intent to arouse or satisfy the sexual desires of either" the complainant or the actor), 35-42-4-7(m), (n)(3) (prohibiting specified individuals, such as a guardian or adoptive parent, or a person who has or had a professional relationship with the complainant, from engaging in "any fondling or touching with the intent to arouse or satisfy the sexual desires" of either the actor or the complainant with a complainant that is at least 16 years of age but less than 18 years of age), 35-42-4-9(b) (prohibiting an actor at least 18 years of age with a complainant that is at least 14 years of age but less than 16 years of age from "perform[ing] or submit[ing] to any fondling or touching" of either the actor or the complainant with the "intent to arouse or satisfy the sexual desires of either" the complainant or the actor); Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A) (prohibiting any "lewd fondling or touching" of either the actor or the complainant "done or submitted to with the intent to arouse or to satisfy the sexual desires" of either the actor or the complainant or both when the complainant is 14 years of age or more but less than 16 years and making it an aggravated offense if done without consent or if the complainant is under the age of 14 years), 21-5507 (prohibiting "any lewd fondling or touching of the person" when the actor is less than 19 years of age, less than four years older than the complainant, and the complainant is 14 years of age or more but less than 16 years of age); Ohio Rev. Code Ann. §§ 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the . . . pubic region . . . for the purpose of sexually arousing or gratifying either person."), 2907.05(A)(4) (prohibiting sexual contact with a complainant under 13 years of age), 2907.06(A)(4) (prohibiting sexual contact with a complainant 13 years of age or older but less than 16 years of age when the actor is at least 18 years of age or older and four or more years older); Tex. Penal Code Ann. § 21.11(a)(1), (c)(2) (prohibiting sexual contact with a complainant younger than 17 years and defining "sexual contact" as "any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person" if done "with the intent to arouse or gratify the sexual desire of any person.").

[1489] D.C. Code § 22-3010.01(b).

[1490] N.H. Rev. Stat. Ann. §§ 632-A:1(IV) (defining "sexual contact" as the "intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including . . . tongue. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."), 632-A:3(III) (prohibiting sexual contact with a complainant under 13 years of age), 632-A:4(I)(a), (I)(b), (I)(c) (though reference to N.H. Rev. Stat. Ann. § 632-A:2, prohibiting sexual contact with a complainant that is 13 years of age or older and under 17 years of age and the actor is in a "position of trust with or authority over the complainant, as well as sexual contact with a complainant that is 13 years of age or older but less than 16 years with different age gap requirements).

[1491] D.C. Code § 22-3010.01(b).

[1492] Colo. Rev. Stat. Ann. §§ 18-3-401(4) (definition of "sexual contact" requiring "for the purposes of sexual arousal, gratification, or abuse."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (definition of "sexual conduct" requiring "for the purpose of sexual gratification or arousal of the victim or the accused."); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9-(b) (prohibiting "any fondling or touching" with the "intent to arouse or satisfy the sexual desires of either" the complainant or the actor); Ohio Rev. Code Ann. § 2907.01(B) (definition of "sexual contact" requiring "for the purpose of sexually arousing or gratifying

arouse or satisfy the sexual desires" for the comparable conduct, except for the least serious offense.[1493] The seventh jurisdiction requires that the conduct "can be reasonably construed as being for the purpose of sexual arousal or gratification,"[1494] and still appears to require a specific purpose to sexually arouse or gratify.

Second, there is limited support in the criminal codes of the reformed jurisdictions for the revised sexually suggestive conduct with a minor statute requiring a "recklessly" culpable mental state for the age of the complainant. Current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[1495] In contrast, the revised sexually suggestive conduct with a minor statute applies a "recklessly" culpable mental state to the age of complainant. The seven reformed jurisdictions with conduct that is comparable to the current MSACM statute[1496] generally do not statutorily specify any culpable mental states in these sex offense statutes. However, two of these reformed jurisdictions codify that strict liability applies to the age of the complainant.[1497] A third reformed jurisdiction codifies a defense for a reasonable mistake of age for younger

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either person."); Tex. Penal Code Ann. § 21.11(c)(2) (definition of "sexual contact" requiring "with the intent to arouse or gratify the sexual desire of any person.").

[1493] Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(2)(3) (offenses of indecent liberties and aggravated indecent liberties prohibiting any "lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both" with complainants of different ages under the age of 18 years); 21-5507(a)(1)(C)(2), (a)(1)(C)(3) (offense of unlawful voluntary sexual relations prohibiting "any lewd fondling or touching of the person" when the complainant is 14 or more years of age but less than 16 years of age and the actor is less than 19 years of age and less than four years of age older than the complainant).

[1494] N.H. Rev. Stat. Ann. § 632-A:1(IV) (defining "sexual contact" as the "intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including . . . tongue. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification.").

[1495] 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).

[1496] At least six of the 29 reformed jurisdictions prohibit conduct that is comparable to touching the complainant "inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks" in the current MSACM statute. Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4), 18-3-405(1), 18-3-405.3(1), (2)(a), (3); 720 Ill. Comp. Stat. Ann. 5/11-0.1, 5/11-1.50(b), 5/11-1.60(c)(1)(i), (c)(2)(i); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9(b); Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A), 21-5507; Ohio Rev. Code Ann. §§ 2907.01(B), 2907.05(A)(4); Tex. Penal Code Ann. § 21.11(a)(1), (c)(2). One additional reformed jurisdiction prohibits conduct comparable to placing the actor's tongue "inside the mouth of the complainant" in the current MSACM statute. N.H. Rev. Stat. Ann. §§ 632-A:1(IV), 632-A:3(III), 632-A:4(I)(a), (I)(b), (I)(c). None of these reformed jurisdictions specifically prohibit conduct that is comparable to touching a complainant "inside his or her clothing" in the current MSACM statute. [Conduct comparable to touching genitalia in the sight of the complainant in the current MSACM statute will be surveyed when revising current D.C. Code § 22-1312 (indecent proposals to minors)].

[1497] Ohio Rev. Code Ann. §§ 2907.05(A)(4) (prohibiting "sexual contact" when the complainant is less than 13 years of age "whether or not the offender knows the age" of the complainant), 2907.06(A)(4) (prohibiting "sexual contact" when the complainant is 13 years of age or older but less than 16 years of age, "whether or not the offender knows the age" of the complainant and the actor is at least 18 years of age and four or more years older); Tex. Penal Code Ann. § 21.11(a), (c)(2) (prohibiting "sexual contact" with a complainant under the age of 17 years "regardless of whether [the actor] knows the age" of the complainant).

complainants,[1498] but requires a "knowledge" culpable mental state for older complainants.[1499]

Third, there is mixed support for the revised sexually suggestive conduct with a minor statute requiring at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requiring strict liability for this age gap. The basis for this revision is the current MSACM statute, which requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 16 years,[1500] 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.[1501] For consistency with the current provision for complainants under the age of 16 years and other RCC sex offenses, the revised sexually suggestive conduct with a minor statute requires at least a four year age gap between an actor and a complainant under the age of 18 years and requires strict liability for this age gap.

There is mixed support in the criminal codes of the reformed jurisdictions because only four[1502] of the seven reformed jurisdictions[1503] with conduct that is comparable to

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[1498] Ind. Code Ann. § 35-42-4-3(b), (d) (making it a defense that the actor "reasonably believed" that the complainant was 16 years of age or older for an offense that prohibits fondling or touching with a complainant under 14 years of age).

[1499] Ind. Code Ann. § 35-42-4-7(m), (n) (prohibiting fondling or touching with a complainant at least 16 years of age but less than 18 years of age when the actor is a guardian, custodian, or child care worker or has or had a "professional relationship" with the complainant, and requiring that the actor "knows" the complainant is at least 16 years of age but under 18 years of age for the professional relationship gradation).

[1500] 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.").

[1501] 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.").

[1502] Colo. Rev. Stat. Ann. § 18-3-405.3(1) (prohibiting "sexual contact" with a complainant less than 18 years of age when the actor is in a "position of trust with or authority over" the complainant); 720 Ill. Comp. Stat. Ann. 5/11-1.60(f), (prohibiting "sexual conduct" with a complainant that is at least 13 years of age but under 18 years of age when the actor is 17 years of age or older and "holds a position of trust, authority, or supervision in relation" to the complainant); Ind. Code Ann. § 35-42-4-7(m), (n) (prohibiting fondling or touching with a complainant at least 16 years of age but less than 18 years of age when the actor is a guardian, custodian, or child care worker or has or had a "professional relationship" with the complainant); N.H. Rev. Stat. Ann. § 632-A:4(I)(a) (prohibiting "sexual contact under any of the circumstances named in [section] 632-A:2, which include when the complainant is 13 years of age or older and under 18 years of age and the actor is in a "position of trust with or authority over" the complainant).

[1503] At least six of the 29 reformed jurisdictions prohibit conduct that is comparable to touching the complainant "inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks" in the current MSACM statute. Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4), 18-3-405(1), 18-3-405.3(1), (2)(a), (3); 720 Ill. Comp. Stat. Ann. 5/11-0.1, 5/11-1.50(b), 5/11-1.60(c)(1)(i), (c)(2)(i); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9(b); Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A), 21-5507; Ohio Rev. Code Ann. §§ 2907.01(B), 2907.05(A)(4); Tex. Penal Code Ann. § 21.11(a)(1), (c)(2). One additional reformed jurisdiction prohibits conduct comparable to placing the actor's tongue "inside the mouth of the complainant" in the current MSACM statute. N.H. Rev. Stat. Ann. §§ 632-A:1(IV), 632-A:3(III), 632-A:4(I)(a), (I)(b), (I)(c). None of these reformed jurisdictions specifically prohibit conduct that is comparable to touching a complainant "inside his or her clothing" in the current MSACM statute. [Conduct comparable to touching genitalia in the sight of the complainant in the current MSACM statute will be surveyed when revising current D.C. Code § 22-1312 (indecent proposals to minors)].

the current MSACM statute include complainants under 18 years of age when the actor is in a significant relationship with the complainant. None of these four reformed jurisdictions require an age gap between the actor and the complainant. However, these four reformed jurisdictions still support narrowing the scope of the revised sexually suggestive conduct with a minor statute for complainants under the age of 18 years. Two of these four reformed jurisdictions are narrower than the District's current MSACM statute because they require the actor to use the position of authority to coerce the complainant into engaging in the sexual activity.[1504] A third jurisdiction grades the offense more severely if a complainant is under the age of 15 years as opposed to under 18 years of age.[1505] Only one jurisdiction is similar in scope to the current MSACM statute, requiring no age gap and permitting liability for any complainant under the age of 18 years.[1506]

Of the remaining three reformed jurisdictions with conduct that is comparable to the current MSACM statute, two do not include any complainants under the age of 18 years.[1507] The remaining jurisdiction applies to complainants under the age of 17 years, regardless of whether there is a relationship with the actor, and provides an affirmative defense if the actor is "not more than three years older" than the complainant.[1508]

Fourth, there is limited support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised sexually suggestive conduct with a minor statute. Current D.C. Code § 22-3020 specifies

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[1504] Ind. Code Ann. § 35-42-4-7(m), (n) (prohibiting fondling or touching with a complainant at least 16 years of age but less than 18 years of age when the actor is a specified individual such as a guardian, custodian, or child care worker, or has or had a "professional relationship" with the complainant and for the "professional relationship" prong requiring that the actor "uses or exerts . . . the professional relationship" to engage in the fondling or lewd touching); N.H. Rev. Stat. Ann. § 632-A:4(I)(a) (prohibiting "sexual contact under any of the circumstances named in [section] 632-A:2," which includes when the complainant is 13 years of age or older and under 18 years of age and the actor is in a "position of trust with or authority over" the complainant and "uses this authority to coerce [the complainant] to submit.").

[1505] Colo. Rev. Stat. Ann. § 18-3-405.3(1), (2)(a), (3) (making it a class 4 felony to engage "sexual contact" with a complainant less than 18 years of age when the actor is in a "position of trust with or authority over" the complainant and a class 3 felony if the complainant is less than 15 years of age).

[1506] 720 Ill. Comp. Stat. Ann. 5/11-1.60(f), (prohibiting "sexual conduct" with a complainant that is at least 13 years of age but under 18 years of age when the actor is 17 years of age or older and "holds a position of trust, authority, or supervision in relation" to the complainant).

[1507] Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A) (prohibiting any "lewd fondling or touching" of either the actor or the complainant "done or submitted to with the intent to arouse or to satisfy the sexual desires" of either the actor or the complainant or both when the complainant is 14 years of age or more but less than 16 years and making it an aggravated offense if done without consent or if the complainant is under the age of 14 years), 21-5507 (prohibiting "any lewd fondling or touching of the person" when the actor is less than 19 years of age, less than four years older than the complainant, and the complainant is 14 years of age or more but less than 16 years of age); Ohio Rev. Code Ann. §§ 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the . . . pubic region . . . for the purpose of sexually arousing or gratifying either person."), 2907.05(A)(4) (prohibiting sexual contact with a complainant under 13 years of age), 2907.06(A)(4) (prohibiting sexual contact with a complainant 13 years of age or older but less than 16 years of age when the actor is at least 18 years of age or older and four or more years older);

[1508] Tex. Penal Code Ann. § 21.11(a), (b) (prohibiting "sexual contact" with a complainant under the age of 17 years and making it an affirmative defense if the actor "was not more than three years older" than the complainant and other conditions are met).

aggravators that apply to all of the current sex offense statutes.[1509] The revised sexually suggestive conduct with a minor statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is limited support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the revised sexually suggestive conduct with a minor statute. Fifteen[1510] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[1511] Of these 16

[1509] 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.

[1510] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

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

[1511] Alaska Stat. Ann. § 11.41.410(2).

reformed jurisdictions, three[1512] have statutes that prohibit conduct that is comparable to the current MSACM statute. Two[1513] of these three reformed jurisdictions apply the penalty enhancements to the statutes prohibiting conduct comparable to the current MSACM statute.

RCC § 22E-1305. ENTICING A MINOR.
[Now RCC § 22E-1305. Enticing a Minor Into Sexual Conduct.]

Relation to National Legal Trends. *The revised enticing offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[1514]

First, there is strong support in the criminal codes of other jurisdictions for the revised enticing statute requiring a "recklessly" culpable mental state for the age of the complainant, as opposed to strict liability under current law. Seventeen of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal

[1512] Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4), 18-3-405(1), 18-3-405.3(1), (2)(a), (3); 720 Ill. Comp. Stat. Ann. 5/11-0.1, 5/11-1.50(b), 5/11-1.60(c)(1)(i), (c)(2)(i); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9(b).

[1513] In these jurisdictions, the relevant penalty enhancements are not codified with the penalty enhancements that apply to the sexual act or sexual intercourse offenses, but are codified separately in the relevant offenses. The first jurisdiction is Illinois. 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of . . . any part of the body of a child under 13 years of age, . . . for the purpose of sexual gratification or arousal of the victim or the accused."), 5/11-1.50(b) (offense of criminal sexual abuse prohibiting an actor who is under 17 years of age from committing an act of sexual conduct with a complainant who is at least nine years of age but under 17 years of age), 5/11-1.6(a)(1), (a)(2) (offense of aggravated criminal sexual abuse prohibiting committing criminal sexual abuse when the actor "displays, threatens to use, or uses a dangerous weapon or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon" and when the actor "causes bodily harm to the victim.").

The second jurisdiction is Indiana, and only the comparable offenses for complainants under the age of 16 years have penalty enhancements. Ind. Code Ann. §§ 35-42-4-3(b), (b)(2) (making it a Level 4 felony for an actor to engage in "any fondling or touching . . . with intent to arouse or satisfy the sexual desires of either" the complainant or the actor when the complainant is under the age of 14 years, but a Level 2 felony if "it is committed while armed with a deadly weapon."), 35-42-4-9(b) (making it a Level 6 felony for an actor at least 18 years of age to engage in "any fondling or touching . . . with intent to arouse or satisfy the sexual desires of either" the complainant or the actor with a complainant that is at least 14 years of age but less than 16 years of age, but making it a Level 2 felony if "it is committed by using or threatening by the use of deadly force, while armed with a deadly weapon."). Indiana does not have any penalty enhancement for the comparable offense for complainants under the age of 18 years. Ind. Code Ann. § 35-42-4-7(m), (n)(3) (prohibiting specified individuals, such as a guardian or adoptive parent, or a person who has or had a professional relationship with the complainant, from engaging in "any fondling or touching with the intent to arouse or satisfy the sexual desires" of either the actor or the complainant with a complainant that is at least 16 years of age but less than 18 years of age).

[1514] Unless otherwise noted, this survey is limited to general enticing statutes, which may include specific provisions for online and other electronic means of enticing. Statutes that are limited to online and other electronic means of enticing were excluded. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

Code (MPC) and have a general part[1515] ("reformed jurisdictions") have general enticing a minor statutes.[1516] Nine of these 18 reformed jurisdictions statutorily specify a culpable mental state for the age of the complainant—two jurisdictions require "knows or should know" or "knows or has reason to know"[1517] and seven jurisdictions require "believes"[1518] or "knows or believes."[1519] Only one of the 18 reformed jurisdictions statutorily specifies that the age of the complainant is a matter of strict liability, but even in this jurisdiction strict liability is limited to the younger complainants[1520] and a culpable mental state of "recklessly" is required for complainants that are 16 or 17 years of age.[1521]

The remaining eight reformed jurisdictions with general enticing a minor statutes do not statutorily specify a culpable mental state for the age of the complainant in the enticing statutes.

Second, there is strong support in the criminal codes of the reformed jurisdictions for the revised enticing statute requiring that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element, as opposed to the current enticing statute, which does not specify any requirements for the age of the actor. Of the 17 reformed jurisdictions with general enticing a minor statutes,[1522] ten have an

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[1515] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1516] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[1517] Ariz. Rev. Stat. Ann. § 13-3554(A) ("knowing or having reason to know that the other person is a minor."); Tenn. Code Ann. § 39-13-528(a)("knows, or should know, is less than eighteen (18) years of age.").

[1518] Del. Code Ann. tit. 11, § 1112A(a)(1), (b)(3) (defining "child" to include "an individual whom the person committing the offense believes to be younger than 18 years of age."); 720 Ill. Comp. Stat. Ann. 5/11-6(a) ("believes to be a child."); Ind. Code Ann. § 35-42-4-6(b) ("believes to be a child under fourteen (14) years of age."); Mont. Code Ann. § 45-5-625(1)(c) ("believes to be a child under 16 years of age."); Minn. Stat. Ann. § 609.352(2) ("believes is a child."); S.D. Codified Laws § 22-24A-5(1) ("reasonably believes is a minor.").

[1519] Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1), (A)(2), (1)(B)(2) ("knows or believes" is a complainant of a certain age).

[1520] Ohio Rev. Code Ann. § 2907.07(A), (B)(1) (stating "whether or not the offender knows the age of such person" for a complainant that is under the age of 13 years or at least 13 years of age but under 16 years of age).

[1521] Ohio Rev. Code Ann. § 2907.07(B)(2) (prohibiting enticing a complainant that is 16 or 17 years of age when "the offender knows or has reckless disregard of the age" of the complainant).

[1522] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. §

age requirement for the actor, with a majority of these jurisdictions requiring that the actor be 18 years of age or older.[1523] An additional reformed jurisdiction requires that the actor be 18 years of age or older in the gradations of the enticing offense with older complainants,[1524] and has no age requirement for the actor in the gradation for the youngest complainants.[1525]

These reformed jurisdictions do not statutorily specify whether there is a culpable mental state requirement for the age of the actor in the general enticing statutes.

Third, there is limited supported in the criminal codes of the reformed jurisdictions for the revised enticing statute requiring at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requiring strict liability for this age gap. The basis for this revision is the current enticing statute, which requires a four year age gap between the actor and a complainant under the age of 16 years,[1526] but does not have an age gap requirement when the complainant is under the age of 18 years.[1527] There is limited support in the criminal codes of the reformed jurisdictions for this revision because most of the 17 reformed jurisdictions that have general enticing a minor statutes[1528] do not require an age gap between the actor and the complainant. However, five of these 17 reformed jurisdictions do require an age gap between the actor and the complainant, with an age gape of three or four years being the most common,[1529] and a sixth jurisdiction

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12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[1523] Ark. Code Ann. § 5-14-110(a)(1) (requiring the actor to be 18 years of age or older); Del. Code Ann. tit. 11, §§ 1112(a)(1) (requiring the actor to be 18 years of age or older); 720 Ill. Comp. Stat. Ann. 5/11-6(a) (requiring the actor to be 17 years of age or older); Ind. Code Ann. § 35-42-4-6(b) (requiring the actor to be 18 years of age or older); Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1)(A)(1), (1)(B)(1) (requiring the actor to be 16 years of age or older); Mo. Ann. Stat. § 566.151(1) (requiring the actor to be 21 years of age or older); Minn. Stat. Ann. § 609.352(2) (requiring the actor to be 18 years of age or older); N.D. Cent. Code Ann. § 12.1-20-05(1), (2) (requiring the actor to be an "adult.") S.D. Codified Laws § 22-24A-5(1) (requiring the actor to be 18 years of age or older); Tenn. Code Ann. § 39-13-528(a) (requiring the actor to be 18 years of age or older).

[1524] Ohio Rev. Code Ann. § 2907.07(B)(1), (C)(1) (enticing offense requiring that the actor be 18 years of age or older when the complainant is at least 13 years of age but less than 16 years of age or when the complainant is 16 or 17 years of age).

[1525] Ohio Rev. Code Ann. § 2907.07(A) (enticing offense applying to any "person" when the complainant is less than 13 years of age).

[1526] 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.").

[1527] 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.").

[1528] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[1529] Ark. Code Ann. § 5-14-110(a)(1) (enticing offense requiring that the actor be 18 years of age or older and the complainant be less than 15 years of age); Ind. Code Ann. § 35-42-4-6(b) (enticing offense requiring that the actor be 18 years of age or older and the complainant be less than 14 years of age); Me.

appears to grade the offense more severely if there is an age gap between the actor and the complainant.[1530] A seventh jurisdiction requires an age gap of at least four years in the gradations for older complainants,[1531] and has no age gap requirement in the gradation for the youngest complainants.[1532]

These reformed jurisdictions do not statutorily specify whether there is a culpable mental state requirement for the required age gap in the general enticing statutes.

Fourth, there is little support in the criminal codes of the reformed jurisdictions for the revised enticing statute limiting the offense to fictitious complainants that are law enforcement officers. The basis for this revision is that the current closely-related statute for arranging sexual conduct with a real or fictitious child is limited to fictitious complainants that are law enforcement officers[1533] and the legislative concerns that underlie this limitation apply equally to the enticing offense.[1534] Of the 17 reformed jurisdictions with general enticing a minor statutes,[1535] nine include fictitious children.[1536]

Rev. Stat. Ann. tit. 17-A, § 259-A(1)(A), (1)(B) (enticing offense requiring that the actor be at least 16 years of age, that the complainant be either less than 14 years of age or less than 12 years of age, and that the actor be at least three years older than the complainant); Mo. Ann. Stat. § 566.151(1) (enticing offense requiring the actor to be 21 years of age or older and the complainant be less than 15 years of age); Minn. Stat. Ann. § 609.352(1)(a), (2) (enticing offense requiring that the actor be 18 years of age or older and soliciting a "child" and defining "child" to include a person 15 years of age or younger);

[1530] N.D. Cent. Code Ann. § 12.1-20-05(1), (2) (enticing offense requiring that the actor be an "adult" and making the offense a class A misdemeanor if the compliant is a "minor"15 years of age or older, but making the offense a class C felony if the actor is at least 22 years of age and the complainant is a "minor" 15 years of age or older).

[1531] Ohio Rev. Code Ann. § 2907.07(B)(1), (C)(1) (enticing offense requiring that at least a four year age gap between the actor and the complainant when the complainant is at least 13 years of age but less than 16 years of age or when the complainant is 16 or 17 years of age).

[1532] Ohio Rev. Code Ann. § 2907.07(A) (enticing offense not requiring any age gap between the actor and the complainant when the complainant is less than 13 years of age).

[1533] 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.").

[1534] The legislative history for the current arranging statute states that the statute was limited to law enforcement officers because otherwise the statute could "enable mischief, such as blackmail, between adults where they are acting out fantasies with no real child involved or intended to involved (the thrill such as it is, being in the salacious banter)." Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary, Bill 18-963, the "Criminal Code Amendment Act" at 7 (internal quotation marks omitted) (quoting written testimony of Richard Gilbert, District of Columbia Association of Criminal Defense Lawyers). The current arranging contact statute was enacted in 2011 as part of the "Criminal Code Amendment Act of 2010, 2010 District of Columbia Laws 18-377 (Act 18-722)."

[1535] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[1536] Ark. Code Ann. § 5-14-110(a)(1) (prohibiting solicitation of a "person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age."); Del. Code Ann. tit. 11, § 1112A(b) (defining "child" as "[a]n individual who is younger than 18 years of age; or [a]n individual who represents himself or herself to be younger than 18 years of age; or [a]n individual whom the person committing the offense believes to be younger than 18 years of age."); 720 Ill. Comp. Stat. Ann. 5/11-6(a) (prohibiting solicitation of a "child or one whom [the actor] believes to be a child."); Ind. Code Ann. § 35-

Of these nine jurisdictions, only one includes fictitious children only if they are really law enforcement officers posing as children.[1537]

There are 14 reformed jurisdictions with statutes that specifically prohibit online or other electronic enticing, either in either in addition to the general enticing a minor statute[1538] or as the jurisdiction's only enticing statute.[1539] All 14 of these jurisdictions include fictitious children—12 include all fictitious children[1540] and two are limited to fictitious children if they are law enforcement officers posing as children.[1541]

42-4-6(b) (prohibiting solicitation of a "child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age."); Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1)(A)(2), (B)(2) (prohibiting solicitation when the actor "knows or believes that the other person is less than 14 years of age" or "knows or believes that the other person is less than 12 years of age."); Mont. Code Ann. § 45-5-625(1)(c) (prohibiting solicitation of a "child under 16 years of age or a person the offender believes to be a child under 16 years of age."); Minn. Stat. Ann. § 609.352(2) (prohibiting solicitation of a "child or someone [the actor] reasonably believes is a child."); S.D. Codified Laws § 22-24A-5(1) (prohibiting solicitation of a "minor, or someone [the actor] reasonably believes is a minor."); Mo. Ann. Stat. § 566.151(2) ("It is not a defense to a prosecution for a violation of this section that the other person was a peace officer masquerading as a minor.");

[758] Tenn. Code Ann. § 39-13-528(a) (prohibiting solicitation of a person who "is less than eighteen (18) years of age" or "a law enforcement officer posting as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age.").

[1538] Ala. Code § 13A-6-122; Ark. Code Ann. § 5-27-306(a)(1), (a)(2); Colo. Rev. Stat. Ann. § 18-3-306; Del. Code Ann. tit. 11, § 1112A(a)(2); Kan. Stat. Ann. § 21-5509; Minn. Stat. Ann. § 609.352(2a)(1); N.D. Cent. Code Ann. § 12.1-20.05.1(1)(b); Ohio Rev. Code Ann. § 2907.07(C), (D).

[1539] Alaska Stat. Ann. § 11.41.452; Conn. Gen. Stat. Ann. § 53a-90; Ky. Rev. Stat. Ann. § 510.155; N.H. Rev. Stat. Ann. § 649-B:4; Or. Rev. Stat. Ann. §§ 163.431 – 163.434; Tex. Penal Code Ann. § 33.021(c).

[1540] Ala. Code § 13A-6-122 (prohibiting soliciting "a child who is at least three years younger than the defendant or another person believed by the defendant to be a child at least three years younger than the defendant."); Alaska Stat. Ann. § 11.41.452 (a)(1), (a)(2) (prohibiting solicitation of a "child under 16 years of age" or a person the actor "believes" is a child under 16 years of age); Ark. Code Ann. § 5-27-306(a)(1), (a)(2) (prohibiting solicitation of a "child fifteen (15) years of age or younger" or a person the actor "believes to be fifteen (15) years of age or younger."); Colo. Rev. Stat. Ann. § 18-3-306(1) (prohibiting solicitation of a person "the actor knows or believes to be under fifteen (15) years of age."); Conn. Gen. Stat. Ann. § 53a-90(a)(1), (a)(2) (prohibiting solicitation of a person "under eighteen years or age or who the actor reasonably believes to be under eighteen years of age."); Del. Code Ann. tit. 11, §§ 1112A(a)(2), (b) and 1112B(a)(2), (b) (prohibiting solicitation of a "child" and defining "child" as "[a]n individual who is younger than 18 years of age; or [a]n individual who represents himself or herself to be younger than 18 years of age; or [a]n individual whom the person committing the offense believes to be younger than 18 years of age."); Kan. Stat. Ann. § 21-5509(a) (prohibiting solicitation of a person "whom the offender believes to be a child."); Minn. Stat. Ann. § 609.352(2a)(1) (prohibiting solicitation of a "child or someone [the actor] reasonably believes is a child."); N.D. Cent. Code Ann. § 12.1-20.05.1(1)(b) (prohibiting solicitation of a "person [the actor] believes to be a minor."); N.H. Rev. Stat. Ann. § 649-B:4(I) (prohibiting solicitation of a "child or another person believed by [the actor] to be a child."); Or. Rev. Stat. Ann. §§ 163.431(1), .432(1)(a), .433(1) (prohibiting solicitation of a child and defining "child" as a "person who the defendant reasonably believes to be under 16 years of age."); Tex. Penal Code Ann. § 33.021(a)(1), (c) (prohibiting solicitation of a "minor" and defining "minor" to include "an individual whom the actor believes to be younger than 17 years of age.").

[1541] Ky. Rev. Stat. Ann. § 510.155(1) (prohibiting procuring or promoting "the use of a minor, or a peace officer posing as a minor if the person believes that the piece officer is a minor or is wanton or reckless in that belief."); Ohio Rev. Code Ann. § 2907.07(C), (D) (prohibiting solicitation of a child of specified ages or a "law enforcement officer posing as a person" of the specified ages and "the offender believes that the other person [is of the specified ages] or is reckless in that regard.").

Fifth, there is strong support in the criminal codes of reformed jurisdictions for limiting the revised enticing statute to persuading or enticing a child to go to another location to engage in or submit to a sexual act or sexual contact and eliminating the provision of the current enticing statute which prohibits actually taking a complainant. Of the 17 reformed jurisdictions with general enticing a minor statutes,[1542] only one jurisdiction[1543] includes making the complainant go somewhere for the purposes of sexual activity like the current enticing statute.

Sixth, there is strong support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised enticing statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[1544] The revised enticing statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is strong support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the revised sexually suggestive conduct with a minor statute. Fifteen[1545] of the 29 reformed

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[1542] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[1543] Wis. Stat. Ann. § 948.07(1) ("Whoever, with intent to commit any of the following acts, causes . . . any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony: (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.").

[1544] 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.

[1545] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily

jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[1546] Of the 17 reformed jurisdictions with general enticing a minor statutes,[1547] nine have general enticing a minor statutes,[1548] none applies the penalty enhancements to the general enticing a minor statutes.

Seventh, it is difficult to determine the national legal trends for prohibiting an actor from receiving a conviction for both enticing a complainant and engaging in the prohibited conduct because none of the 17 reformed jurisdictions with general enticing a minor statutes,[1549] statutorily addresses convictions for both enticing and engaging in the prohibited conduct in the general enticing statutes.

RCC § 22E-1306. ARRANGING FOR SEXUAL CONDUCT WITH A MINOR.
[Now RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.]

Relation to National Legal Trends. None of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1550] ("reformed jurisdictions") appear to have a specific offense that is comparable to the District's current[1551] or revised arranging statute. The

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

[1546] Alaska Stat. Ann. § 11.41.410(2).

[1547] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[1548] Ariz. Rev. Stat. Ann. § 13-3554; Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Mo. Ann. Stat. § 566.151; Minn. Stat. Ann. § 609.352(2); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[1549] S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[1550] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1551] D.C. Code § 22-3010.02.

reformed jurisdictions may have offenses that prohibit arranging for a complainant under the age of 18 years to engage in a commercial sex act[1552] or traveling within a state to engage in sexual conduct with such a complainant,[1553] but they do not appear to have offenses prohibit merely arranging for any sexual conduct to occur.

RCC § 22E-1307. NONCONSENSUAL SEXUAL CONDUCT.

Relation to National Legal Trends. *The revised nonconsensual sexual conduct offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[1554]

First, there is strong support in other jurisdictions' criminal codes for the revised nonconsensual sexual conduct statute having two gradations, based on whether a "sexual act" or "sexual contact" was committed. Eleven of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1555] ("reformed jurisdictions") have offenses that prohibit

[1552] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-6-404 ("Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available, to another p-erson a child for the purpose of sexual exploitation of a child commits procurement of a child for sexual exploitation, which is a class 3 felony."), 18-6-403(3) ("A person commits sexual exploitation of a child if, for any purpose, he or she knowingly: (a) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material; or (b) Prepares, arranges for, publishes, including but not limited to publishing through digital or electronic means, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, or distributes, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or (b.5) Possesses or controls any sexually exploitative material for any purpose; except that this subsection (3)(b.5) does not apply to law enforcement personnel, defense counsel personnel, or court personnel in the performance of their official duties, nor does it apply to physicians, psychologists, therapists, or social workers, so long as such persons are licensed in the state of Colorado and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site; or (c) Possesses with the intent to deal in, sell, or distribute, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or (d) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing a performance.").

[1553] *See, e.g.*, Mont. Code Ann. § 45-5-625(1)("A person commits the offense of sexual abuse of children if the person . . . knowingly travels within, from, or to this state with the intention of meeting a child under 16 years of age or a person the offender believes to be a child under 16 years of age in order to engage in sexual conduct, actual or simulated."); Ark. Code Ann. § 5-27-305(a) ("A person commits the offense of transportation of a minor for prohibited sexual conduct if the person transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, and the actor: (1) Knows or has reason to know that prostitution or sexually explicit conduct involving the minor will be commercially exploited by any person; and (2) Acts with the purpose that the minor will engage in: (A) Prostitution; or (B) Sexually explicit conduct.").

[1554] This survey is limited to offenses that require lack of consent, without any other requirement, such as use of force or incapacity. Offenses are included even if "consent" was not statutorily defined. Parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[1555] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code

both sexual penetration and sexual contact without consent.[1556] All 11 of these reformed jurisdictions penalize sexual penetration more severely than sexual contact. An additional reformed jurisdiction makes it a felony to engage in sexual intercourse without consent but does not appear to have a similar provision for sexual contact.[1557]

General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1556] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[1557] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

Second, second degree of the revised nonconsensual sexual conduct statute generally replaces non-violent sexual touching forms of assault. A discussion of the scope of the reformed jurisdictions' assault statutes is beyond the scope of this commentary.

Third, there is limited support for the revised nonconsensual sexual conduct offense requiring a culpable mental state of "recklessly" as to engaging in the sexual act or sexual contact. The support is limited because most of the 11 reformed jurisdictions[1558] with comparable offenses do not statutorily specify a culpable mental state for engaging in the sexual activity in these sex offense statutes. Three of the 11 reformed jurisdictions statutorily specify a culpable mental state for engaging in the sexual activity. Of these three jurisdictions, one jurisdiction requires an "intentionally"

[1558] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

culpable mental state,[1559] one jurisdiction requires a "knowingly" culpable mental state,[1560] and the third jurisdiction has a gradation for a "knowingly" culpable mental state and a gradation for a "recklessly" culpable mental state.[1561]

The reformed jurisdiction that has a felony offense for sexual intercourse without consent, but no similar provision for sexual contact, does not statutorily specify a culpable mental state for engaging in the sexual activity in the sex offense statute.[1562]

Fourth, there is limited support for the revised nonconsensual sexual conduct offense requiring a culpable mental state of "recklessly" as to the fact that the actor lacked effective consent from the complainant. The support is limited because most of the 11 reformed jurisdictions[1563] with comparable offenses do not statutorily specify a culpable mental state for engaging in the sexual activity in these sex offense statutes.

[1559] Me. Rev. Stat. tit. 17-A, § 255-A(1)(A), (1)(B) ("A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact" and the complainant has not "expressly or impliedly acquiesced.). There is no culpable mental state specified for the felony gradation that is limited to a sexual act, but it is the same class of crime. Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act.").

[1560] Mont. Code Ann. §§ 45-5-502(1), (2)(a) ("A person who knowingly has sexual intercourse with another person without consent" and "[a] person who knowingly subjects another person to any sexual contact without consent.");

[1561] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent.").

[1562] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[1563] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree

Only two of these eleven reformed jurisdictions statutorily specify a culpable mental state for the without consent element. One jurisdiction requires a "knowing" culpable mental state for the sexual penetration gradation, but does not clearly specify a culpable mental state for the sexual contact gradation.[1564] A second jurisdiction specifies "knows or has reason to know."[1565]

The reformed jurisdiction that has a felony offense for sexual intercourse without consent, but no similar provision for sexual contact, does not statutorily specify a culpable mental state for the lack of consent in the sex offense statute.[1566]

Fifth, there is strong support in the criminal codes of reformed jurisdictions for the revised nonconsensual sexual conduct offense requiring proof that the actor lacked effective consent. The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission,"[1567] which, unlike "consent,"[1568] is undefined in the current sexual abuse statutes. The current MSA statute, however, is subject to the same consent defense applicable to other sexual abuse statutes.[1569] There is strong support in the criminal codes of the reformed jurisdictions for requiring that the actor lack "effective consent," as opposed to "permission," and for eliminating the consent defense. Of the 11 reformed jurisdictions[1570] with comparable offenses, ten

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sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[1564] Mo. Ann. Stat. §§ 566.031, 566.101 (prohibiting sexual intercourse "knowing that he or she does so without that person's consent" and "purposely" subjecting another person to sexual contact without consent).

[1565] Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) ("knows or has reason to know" that the complainant did not consent to the sexual penetration or the sexual contact).

[1566] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[1567] D.C. Code § 22-3006.

[1568] 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.").

[1569] D.C. Code § 22-3007.

[1570] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual

require that the actor lack "consent."[1571] The remaining reformed jurisdiction requires that the complainant "has not expressly or impliedly acquiesced" to the sexual act or

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contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[1571] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the

sexual contact,[1572] yet uses "consent" in other sex offenses.[1573] The reformed jurisdiction that has a felony offense for sexual intercourse without consent, but no similar provision for sexual contact, requires that the actor lack "consent."[1574]

A discussion of these reformed jurisdictions' defenses is beyond the scope of this commentary.

Sixth, there is strong support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised nonconsensual sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[1575] The revised

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complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[1572] Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime).

[1573] Me. Rev. Stat. tit. 17-A, § 253(2)(D) ("A person is guilty of gross sexual assault if that person engages in a sexual act with another person and the other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual act."), § 255-A(1)(C) ("A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact and the other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual contact.").

[1574] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[1575] 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-

nonconsensual sexual conduct statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is strong support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the revised nonconsensual sexual conduct statute. Fifteen[1576] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[1577]

Of these 16 reformed jurisdictions, five have statutes that prohibit conduct that is comparable to the current MSA statute,[1578] including the jurisdiction that only prohibits

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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.

[1576] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

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

[1577] Alaska Stat. Ann. § 11.41.410(2).

[1578] Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or

sexual penetration without consent.[1579] These jurisdictions take a variety of approaches to grading the MSA comparable offense and for the purpose of this analysis, the commentary will discuss only the comparable penetration offenses. Two of these jurisdictions apply the penalty enhancements to the comparable penetration offense, but also define sexual assault as sexual intercourse without consent.[1580] In these jurisdictions, applying the penalty enhancements to the offense appears to distinguish a "forcible" sexual assault from a non-forcible sexual assault. The remaining three jurisdictions do not apply the penalty enhancements to the comparable penetration offense.[1581]

RCC § 22E-1308. LIMITATIONS ON LIABILITY FOR RCC CHAPTER 13 OFFENSES.

Relation to National Legal Trends: It is difficult to discuss merger of sex offenses in other jurisdictions due to the wide variety of statutory organization and penalties. However, there is limited supported in the criminal codes of other jurisdictions for limiting liability for young persons for certain sex offenses. The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and exempts persons under the age of 12 years for liability for sex offenses other than those that involve the use of aggravated force or restraint, a deadly weapon, or infliction of serious bodily injury.[1582] The ALI commentary notes that the "revised Code rests this

impliedly acquiesce in the actor's conduct."); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct.").

[1579] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[1580] Utah Code Ann. §§ 76-5-402(1), (3), 76-5-406(1) (defining rape as sexual intercourse without the complainant's consent and stating "without consent" includes "the victim expresses lack of consent through words or conduct."), 76-5-405(1)(a)(i), (1)(a)(iii) (applying the penalty enhancements for a dangerous weapon and accomplices to the offense of rape); Tenn. Code Ann. §§ 39-13-503(a)(2), (b) (including sexual penetration "without the consent" in the offense of rape), Tenn. Code Ann. § 39-13-502(a) (applying penalty enhancements for a dangerous weapon, bodily injury, or accomplices to "unlawful sexual penetration.").

[1581] Mo. Ann. Stat. §§ 566.031 (making sexual intercourse without the complainant's consent a class D felony, without any sentencing provision for an "aggravated sexual offense."), 566.010(1)(a), (1)(b), (1)(c) (defining "aggravated sexual offense" as one that involves serious bodily injury, a dangerous weapon, or accomplices); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (including sexual intercourse without the complainant's consent in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.95(1) (applying penalty enhancements for serious physical injury or a dangerous weapon to rape in the first degree).

[1582] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018) (defining "actor.").

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."[1583]

In addition, several of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1584] ("reformed jurisdictions") limit the liability of young complainants for some or all of the jurisdictions' sex offenses. At least two of the 29 reformed jurisdictions statutorily exclude actors younger than 16 years of age or 17 years of age from liability for all age-based sex offenses.[1585] Three additional reformed jurisdictions exclude young actors from all gradations of age-based sexual assault except for the most serious gradation for the youngest complainants.[1586] Finally, two more reformed jurisdictions reserve the most serious penalty for age-based sex offenses for actors that are 18 years of age or older.

Chapter 14. Kidnapping and Criminal Restraint

RCC § 22E-1401. KIDNAPPING.

[1583] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018) (defining "actor.") cmt. at 51.

[1584] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1585] Ala. Code §§ 13A-6-61(a)(3), 13A-6-62(a)(1) (requiring that the actor be 16 years of age or older for sexual intercourse with a complainant who is less than 12 years of age, or less than 16 years but more than 12 years of age when the actor is at least 2 years older); Alaska Stat. Ann. §§ 11.41.434(a)(1), 11.41.41.436(a)(1) (requiring that the actor be 16 years of age or older for sexual penetration with a complainant under 13 years of age and the actor be 17 years of age or older for sexual penetration with a complainant that is 13, 14, or 15 years of age and at least four years younger).

[1586] Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), 510.050(1)(a), 510.060(1)(b) (first degree rape offense prohibiting any actor from engaging in sexual intercourse with a complainant that is less than 12 years old, but requiring that the actor be 18 years of age or more for second degree rape [sexual intercourse with a complainant less than 14 years old] and requiring that the actor be 21 years of age or more for third degree rape [sexual intercourse with a complainant less than 16 years of age]); N.Y. Penal Law §§ 130.25(2), 130.30(1), 130.35(3), (4) (offense of third degree rape prohibiting an actor 21 years of age or older from engaging in sexual intercourse with a person less than 17 years of age and second degree rape prohibiting an actor 18 years of age or more from engaging in sexual intercourse with a complainant less than 15 years of age, but first degree rape prohibiting any actor from engaging in sexual intercourse with a complainant less than 11 years old or an actor 18 years of age or more from engaging in sexual intercourse with a complainant less than 13 years of age), 130.96 (offense of predatory sexual assault against a child prohibiting an actor 18 years of age or more from committing first degree rape when the complainant is less than 13 years old); Utah Code Ann. §§ 76-5-401(1), (2)(a), 76-5-402.1(1) (offense of unlawful sexual activity with a minor prohibiting an actor 18 years of age or older from engaging in sexual intercourse with a complainant who is 14 years of age or older but less than 16 years of age, but the offense of rape of a child prohibiting any actor from engaging in sexual intercourse with a complainant under the age of 14 years).

Relation to National Legal Trends. *Codifying an aggravated kidnapping statute based on the status of the complainant, or whether the defendant used a dangerous or imitation weapon is not supported by national legal trends.*

First, the changes to law under the RCC's kidnapping statute, which are incorporated into the RCC's aggravated kidnapping statute are consistent with most criminal codes.[1587]

Second, it is unclear if barring multiple penalty enhancements from applying to a single kidnapping conviction is consistent with most criminal codes. CCRC staff has not researched whether other jurisdictions allow more than one penalty enhancement to apply to a single kidnapping conviction.

Third, including penalty enhancements based on the status of the complainant as elements of aggravated kidnapping is not consistent with most criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1588] (hereinafter "reformed code jurisdictions"), none include heightened penalty gradations based on whether the complainant was a law enforcement officer, public safety employee, member of a citizen patrol, government official or employee, family member of a government official or employee, or transportation worker. Five reformed code jurisdictions include as an element of an aggravated form of kidnapping that the complainant was a child,[1589] and one includes as an element that the complainant had a "profound intellectual disability."[1590]

Fourth, including as an element of aggravated kidnapping that the defendant acted with the purpose of harming the complainant due to the complainant's status as a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or family member of a District official or employee is not consistent with most criminal codes. As discussed above, none of the reformed code jurisdictions include as an element of aggravated kidnapping that the complainant was a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or family member of a District official or employee. However, CCRC staff has not researched whether other jurisdictions' separate penalty enhancement statutes that may authorize heightened penalties for kidnapping based on the status of the complainant.

Fifth, including as an element of aggravated kidnapping that the defendant used a dangerous weapon or imitation dangerous weapon to commit the offense is not consistent with most criminal codes. Of the 29 reformed code jurisdictions, four include as an element of an aggravated form of kidnapping that the defendant was armed with a

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[1587] *See* the Relation to National Legal Trends section in Commentary to the RCC's Kidnapping offense.

[1588] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1589] Ariz. Rev. Stat. Ann. § 13-1304 (under 15 years of age); 720 Ill. Comp. Stat. Ann. 5/10-2 (under 13 years of age); Ind. Code Ann. § 35-42-3-2 (under 14 years of age); N.J. Stat. Ann. § 2C:13-1 (under 16 years of age); Ohio Rev. Code Ann. § 2905.01 (under 13 years of age, and defendant had a sexual motivation).

[1590] 720 Ill. Comp. Stat. Ann. 5/10-2.

dangerous weapon.[1591] However, CCRC staff has not researched whether other jurisdictions' criminal codes include separate while-armed enhancement provisions that may authorize heightened penalties for kidnappings committed while armed.

Relation to National Legal Trends. *The above mentioned changes to current District law are supported by national legal trends.*

First, requiring that the defendant acted with one of the enumerated motives is consistent with the kidnapping statutes adopted by the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1592] (hereinafter "reformed code jurisdictions"). None of the 29 states' kidnapping statutes include a catchall provision similar to the District's statute criminalizing restraints "for ransom or reward or otherwise."[1593] A large majority of reformed code jurisdictions' kidnapping statutes include intent to hold another for random or reward[1594]; to use the complainant as a shield or hostage[1595]; to facilitate the commission of any felony or flight thereafter[1596]; or to inflict bodily injury upon the complainant, or to commit a sexual offense.[1597] Although no reformed code

[1591] Ind. Code Ann. § 35-42-3-2; 720 Ill. Comp. Stat. Ann. 5/10-2 (dangerous weapon other than a firearm); Utah Code Ann. § 76-5-302; Tenn. Code Ann. § 39-13-305 ("accomplished with a deadly weapon or by displaying of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon").

[1592] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1593] D.C. Code § 22-2001.

[1594] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; 720 Ill. Comp. Stat. Ann. 5/10-2; Ind. Code Ann. § 35-42-3-2; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

[1595] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; Ind. Code Ann. § 35-42-3-2; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

[1596] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

[1597] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; 720 Ill. Comp. Stat. Ann. 5/10-2; Ind. Code Ann. § 35-42-3-2; Kan. Stat. Ann. § 21-5408; Ky.

jurisdictions' kidnapping statutes include intent to cause any person to believe that the complainant will not be released without suffering significant bodily injury, a majority do include a comparable "intent to terrorize the complainant or another" as an element of kidnapping.[1598] However, including intent to permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or to hold the person in a condition of involuntary servitude are not strongly supported by national criminal codes. Only a minority of reformed jurisdictions' kidnapping statutes include intent to intent to permanently deprive a parent of legal custody[1599], or to hold a person in a condition of involuntary servitude.[1600]

Second, requiring that interference must be "to a substantial degree" is supported by other criminal codes. A majority of reformed code jurisdictions' kidnapping statutes require that the defendant interfere with another person's freedom of movement to a substantial degree.[1601]

Third, including a relative defense to kidnapping has mixed support from other reformed criminal codes. A minority of reformed code jurisdiction includes a relative defense to kidnapping or kidnapping-related offenses.[1602] The RCC's definition of "relative" differs from most reformed jurisdictions that statutorily recognize a relative defense. A slight majority of these jurisdictions define "relative" to include any "ancestor."[1603]

Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

[1598] Ala. Code § 13A-6-43; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

[1599] Colo. Rev. Stat. Ann. § 18-3-302; Del. Code Ann. tit. 11, § 783A; 720 Ill. Comp. Stat. Ann. 5/10-2; Ind. Code Ann. § 35-42-3-2; Ky. Rev. Stat. Ann. § 509.040; Mo. Ann. Stat. § 565.110; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; Tenn. Code Ann. § 39-13-304; Utah Code Ann. § 76-5-302.

[1600] Ariz. Rev. Stat. Ann. § 13-1304; Haw. Rev. Stat. Ann. § 707-720; Minn. Stat. Ann. § 609.25; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; Ohio Rev. Code Ann. § 2905.01; Utah Code Ann. § 76-5-302; Wis. Stat. Ann. § 940.31.

[1601] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ark. Code Ann. § 5-11-101; Ariz. Rev. Stat. Ann. § 13-1301; Conn. Gen. Stat. Ann. § 53a-91; Del. Code Ann. tit. 11, § 786; Haw. Rev. Stat. Ann. § 707-700; Ky. Rev. Stat. Ann. § 509.010; Me. Rev. Stat. tit. 17-A, § 301; Mo. Ann. Stat. § 565.110, Mo. Ann. Stat. § 565.120, Mo. Ann. Stat. § 565.130; N.D. Cent. Code Ann. § 12.1-18-04; Or. Rev. Stat. Ann. § 163.225; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1, S.D. Codified Laws § 22-19-17; Tenn. Code Ann. § 39-13-302; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

[1602] Alaska Stat. Ann. § 11.41.300; Ala. Code § 13A-6-44; Ariz. Rev. Stat. Ann. § 13-1303; N.Y. Penal Law § 135.15; Or. Rev. Stat. Ann. § 163.225; 18 Pa. Stat. Ann. § 2902; Tex. Penal Code Ann. § 20.02; Wash. Rev. Code Ann. § 9A.40.030.

[1603] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ariz. Rev. Stat. Ann. § 13-1301; Or. Rev. Stat. Ann. § 163.215; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

Fourth, barring sentences for kidnapping if the interference with the other person's freedom of movement was incidental to the commission of another criminal offense is consistent with reformed criminal codes. A majority of reformed code jurisdictions either by statute[1604] or case law[1605] bar sentences for both kidnapping and a separate offense if the kidnapping was incidental to another offense.

RCC § 22E-1402. CRIMINAL RESTRAINT.

Relation to National Legal Trends. *Codifying an aggravated criminal restraint offense is well supported by national criminal codes, however the use of complainant-specific and weapon-based aggravators is not well supported by national criminal codes.*

Codifying a more serious gradation of criminal restraint is the majority approach across the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereinafter "reformed code jurisdictions"). Nearly all reformed code jurisdictions codify a separate criminal restraint type offense[1606], and a slight majority of these recognize more than one grade of the criminal restraint offense.[1607] The MPC also codifies more than one grade of criminal restraint. However, of the states that recognize more than one penalty grade, most have followed the MPC's lead and grade their analogous criminal restraint offenses based on whether the defendant placed the complainant at "risk of serious bodily injury."[1608] Only one reformed code jurisdictions grade their criminal restraint offenses

[1604] Ky. Rev. Stat. Ann. § 509.050

[1605] *Hurd v. State*, 22 P.3d 12, 18 (Alaska Ct. App. 2001); *Summerlin v. State*, 756 S.W.2d 908, 910 (Ark. 1988); *Apodaca v. People*, 712 P.2d 467, 475 (Colo. 1985); *Weber v. State*, 547 A.2d 948, 958 (Del. 1988); *State v. Deguair*, 384 P.3d 893, 895 (Haw. 2016); *People v. Smith*, 414 N.E.2d 1117, 1121 (Ill. App. Ct. 1980); *State v. Buggs*, 547 P.2d 720, 730–31 (Kan. 1976); *State v. Taylor*, 661 A.2d 665, 667–68 (Me. 1995); *State v. Welch*, 675 N.W.2d 615, 620 (Minn. 2004); *State v. Williams*, 860 S.W.2d 364, 366 (Mo. Ct. App. 1993); *State v. Casanova*, 63 A.3d 169, 172 (N.H. 2013); *State v. Masino*, 466 A.2d 955, 960 (N.J. 1983); *People v. Miles*, 245 N.E.2d 688, 695 (N.Y. 1969); *State v. Logan*, 397 N.E.2d 1345, 1351–52 (Ohio 1979); *State v. Garcia*, 605 P.2d 671, 676–77 (Or. 1980); *Com. v. Hook*, 512 A.2d 718, 720 (Pa. 1986); *State v. Lykken*, 484 N.W.2d 869, 876 (S.D. 1992); *State v. White*, 362 S.W.3d 559, 581 (Tenn. 2012).

[1606] In other jurisdictions, the analogous offenses are often labeled as felonious restraint, unlawful restraint, false imprisonment, or unlawful imprisonment.

[1607] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ark. Code Ann. § 5-11-103, Ark. Code Ann. § 5-11-104; Colo. Rev. Stat. Ann. § 18-3-303; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; 720 Ill. Comp. Stat. Ann. 5/10-3, 720 Ill. Comp. Stat. Ann. 5/10-3.1; Ind. Code Ann. § 35-42-3-3; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; Me. Rev. Stat. tit. 17-A, § 302; N.D. Cent. Code Ann. § 12.1-18-02, N.D. Cent. Code Ann. § 12.1-18-03; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law § 135.05; N.Y. Penal Law § 135.10; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; Tex. Penal Code Ann. § 20.02.

[1608] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ark. Code Ann. § 5-11-103, Ark. Code Ann. § 5-11-104; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; N.D. Cent. Code Ann. § 12.1-18-03; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal

based on the status of the complainant[1609], and no reformed code jurisdictions grade criminal restraint based on whether the defendant was armed with a dangerous weapon. However, some state courts have held that using or being armed with a dangerous weapon can create a risk of serious bodily injury[1610], which is a widely recognized grading factor.

Relation to National Legal Trends. *Changing current District law by including a criminal restraint is supported by national criminal codes*.

First, including a separate criminal restraint offense is consistent with the approach across the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1611] (hereinafter "reformed code jurisdictions"). The Model Penal Code, as well as twenty-seven of the twenty-nine reformed code jurisdictions include a separate criminal restraint offense that is subject to less severe penalties that kidnapping.[1612]

Requiring that the restraint be without consent, or with consent obtained by causing bodily injury, threat to cause bodily injury, or deception has limited support amongst other states' criminal codes. A minority of reformed jurisdictions' analogous criminal restraint offenses explicitly require lack of consent, use of force, threats, or any means if the complainant is under the age of 16.[1613] However, CCRC has staff has not

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Law § 135.05; N.Y. Penal Law § 135.10; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; Tex. Penal Code Ann. § 20.02.

[1609] Tex. Penal Code Ann. § 20.02.

[1610] *E.g.*, *State v. Zubhuza*, 90 A.3d 614, 618 (N.H. 2014) ("In determining whether such a risk exists, the defendant's use or brandishing of a deadly weapon is a highly relevant consideration."); *Linville v. Com.*, No. 2011-SC-000109-MR, 2012 WL 2362489, at *6 (Ky. June 21, 2012) (holding that at least certain uses of dangerous weapons create risk of serious physical injury); *State v. Ciullo*, 59 A.3d 293, 301 (2013), *aff'd*, 314 Conn. 28, 100 A.3d 779 (Ct. App. 2014) (holding that pointing guns at complainants created a risk of substantial injury).

[1611] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1612] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ariz. Rev. Stat. Ann. § 13-1303; Ark. Code Ann. § 5-11-104, Ark. Code Ann. § 5-11-103; Colo. Rev. Stat. Ann. § 18-3-303; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; 720 Ill. Comp. Stat. Ann. 5/10-3, 720 Ill. Comp. Stat. Ann. 5/10-3.1; Ind. Code Ann. § 35-42-3-3; Kan. Stat. Ann. § 21-5411; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; Me. Rev. Stat. tit. 17-A, § 302; Minn. Stat. Ann. § 609.255; Mo. Ann. Stat. § 565.130 (though labeled third degree kidnapping); Mont. Code Ann. § 45-5-301; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law § 135.05, N.Y. Penal Law § 135.10; N.D. Cent. Code Ann. § 12.1-18-02, N.D. Cent. Code Ann. § 12.1-18-03; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; S.D. Codified Laws § 22-19-17; Tenn. Code Ann. § 39-13-302; Tex. Penal Code Ann. § 20.02; Wash. Rev. Code Ann. § 9A.40.040; Wis. Stat. Ann. § 940.30.

[1613] Ala. Code § 13A-6-40; Ark. Code Ann. § 5-11-101; Ariz. Rev. Stat. Ann. § 13-1301; Conn. Gen. Stat. Ann. § 53a-91; Del. Code Ann. tit. 11, § 786; 720 Ill. Comp. Stat. Ann. 5/10-1 (Illinois' kidnapping offense is analogous to the RCC's criminal restraint offense); Ky. Rev. Stat. Ann. § 509.010; N.D. Cent. Code Ann. § 12.1-18-04; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

comprehensively researched case law in other jurisdictions to determine whether courts have interpreted analogous criminal restraint offenses to require lack of consent, use of force, threat of force, deception, or any other means when the complainant is a minor.

Second, requiring that interference must be "to a substantial degree" is supported by other criminal codes. A majority of reformed code jurisdictions' analogous criminal restraint offenses require that the defendant interfere with another person's freedom of movement to a substantial degree.[1614]

Third, recognizing a defense if the defendant was a relative of the complainant is not consistent with most criminal codes. A minority of reformed code jurisdiction includes a relative defense to kidnapping or criminal restraint-type offenses.[1615] The RCC's definition of "relative" differs from most reformed jurisdictions that statutorily recognize a relative defense. A slight majority of these jurisdictions define "relative" to include any "ancestor."[1616]

Fourth, barring sentences for criminal restraint if the interference with the other person's freedom of movement was incidental to the commission of another criminal offense is consistent with reformed criminal codes. A majority of reformed code jurisdictions either by statute[1617] or case law[1618] bar sentences for both kidnapping and a separate offense if the kidnapping was incidental to another offense. However, CCRC staff has not researched whether the same rule specifically applies to sentencing for the lesser criminal restraint-type offenses that are incidental to other offenses.

Chapter 15. Abuse and Neglect of Children and Vulnerable Persons

RCC § 22E-1501. CHILD ABUSE.
[Now RCC § 22E-1501. Criminal Abuse of a Minor.]

[1614] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ark. Code Ann. § 5-11-101; Ariz. Rev. Stat. Ann. § 13-1301; Conn. Gen. Stat. Ann. § 53a-91; Del. Code Ann. tit. 11, § 786; Haw. Rev. Stat. Ann. § 707-700; Ind. Code Ann. § 35-42-3-1; Kan. Stat. Ann. § 21-5411; Ky. Rev. Stat. Ann. § 509.010; Me. Rev. Stat. tit. 17-A, § 301; Mo. Ann. Stat. § 565.110, Mo. Ann. Stat. § 565.120, Mo. Ann. Stat. § 565.130; Mont. Code Ann. § 45-5-301; N.D. Cent. Code Ann. § 12.1-18-04; N.J. Stat. Ann. § 2C:13-3; Or. Rev. Stat. Ann. § 163.225; S.D. Codified Laws § 22-19-1, S.D. Codified Laws § 22-19-17; Tenn. Code Ann. § 39-13-302; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

[1615] Alaska Stat. Ann. § 11.41.300; Ala. Code § 13A-6-44; Ariz. Rev. Stat. Ann. § 13-1303; N.Y. Penal Law § 135.15; Or. Rev. Stat. Ann. § 163.225; 18 Pa. Stat. Ann. § 2902; Tex. Penal Code Ann. § 20.02; Wash. Rev. Code Ann. § 9A.40.030.

[1616] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ariz. Rev. Stat. Ann. § 13-1301; Or. Rev. Stat. Ann. § 163.215; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

[1617] Ky. Rev. Stat. Ann. § 509.050

[1618] *Hurd v. State*, 22 P.3d 12, 18 (Alaska Ct. App. 2001); *Summerlin v. State*, 756 S.W.2d 908, 910 (Ark. 1988); *Apodaca v. People*, 712 P.2d 467, 475 (Colo. 1985); *Weber v. State*, 547 A.2d 948, 958 (Del. 1988); *State v. Deguair*, 384 P.3d 893, 895 (Haw. 2016); *People v. Smith*, 414 N.E.2d 1117, 1121 (Ill. App. Ct. 1980); *State v. Buggs*, 547 P.2d 720, 730–31 (Kan. 1976); *State v. Taylor*, 661 A.2d 665, 667–68 (Me. 1995); *State v. Welch*, 675 N.W.2d 615, 620 (Minn. 2004); *State v. Williams*, 860 S.W.2d 364, 366 (Mo. Ct. App. 1993); *State v. Casanova*, 63 A.3d 169, 172 (N.H. 2013); *State v. Masino*, 466 A.2d 955, 960 (N.J. 1983); *People v. Miles*, 245 N.E.2d 688, 695 (N.Y. 1969); *State v. Logan*, 397 N.E.2d 1345, 1351–52 (Ohio 1979); *State v. Garcia*, 605 P.2d 671, 676–77 (Or. 1980); *Com. v. Hook*, 512 A.2d 718, 720 (Pa. 1986); *State v. Lykken*, 484 N.W.2d 869, 876 (S.D. 1992); *State v. White*, 362 S.W.3d 559, 581 (Tenn. 2012).

Relation to National Legal Trends. *The revised child abuse offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, limiting the revised child abuse statute to conduct that actually harms a child is well-supported by criminal codes in reformed jurisdictions. Twenty of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1619] ("reformed jurisdictions") have specific statutes for child abuse.[1620] Fifteen of these jurisdictions limit child abuse crimes to actual harm.[1621] An additional eight reformed jurisdictions include gradations in their general assault statutes for causing injury to children,[1622] and in so doing, limit the offense to actually harming a child.

The Model Penal Code does not have a child abuse offense or a gradation in its assault statute for injuring a child.[1623]

Second, partially grading the revised child abuse offense based on whether the defendant "purposely" or "recklessly" caused "serious mental injury" reflects trends in the criminal codes of reformed jurisdictions. DCCA case law is clear that the current child cruelty statute includes mental harm,[1624] but the current statute does not grade based

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[1619] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1620] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[1621] Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Minn. Stat. Ann. §§ 609.376, 609.377; Mont. Code Ann. § 45-5-212; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[1622] A few reformed jurisdictions may have gradations for children in their assault statutes, as well as specific child abuse statutes. In such a case, the jurisdiction's child abuse statutes were used, not the assault statutes. Alaska Stat. Ann. §11.41.220(a)(1)(C)(i), (a)(3), (b); Ark. Code Ann. §§ 5-13-201(a)(7), 5-13-202(a)(4)(C); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2), (h); Ind. Code Ann. § 35-42-2-1(e)(3); Me. Rev. Stat. tit. 17-A, § 207(B); N.H. Rev. Stat. Ann. §§ 631:1(I)(d), 631:2(I)(d); N.Y. Penal Law § 120.05(8), (9); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2), 2702(a)(8), (a)(9).

[1623] MPC § 211.1.

[1624] 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

upon the defendant's culpable mental state as to that harm.[1625] Legal trends in the reformed jurisdictions strongly support grading the revised child abuse offense based, in part, on the culpable mental state. Twenty of the 29 reformed jurisdictions[1626] have specific child abuse statutes.[1627] Six of these 20 states grade the offense based on the defendant's culpable mental state.[1628] An additional eight states are limited to culpable mental states that are higher than recklessness, such as knowingly and purposely.[1629] Only three of the 20 reformed jurisdictions with specific child abuse statutes include recklessly[1630] or negligence[1631] without grading the offense based on the culpable mental state. The remaining three states do not clearly specify a culpable mental state by statute.[1632]

"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).

[1625] Both first degree child cruelty and second degree child cruelty require "intentionally, knowingly, or recklessly." D.C. Code § 22-1101(a), (b), (c).

[1626] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1627] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[1628] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[1629] Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1 (requiring a culpable mental state of "willfully."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("intentionally."); Kan. Stat. Ann. § 21-5602(a) ("knowingly."); Minn. Stat. Ann. §§ 609.376, 609.377 (requiring a culpable mental state of "intentional."); Mo. Ann. Stat. § 568.060(2), (5)(1) ("knowingly."); N.D. Cent. Code Ann. § 14-09-22(1) ("willfully."); Or. Rev. Stat. Ann. § 163.205(1)(b) ("intentionally or knowingly."); Tenn. Code Ann. §§ 39-15-401(a), (b), 39-15-402 (requiring a culpable mental state of "knowingly.").

[1630] Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B (requiring a culpable mental state of "recklessly" or "intentionally," with no distinction in penalty). Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140.

[1631] Mont. Code Ann. §§ 45-5-212(1), 45-5-2101(1)(a), (1)(b) (offense of assault on a minor requiring that a person commit assault, as defined in § 45-5-201, which includes "purposely or knowingly" causing bodily injury to another and "negligently" causing bodily injury to another with a weapon).

[1632] These states do not have a culpable mental state codified in their child abuse statutes, although it is possible that case law or general rules of construction would supply a culpable mental state or culpable

Notably, the six reformed jurisdictions that grade their child abuse statutes based upon the culpable mental state[1633] have far lower penalties for recklessly causing injury to a child than the fifteen year maximum punishment in the District's current first degree child cruelty statute[1634] or the ten year maximum punishment in the District's current second degree child cruelty statute.[1635] Half of these states make recklessly injuring a child a misdemeanor,[1636] and one of these states requires "serious physical injury," as opposed to a lesser physical harm.[1637] In the remaining three states, the maximum possible penalties are one-and-a-half years,[1638] two years,[1639] or three-and-a-half years.[1640]

In the three reformed jurisdictions that include recklessly or negligently culpable mental states in their child abuse statutes without grading the offense based on the culpable mental state, the penalties are also significantly lower than the fifteen and ten year penalties in the District's current child cruelty statute. One jurisdiction makes it a misdemeanor to recklessly cause "physical injury" to a child.[1641] The remaining two jurisdictions only permit a reckless[1642] or negligent[1643] culpable mental state to be the

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mental states. Ohio Rev. Code Ann. § 2919.22(B), (E); S.D. Codified Laws § 26-10-1; N.J. Stat. Ann. §§ 9:6-1 (definition of "cruelty to a child"), 9:6-3.

[1633] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[1634] D.C. Code § 22-1101(a), (c)(1). For the purpose of this survey, the prong of the current first degree child cruelty statute that requires engaging "in conduct which creates a grave risk of bodily injury to a child and thereby causes bodily injury" was used. It is unclear what level of injury is required in the current first degree child cruelty statute for the prong that requires "tortures, beats, or otherwise maltreats a child."

[1635] D.C. Code § 22-1101(b), (c)(2).

[1636] Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(IV) (making it a class 1 misdemeanor to "knowingly or recklessly" injure a child and "any injury other than serious bodily injury" results); Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury."); Utah Code Ann. § 76-5-109(3)(b) (making it a Class B misdemeanor to "recklessly" cause a child "physical injury.").

[1637] Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury.").

[1638] Ariz. Rev. Stat. Ann. §§ 13-3623(B), (B)(2), 13-702(A), (D) (making it a class 5 felony, punishable by a maximum term of imprisonment of one-and-a-half years for a first offense, to "recklessly" "under circumstances other than those likely to produce death or serious physical injury to a child . . . cause[] a child . . . to suffer physical injury or abuse.").

[1639] Tex. Penal Code Ann. §§ 22.04(a)(3), (f), 12.35(a) (making it a state jail felony, punishable by a maximum term of imprisonment of two years, to "recklessly" cause a child "bodily injury.").

[1640] Wis. Stat. Ann. §§ 948.03, 939.50(3)(i) (making it a Class I felony, punishable by a maximum of three years and six months in prison, to "recklessly" cause a child "bodily harm.").

[1641] Del. Code Ann. tit. 11, § 1103 (making it a class A misdemeanor to "recklessly or intentionally" cause a child physical injury).

[1642] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.").

[1643] Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

basis for liability if a weapon is used. Despite the weapon requirement, each jurisdiction only has a maximum penalty of five years imprisonment.[1644]

A review of the 20 reformed jurisdictions with specific child abuse statutes revealed that at least five states specifically prohibit mental harm[1645] and a sixth state makes causing a child mental harm a separate offense.[1646] Two of these states grade the offense based on the culpable mental state[1647] and two[1648] require a higher culpable mental state than "recklessly" in the current child cruelty statute.[1649] One of these states has a culpable mental state similar to recklessness[1650] and the remaining state's statute does not specify a culpable mental state.[1651]

The Model Penal Code does not have a child abuse offense.

Third, criminal codes in reformed jurisdictions support limiting child abuse to individuals of a certain age or relationship to the child, as opposed to the District's current child cruelty statute, which applies to any individual.[1652] Twenty of the 29 reformed jurisdictions[1653] have specific child abuse statutes.[1654] Seven of these states

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[1644] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm."); Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[1645] Mo. Ann. Stat. § 568.060(1)(3), (2)(1), (5)(1); N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22(1); Tex. Penal Code Ann. § 22.04(a)(2); Utah Code Ann. § 76-5-109(1)(f)(i)(C), (2).
Additional states may include mental harm through case law, especially in statutes like D.C.'s current child cruelty statute that use old, undefined terms such as "tortures" and "maltreats." *See, e.g.*, Ala. Code § 26-15-3 ("torture, willfully abuse, cruelly beat, or otherwise willfully maltreat."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("maltreats, tortures, overworks or cruelly or unlawfully punishes."); S.D. Codified Laws § 26-10-1 ("abuses, exposes, tortures, torments, or cruelly punishes.").

[1646] Wis. Stat. Ann. § 948.04.

[1647] Tex. Penal Code Ann. § 22.04(a)(2), (e); Utah Code Ann. § 76-5-109(1)(f)(i)(C), (2).

[1648] Mo. Ann. Stat. § 568.060(1)(3), (2)(1), (5) (requiring a culpable mental state of "knowingly" in both gradations of the offense); N.D. Cent. Code Ann. § 14-09-22(1) ("willfully.").

[1649] D.C. Code § 22-1101.

[1650] Wis. Stat. Ann. § 948.04(1) ("conduct which demonstrates substantial disregard for the mental well-being of the child.").

[1651] This state does not have a culpable mental state codified in its child abuse statute, although it is possible that case law or general rules of construction would supply a culpable mental state or culpable mental states. N.J. Stat. Ann. §§ 9:6-1 (definition of "cruelty to a child"); 9:6-3.

[1652] D.C. Code § 22-1101.

[1653] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1654] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§

limit their child abuse statutes to individuals that have a special relationship to the child, like a parent or guardian.[1655] Two reformed jurisdictions limit liability to persons 18 years of age or older,[1656] with one jurisdiction also requiring that the child be "under 14 years of age"[1657] and the other jurisdiction also requiring that the child be "under the age of thirteen."[1658] An additional eight reformed jurisdictions include gradations for assaulting children in their general assault statutes.[1659]Six of these jurisdictions limit liability to persons 18 years of age or older,[1660] and several require an age difference between the defendant and the child.[1661]

609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[1655] Ala. Code §§ 26-15-2(4), 26-15-3, 26-15-3.1 (requiring that the defendant is a "responsible person" and defining "responsible person" as [a] child's natural parent, stepparent, adoptive parent, legal guardian, custodian, or any other person who has the permanent or temporary care or custody or responsibility for the supervision of a child."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("any person having the custody and control of any child under the age of nineteen years."); Ky. Rev. Stat. Ann. §§ 508.100(1), 508.110(1), 503.120(1) (requiring having "actual custody."); Minn. Stat. Ann. § 609.377(1) ("parent, legal guardian, or caretaker."); N.J. Stat. Ann. §§ 9:6-1; 9:6-3 (requiring "any parent, guardian, or person having the care, custody or control of any child."); N.D. Cent. Code Ann. § 14-09-22(1) ("a parent, adult family or household member, guardian, or other custodian of any child."); Or. Rev. Stat. Ann. § 163.205(b) ("in violation of a legal duty to provide care for a dependent person . . . or having assumed the permanent or temporary care, custody or responsibility for the supervision of a dependent person.").

[1656] Mont. Code Ann. § 45-5-212(1) ("offender is 18 years of age or older."); Wash. Rev. Code Ann. §§ 9A.36.120(1), 9A.36.130(1), 9A.36.140(1) ("person eighteen years of age or older.").

[1657] Mont. Code Ann. § 45-5-212(1).

[1658] Wash. Rev. Code Ann. §§ 9A.36.120(1), 9A.36.130(1), 9A.36.140(1).

[1659] A few reformed jurisdictions may have gradations for children in their assault statutes, as well as specific child abuse statutes. In such a case, the jurisdiction's child abuse statutes were used, not the assault statutes. Alaska Stat. Ann. §11.41.220(a)(1)(C)(i), (a)(3), (b); Ark. Code Ann. §§ 5-13-201(a)(7), 5-13-202(a)(4)(C); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2), (h); Ind. Code Ann. § 35-42-2-1(e)(3); Me. Rev. Stat. tit. 17-A, § 207(B); N.H. Rev. Stat. Ann. §§ 631:1(I)(d), 631:2(I)(d); N.Y. Penal Law § 120.05(8), (9); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2), 2702(a)(8), (a)(9).

[1660] Alaska Stat. Ann. §11.41.220(a)(1)(C)(i), (a)(3) (requiring that the defendant be "18 years of age or older."); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2) (requiring that the defendant be "at least 18 years of age."); Ind. Code Ann. § 35-42-2-1(e)(3), (j), (k)(1) (requiring that the defendant be "at least eighteen (18) years of age."); Me. Rev. Stat. tit. 17-A, § 207(B) (requiring that the defendant is "at least 18 years of age."); N.Y. Penal Law § 120.05(8), (9) (requiring that the defendant be "eighteen years old or more"); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2) (requiring that the defendant is "18 years of age or older"), 2702(a)(8), (a)(9) (requiring that the defendant be "18 years of age or older" for two gradations of aggravated assault).

[1661] Alaska Stat. Ann. §11.41.220(a)(1)(C)(i) ("while being 18 years of age or older, causes physical injury to a child under 12 years of age"), (a)(3) ("while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 12 years of age."); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2) (requiring that the defendant be "at least 18 years of age" and the child be "under the age of 13 years."); Ind. Code Ann. § 35-42-2-1(e)(3), (j), (k)(1) (requiring that the defendant be "at least eighteen (18) years of age" and the child to be "less than fourteen (14) years of age."); Me. Rev. Stat. tit. 17-A, § 207(B) (requiring that the defendant is "at least 18 years of age" and the child be "less than 6 years of age."); N.Y. Penal Law § 120.05(8), (9) (requiring that the defendant be "eighteen years old or more" and the child be either "less than eleven years" or "less than seven years."); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2) (making it a misdemeanor of the first degree for a person 18 years of age or older to

The Model Penal Code does not have a child abuse offense.

Fourth, criminal codes of reformed jurisdictions provide mixed support for the revised offense to include a gradation requiring a culpable mental state to match the scope of the current[1662] and revised[1663] aggravated assault statutes, as well as the revised abuse of a vulnerable adult or elderly person statute. Twenty of the reformed jurisdictions have specific child abuse statutes.[1664] None of these states have a culpable mental state equivalent to "recklessly, under circumstances manifesting extreme indifference to human life," as in the revised child abuse statute. However, at least 12 of the 29 reformed jurisdictions do have this culpable mental state in the highest gradations of their assault statutes.[1665]

There is widespread support in the reformed jurisdictions, however, for including a culpable mental state higher than "recklessly" in first degree child abuse, particularly given the District's penalties. For harms inflicted with only a reckless culpable mental state, the District's current first degree child cruelty offense is the most severe in reformed jurisdictions. It has a low culpable mental state of "recklessly," requires only "bodily injury," and has a maximum term of imprisonment of 15 years.[1666] Six of the 20 reformed jurisdictions with specific child abuse statutes[1667] grade the offense based on the defendant's culpable mental state.[1668] An additional eight states are limited to culpable mental states that are higher than recklessness, such as knowingly and

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assault a child under 12 years of age), 2702(a)(8), (a)(9) (requiring that the defendant be 18 years of age or older for two gradations of aggravated assault and the child to be either "less than six years of age" or "less than 13 years of age.").

[1662] D.C. Code § 22-404.01(a)(2).

[1663] RCC § 22E-1202.

[1664] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[1665] *See, e.g.*, Ala. Code § 13A-6-20(a)(3); Alaska Stat. Ann. § 11.41.200(a)(3); Ark. Code Ann. § 5-13-201(a)(3); Colo. Rev. Stat. Ann. § 18-3-202(1)(c); Conn. Gen. Stat. Ann. §53a-59; Ky. Rev. Stat. Ann. § 508.010(1)(b); Me. Rev. Stat. tit. 17-A, § 208-B(1)(B); N.J. Stat. Ann. § 2C:12-1(b)(1); N.Y. Penal Law § 120.10(3); Or. Rev. Stat. Ann. § 163.65(1)(b); 18 Pa. Stat. Ann. § 2702(a)(1); S.D. Codified Laws § 22-18-1.1(1).

[1666] D.C. Code § 22-1101(a), (c)(1).

[1667] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1668] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

purposely.[1669] Only three of the 20 reformed jurisdictions include recklessly[1670] or negligence[1671] without grading the offense based on the culpable mental state. The remaining three states do not clearly specify a culpable mental state.[1672]

The six reformed jurisdictions that grade their child abuse statutes based upon a culpable mental state[1673] have far lower penalties for recklessly causing injury to a child the fifteen year maximum punishment in the District's current first degree child cruelty statute[1674] or the ten year maximum punishment in the District's current second degree child cruelty statute.[1675] Half of these states make recklessly injuring a child a misdemeanor,[1676] and one of these states requires "serious physical injury," as opposed to a lesser physical harm.[1677] In the remaining three states, the maximum possible penalties are one-and-a-half years,[1678] two years,[1679] or three-and-a-half years.[1680]

In the three reformed jurisdictions that include recklessly or negligently in their child abuse statutes without grading the offense based on the culpable mental state, the

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[1669] Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1 (requiring a culpable mental state of "willfully."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("intentionally."); Kan. Stat. Ann. § 21-5602(a) ("knowingly."); Minn. Stat. Ann. §§ 609.376, 609.377 (requiring a culpable mental state of "intentional."); Mo. Ann. Stat. § 568.060(2), (5)(1) ("knowingly."); N.D. Cent. Code Ann. § 14-09-22(1) ("willfully."); Or. Rev. Stat. Ann. § 163.205(1)(b) ("intentionally or knowingly."); Tenn. Code Ann. §§ 39-15-401(a), (b), 39-15-402 (requiring a culpable mental state of "knowingly.").

[1670] Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B (requiring a culpable mental state of "recklessly" or "intentionally," with no distinction in penalty). Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140.

[1671] Mont. Code Ann. §§ 45-5-212(1), 45-5-2101(1)(a), (1)(b) (offense of assault on a minor requiring that a person commit assault, as defined in § 45-5-201, which includes "purposely or knowingly" causing bodily injury to another and "negligently" causing bodily injury to another with a weapon).

[1672] These states do not have a culpable mental state codified in their child abuse statutes, although it is possible that case law or general rules of construction would supply a culpable mental state or culpable mental states. Ohio Rev. Code Ann. § 2919.22(B), (E); S.D. Codified Laws § 26-10-1; N.J. Stat. Ann. §§ 9:6-1, 9:6-3.

[1673] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[1674] D.C. Code § 22-1101(a), (c)(1). For the purpose of this survey, the prong of the current first degree child cruelty statute that requires engaging "in conduct which creates a grave risk of bodily injury to a child and thereby causes bodily injury" was used. It is unclear what level of injury is required in the current first degree child cruelty statute for the prong that requires "tortures, beats, or otherwise maltreats a child.".

[1675] D.C. Code § 22-1101(a), (c)(1).

[1676] Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(IV) (making it a class 1 misdemeanor to "knowingly or recklessly" injure a child and "any injury other than serious bodily injury" results); Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury."); Utah Code Ann. § 76-5-109(3)(b) (making it a Class B misdemeanor to "recklessly" cause a child "physical injury.").

[1677] Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury.").

[1678] Ariz. Rev. Stat. Ann. §§ 13-3623(B), (B)(2), 13-702(A), (D) (making it a class 5 felony, punishable by a maximum term of imprisonment of one-and-a-half years for a first offense, to "recklessly" "under circumstances other than those likely to produce death or serious physical injury to a child . . . cause[] a child . . . to suffer physical injury or abuse.").

[1679] Tex. Penal Code Ann. §§ 22.04(a)(3), (f), 12.35(a) (making it a state jail felony, punishable by a maximum term of imprisonment of two years, to "recklessly" cause a child "bodily injury.").

[1680] Wis. Stat. Ann. §§ 948.03, 939.50(3)(i) (making it a Class I felony, punishable by a maximum of three years and six months in prison, to "recklessly" cause a child "bodily harm.").

penalties are also significantly lower than the fifteen and ten year penalties in the District's current child cruelty statute. One jurisdiction makes it a misdemeanor to recklessly cause "physical injury" to a child.[1681] The remaining two states only permit a reckless[1682] or negligent[1683] culpable mental state to be the basis for liability if a weapon is used. Despite the weapon requirement, each jurisdiction only has a maximum penalty of five years imprisonment.[1684]

The Model Penal Code does not have a child abuse offense.

Fifth, the criminal codes in reformed jurisdictions provide general support for not further enhancing a crime limited to children because the crime involved a child. At least two of the reformed jurisdictions have general penalty enhancements for crimes against children.[1685] One of these two jurisdictions does not have a separate child abuse statute or enhanced gradations for assaulting a child, but the other jurisdiction enhances gradations in its assault statute based upon the age of complaining witness.[1686] Several reformed jurisdictions include the age of the victim as an aggravating factor the court may or shall consider at sentencing,[1687] but do not change the statutory maximum for the

[1681] Del. Code Ann. tit. 11, § 1103 (making it a class A misdemeanor to "recklessly or intentionally" cause a child physical injury).

[1682] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.").

[1683] Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[1684] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm."); Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[1685] *See, e.g.*, Haw. Rev. Stat. Ann. § 706-660.2 (codifying a mandatory minimum with the possibility of parole, the length of which varies with the class of offense, if "(a) The person, in the course of committing or attempting to commit a felony, causes the death or inflicts serious or substantial bodily injury upon another person who is . . . (iii) Eight years of age or younger; and (b) Such disability is known or reasonably should be known to the defendant."); N.H. Rev. Stat. Ann. § 651:6 ("A convicted person may be sentenced [to an extended term of imprisonment, the length of which varies with the class of offense] if the jury also finds beyond a reasonable doubt that such person . . . [h]as committed or attempted to commit any [specified crimes against persons] against a person under 13 years of age.").

[1686] N.H. Rev. Stat. Ann. §§ 631:1(I)(d), 631:2(d) (gradations in assault statutes that require causing either "serious bodily injury" or "bodily injury" to a "person under 13 years of age.")

[1687] *See, e.g.*, Alaska Stat. Ann. § 12.55.155(c)(5) ("The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range set out in AS 12.55.125 . . .the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to . . . extreme youth."); Tenn. Code Ann. § 40-35-114(4) ("If appropriate for the offense and if not already an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence . . . [a] victim of the offense was particularly vulnerable because of age or physical or mental disability.").

offense. One of these jurisdictions specifically prohibits considering the age of the victim if it is already an element of the offense.[1688]

The Model Penal Code does not have a general penalty enhancement for crimes against children.

Sixth, the criminal codes in reformed jurisdictions provide general support for not including in the child abuse offense a penalty enhancement for committing the offense "while armed" or "having readily available" a dangerous weapon, and not grading the offense by the use of a weapon. Only four[1689] of the 20 reformed jurisdictions with specific child abuse statutes[1690] have a gradation for weapons. Two of these states penalize the weapon gradation of the child abuse offense more severely than the equivalent weapon gradation in the general assault statute.[1691] The remaining two states

[1688] Tenn. Code Ann. § 40-35-114(4) ("If appropriate for the offense and if not already an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence . . . [a] victim of the offense was particularly vulnerable because of age or physical or mental disability.").

[1689] Del. Code Ann. tit. 11, § 1103A(a)(3) ("intentionally or recklessly causes physical injury to a child by means of a deadly weapon or dangerous instrument."); Mont. Code Ann. §§ 45-5-212(1), 45-5-201(1)(b) (offense of assault on a minor prohibiting, in part, committing an assault under § 45-5-201 and defining assault to include "negligently causes bodily injury to another with a weapon."); Tenn. Code Ann. §§ 39-15-401, 39-15-402(a)(2) (offense of aggravated child abuse enhancing requiring "a deadly weapon [or] dangerous instrumentality . . . is used to accomplish the act of abuse, neglect, or endangerment."); Wash. Rev. Code Ann. §§ 9A.36.120(1)(a), 9A.36.130(1)(a), 9A.36.140(1) (including in the three degrees of child assault committing first degree assault, second degree assault, and third degree assault, respectively, each of which has a gradation for assault with or use of a weapon).

[1690] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[1691] *Compare* Mont. Code Ann. § 45-5-212(1), (2)(a) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon) *with* § 45-5-2101(1)(b) (making it an offense with six month maximum term of imprisonment to "negligently cause[] bodily injury to another with a weapon."). *Compare* Tenn. Code Ann. §§ 39-15-401(a), 39-15-402(a)(2), (b) (making it a class B felony to knowingly inflict "injury" to a child with a "deadly weapon" or "dangerous instrumentality") *with* Tenn. Code Ann. § 39-13-102(a)(1)(A)(iii), (e)(1)(A)(ii) (making it a Class C felony to knowingly or intentionally commit assault that "involved the use or display of a deadly weapon.").

either punish the weapons gradation of the child abuse offense the same[1692] or less seriously[1693] than the equivalent weapon gradation in the general assault statute.

The Model Penal Code does not have a child abuse offense.

RCC § 22E-1502. CHILD NEGLECT.
[Now RCC § 22E-1502. Criminal Neglect of a Minor.]

Relation to National Legal Trends. *The revised child neglect offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First criminal codes in reformed jurisdictions support criminalizing child abandonment separately from child abuse, although only a couple jurisdictions combine such an offense with a child neglect statute. At least 19 of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1694] ("reformed jurisdictions") have separate statutes for abandoning a child, and do not include abandonment as part of child cruelty.[1695] An additional two reformed jurisdictions include abandoning a child in their neglect offense,[1696] like the revised criminal child neglect statute does. Only one reformed jurisdiction includes abandoning a child in the same statute as child abuse,[1697] like the District's current child cruelty statute.[1698]

[1692] In Washington, the three degrees of child assault each include committing first degree assault, second degree assault, and third degree assault, respectively. Wash. Rev. Code Ann. §§ 9A.36.120(1)(a), 9A.36.130(1)(a), 9A.36.140(1). The three degrees of child assault have the same penalties as the assault offenses they incorporate and the assault offenses have gradations for weapons. *Compare* Wash. Rev. Code Ann. §§ 9A.36.120(1)(a)(2), 9A.36.130(1)(a), (2), 9A.36.140(1), (2) *with* Wash Rev. Code Ann. §§ 9A.36.011(1)(a), (2), 9A.36.021(c), (2)(a), 9A.36.031(d), (2).

[1693] *Compare* Del. Code Ann. tit. 11, § 1103A(a)(3) (second degree child abuse statute making it a class G felony to "intentionally or recklessly cause[] physical injury to a child by means of a deadly weapon or dangerous instrument.") *with* § 612(a)(2), (d) (general assault statute making it a class D felony to "recklessly or intentionally cause[] physical injury to another person by means of a deadly weapon or a dangerous instrument.").

[1694] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1695] Ala. Code § 13A-3-5; Colo. Rev. Stat. Ann. § 14-6-101; Conn. Gen. Stat. Ann. § 53a-23; Del. Code Ann. tit. 11, § 1101; Haw. Rev. Stat. Ann. § 709-902; 720 Ill. Comp. Stat. Ann. 5/12C-10; Kan. Stat. Ann. § 21-5605; Ky. Rev. Stat. Ann. § 530.040; Me. Rev. Stat. tit. 17-A, § 533; Mo. Ann. Stat. §§ 568.030, 568.032; N.J. Stat. Ann. § 9:6-1; N.Y. Penal Law § 260.00; N.D. Cent. Code Ann. § 14-07-15; Ohio Rev. Stat. Ann. § 2919.21; Or. Rev. Stat. Ann. § 163.535; S.D. Codified Laws § 25-7-15; Wash. Rev. Code Ann. §§ 9A.42.060, 9A.42.070, 9A.42.080, 9A.42.090; Wis. Stat. Ann. § 948.20; Tex. Penal Code Ann. § 22.041.

[1696] Ind. Code Ann. § 35-46-1-4(a)(2); N.J. Stat. Ann. § 9:6-1.

[1697] Utah Code Ann. § 76-5-109(4).

[1698] D.C. Code § 22-1101(b)(2).

The MPC does not have a child abandonment offense, nor does it include child abandonment in its offense for endangering the welfare of children.[1699]

Second, criminal codes in reformed jurisdictions provide mixed support for integrating an offense of nonsupport of a child under 18 in a general child neglect statute. At least 27 of the 29 reformed jurisdictions have separate statutes criminalizing nonsupport of a child, ranging in breadth from failing to provide food, clothing, medical care, and other similar items, to failing to provide monetary child support.[1700] At least nine of the 29 reformed jurisdictions include such failure to support provisions in their child abuse or neglect statutes,[1701] like the revised criminal child neglect statute does. However, there is strong support in reformed jurisdictions for making nonsupport crimes applicable to persons under 18 years of age, the limit in the revised statute. Many of the separate nonsupport statutes do not specify the age of the child, but in those statutes that do, a majority covers children less than 18 years of age or 19 years of age.[1702] Five of the reformed jurisdictions that include failure to support in their child abuse or neglect statutes apply to children under the age of 18 years.[1703]

[1699] MPC § 230.4.

[1700] Reformed jurisdictions may have separate nonsupport statutes in addition to similar provisions in their child abuse and neglect laws. For this limited survey, only the separate statutes were counted. Ala. Code § 13A-13-4; Alaska Stat. Ann. § 11.51.120; Ark. Code Ann. § 5-26-401; Colo. Rev. Stat. Ann. § 14-6-101; Conn. Gen. Stat. Ann. § 53-304; Del. Code Ann. tit. 11, § 1113; Haw. Rev. Stat. Ann. § 709-903; 750 Ill. Comp. Stat. Ann. 16/15; Ind. Code Ann. § 35-46-1-5; Kan. Stat. Ann. § 21-5605; Ky. Rev. Stat. Ann. §§ 530.050; Me. Rev. Stat. tit. 17-A, § 552; Mo. Ann. Stat. § 568.040; Mont. Code Ann. § 45-5-621; N.H. Rev. Stat. Ann. § 639:4; N.J. Stat. Ann. § 2C:24-5; N.Y. Penal Law §§ 260.05, 260.06; N.D. Cent. Code Ann. § 14-07-15; Ohio Rev. Code Ann. § 2919.21; Or. Rev. Stat. Ann. § 163.555; 23 Pa. Stat. Ann. § 4354; S.D. Codified Laws § 25-7-16; Tenn. Code Ann. § 39-15-101; Tex. Penal Code Ann. § 25.05; Utah Code Ann. § 76-7-201; Wash. Rev. Code Ann. § 26.20.035; Wis. Stat. Ann. § 948.22.

[1701] These jurisdictions may also have a separate nonsupport offense in their civil laws. Alaska Stat. Ann. § 11.51.100(a)(4); Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Ind. Code Ann. § 35-46-1-4(a)(3); Minn. Stat. Ann. §§ 609.376, 609. 378(a)(1); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1; N.D. Cent. Code Ann. § 14-09-22.1(1); Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 948.21.

[1702] Ala. Code § 13A-13-4(a) ("less than 19 years of age."); Ark. Code Ann. § 5-26-401(a)(2), (a)(3) ("[l]egitimate child who is less than eighteen (18) years or age" or "[i]llegitimate child who is less than eighteen (18) years of age and whose parentage has been determined in a previous judicial proceeding."); Colo. Rev. Stat. Ann. § 14-6-101 ("children under eighteen years of age."); Conn. Gen. Stat. Ann. § 53-304 ("child under the age of eighteen."); Del. Code Ann. tit. 11, § 1113(a), (k)(2) (requiring "minor child" and defining "minor child" as "any child, natural, or adopted, whether born in or out of wedlock, under 18 years of age, or over 18 years of age but not yet 19 years of age if such child is a student in high school and is likely to graduate."); Ky. Rev. Stat. Ann. §§ 530.050(1)(a), 500.080 (requiring "minor" and defining "minor" as "any person who has not reached the age of majority as defined in KRS 2.015 [for purposes of the nonsupport statute, 18 years]."); 750 Ill. Comp. Stat. Ann. 16/15(a)(1), (f), 5/505(a) ("requiring "child" and defining "child" as "any child under age 18 and any child age 19 or younger who is still attending high school."); Kan. Stat. Ann. § 21-5606(c) ("a child under the age of 18 years and includes an adopted child or a child born out of wedlock whose parentage has been judicially determined or has been acknowledged in writing by the person to be charged with the support of such child."); Or. Rev. Stat. Ann. § 163.555(1) ("child under 18 years of age."); Tex. Penal Code Ann. § 25.05(a) ("child younger than 18 years of age."); Utah Code Ann. § 76-7-201(1) ("child, or children under the age of 18 years.").

[1703] These jurisdictions may also have a separate nonsupport offense in their civil laws. Ind. Code Ann. §§ 35-46-1-4(a)(3), 35-46-1-1(child endangerment and neglect offense requiring that the complaining witness be a "dependent" and defining "dependent," in part, as "an unemancipated person who is under eighteen

The MPC has a separate offense for "persistently fail[ing] to support a child,"[1704] but it has the same penalty, a misdemeanor, as the MPC's endangering welfare of children offense.[1705] The MPC's persistent nonsupport offense does not specify the required age of the child.

Third, criminal codes in reformed jurisdictions support limiting child neglect to conduct that does not actually harm a child, as opposed to the current child cruelty statute, which prohibits both a risk of harm and actual harm in the same gradation.[1706] Eighteen of the 29 reformed jurisdictions have child endangerment statutes.[1707] Most of these jurisdictions, 13, criminalize child endangerment separately from child abuse or do not have a child abuse offense, or grade child endangerment differently from child abuse.[1708] Nine of the 29 reformed jurisdictions have failure to provide provisions or offenses[1709] similar to third degree of the revised criminal child neglect statute (subsection (c)(1)(A)). All but three[1710] of these states codify their failing to provide offenses separately from child or abuse.

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(18) years of age."); Minn. Stat. Ann. §§ 609.376(2), 609. 378(a)(1) (child endangerment or neglect offense requiring that the complaining witness be a "child" and defining "child" as "any person under the age of 18 years."); Mo. Ann. Stat. § 568.060(1)(4), (2)(1) (neglect offense defining "neglect," in part, as a failure to provide to a "child under the age of eighteen years."); Wash. Rev. Code Ann. §§ 9A.42.010(3), 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037 (defining "child" as "a person under eighteen years of age."); Wis. Stat. Ann. §§ 948.21, 948.01(1) (defining "child" as a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the age of 17 years.").

[1704] MPC § 230.5.

[1705] MPC § 230.4.

[1706] D.C. Code § 22-1101(b), (c)(2) (second degree child cruelty prohibiting both "maltreats" and "engages in conduct which creates a grave risk of bodily harm.").

[1707] Reformed jurisdictions may have child endangerment offenses in both their criminal codes and civil statutes. This survey uses the child endangerment laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child endangerment offenses were taken from the civil statutes, if there were any. Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-21; Del. Code Ann. tit. 11 §§ 1100, 1102; Haw. Rev. Stat. Ann. §§ 709-903.5, 703-904; 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 554; Minn. Stat. Ann. §§ 609.376, 609.378; Mo. Ann. Stat. § 568.045; Mont. Code Ann. § 45-5-628; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; Ohio Rev. Code Ann. § 2919.22; 18 Pa. Stat. Ann. § 4304.

[1708] Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(a), (7)(b) (offense of child abuse prohibiting both causing injury and "permit[ing] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," but grading differently depending on whether death, injury, or no death or injury results); Conn. Gen. Stat. Ann. § 53-21(a)(1); Del. Code Ann. tit. 11 § 1102(a)(1)(a), (a)(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Me. Rev. Stat. tit. 17-A, § 554(C); Minn. Stat. Ann. § 609.378(b)(1); Mont. Code Ann. § 45-5-622; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; 18 Pa. Stat. Ann. § 4304.

[1709] Alaska Stat. Ann. § 11.51.100(a)(4); Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Ind. Code Ann. § 35-46-1-4(a)(3); Minn. Stat. Ann. §§ 609.376, 609. 378(a)(1); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1; N.D. Cent. Code Ann. § 14-09-22.1(1); Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 948.21.

[1710] Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1.

The MPC does not have a child abuse offense, but does limit its offense for endangering the welfare of a child to "knowingly enander[ing] the child's welfare by violating a duty of care, protection, or support."[1711]

Fourth, criminal codes in reformed jurisdictions generally do not support grading child neglect on a risk of "serious bodily injury or death" (subsection (a)(1)), "significant bodily injury" (subsection (b)(1)(A)), "or "serious mental injury" (subsection (a)(1)(B)). Eighteen of the 29 reformed jurisdictions have child endangerment statutes.[1712] Thirteen of these jurisdictions criminalize child endangerment separately from child abuse or do not have a child abuse offense, or grade child endangerment differently from child abuse. [1713] Six of these jurisdictions do not grade their child endangerment offense and limit the offense to one type of risk creation.[1714]

In the remaining seven states that do grade their child endangerment offenses, only two states grade child endangerment based on the type of risk, but they both have gradations for a risk of death or serious physical injury.[1715] The other five states grade

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[1711] MPC § 230.4.

[1712] Reformed jurisdictions may have child endangerment offenses in both their criminal codes and civil statutes. This survey uses the child endangerment laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child endangerment offenses were taken from the civil statutes, if there were any. Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-21; Del. Code Ann. tit. 11 §§ 1100, 1102; Haw. Rev. Stat. Ann. §§ 709-903.5, 703-904; 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 554; Minn. Stat. Ann. §§ 609.376, 609.378; Mo. Ann. Stat. § 568.045; Mont. Code Ann. § 45-5-628; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; Ohio Rev. Code Ann. § 2919.22; 18 Pa. Stat. Ann. § 4304.

[1713] Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(a), (7)(b) (offense of child abuse prohibiting both causing injury and "permit[ing] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," but grading differently depending on whether death, injury, or no death or injury results); Conn. Gen. Stat. Ann. § 53-21(a)(1); Del. Code Ann. tit. 11 § 1102(a)(1)(a), (a)(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Me. Rev. Stat. tit. 17-A, § 554(C); Minn. Stat. Ann. § 609.378(b)(1); Mont. Code Ann. § 45-5-622; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; 18 Pa. Stat. Ann. § 4304.

[1714] Conn. Gen. Stat. Ann. § 53-21(a)(1), (A), (making it a class C felony to "willfully or unlawfully cause[] or permit[] any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be injured."); Kan. Stat. Ann. § 21-5601(a), (b) (two gradations of endangering a child depending on whether the "child's life, body or health" "may" be endangered or "is" endangered); Me. Rev. Stat. tit. 17-A, § 554(C) (making it a Class D crime to "otherwise recklessly endanger[] the health, safety or welfare of the child by violating a duty of care or protection."); Mont. Code Ann. § 45-5-622(1), (5) (making the general endangering the welfare of a child offense punishable by a maximum term of imprisonment of six months); N.H. Rev. Stat. Ann. § 639:3(I), (V) (making it a misdemeanor to "endanger[] the welfare of a child under 18 years of age . . . by violating a duty of care, protection or support he owes to such child."); N.Y. Penal Law § 260.10(1) (making it a misdemeanor to "act[] in such a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.").

[1715] Ark. Code Ann. §§ 5-27-205(a)(1), 5-27-206(a)(1), 5-27-207(a)(1) (first degree endangering the welfare of a minor prohibiting "creating a substantial risk of death or serious physical injury" and second and third degree prohibiting "creating a substantial risk of serious harm to the physical or mental welfare."); 18 Pa. Stat. Ann. § 4304(a)(1), (b)(iii) (grading the offense, in part, based on whether there was a "substantial risk of death or serious bodily injury.").

the offense based on whether actual harm resulted and the type of that harm, including death or serious bodily injury.[1716]

None of these 13 jurisdictions grade their child endangerment offenses based on a risk of intermediate bodily injury such as "significant bodily injury" in the revised child neglect statute or "serious mental injury." None of these 13 jurisdictions grade their child endangerment offenses based on a risk of serious mental injury. However, four of these jurisdictions specifically include endangering a child's mental welfare in the scope of the endangerment offense.[1717]

The MPC offense for endangering the welfare of a child is a misdemeanor and requires "knowingly endangers the child's welfare by violating a duty of care, protection, or support."[1718]

Fifth, criminal codes in the reformed jurisdictions generally support limiting liability for their neglect statutes to individuals that "know" they have a "duty of care" to the child. Ten of the eighteen reformed jurisdictions with child endangerment offenses[1719] have a "duty of care" element or similar requirement.[1720] However, due to the varying rules of construction amongst states, it is difficult to determine what culpable mental state, if any, applies to these elements. The nine reformed jurisdictions with failure to provide provisions or offenses all require a "duty of care" element or similar

[1716] Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(a), (7)(b) (offense of child abuse prohibiting both causing injury and "permit[ing] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," but grading differently depending on whether death, injury, or no death, "serious bodily injury," "any injury other than serious bodily injury," or no death or injury results); Del. Code Ann. tit. 11 § 1102(a)(1)(a), (a)(1)(b), (b)(1), (b)(2), (b)(4) (grading endangering the welfare of a child based on whether death or "serious physical injury" resulted, and having a gradation for "all other cases."); 720 Ill. Comp. Stat. Ann. 5/12-C(a)1), (a)(2), (d) (grading the offense of endangering the life or health of a child based, in part, on whether the violation "is a proximate cause of the death of the child."); Ind. Code Ann. § 35-46-1-4(a)(1), (b)(1)A), (b)(2), (b)(3) (grading the offense of neglect of a dependent, in part, based on whether "bodily injury," "serious bodily injury," or death resulted); Minn. Stat. Ann. § 609.378(b)(1) (grading the offense of based on whether "substantial harm to the child's physical, mental, or emotional health" resulted).

[1717] Ark. Code Ann. §§ 5-27-205(a)(1), 5-27-206(a)(1), 5-27-207(a)(1) (first degree endangering the welfare of a minor prohibiting "creating a substantial risk of death or serious physical injury" and second and third degree prohibiting "creating a substantial risk of serious harm to the physical or mental welfare."); Del. Code Ann. tit. 11 § 1102(a)(1)(a) ("acts in a manner likely to be injurious to the physical, mental or moral welfare of the child."); Minn. Stat. Ann. § 609.378(b)(1) ("causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death."); N.Y. Penal Law § 260.10(1) (making it a misdemeanor to "act[] in such a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.").

[1718] MPC § 230.4.

[1719] Reformed jurisdictions may have child endangerment offenses in both their criminal codes and civil statutes. This survey uses the child endangerment laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child endangerment offenses were taken from the civil statutes, if there were any.

[1720] Del. Code Ann. tit. 11 § 1102(a)(1)(a); Haw. Rev. Stat. Ann. § 709-903.5(2); Ind. Code Ann. § 35-46-1-4(a)(1); Ky. Rev. Stat. Ann. §§ 508.100(1)(b), 508.110(1)(b), 508.120(1)(b); Me. Rev. Stat. tit. 17-A, § 554(C); Minn. Stat. Ann. § 609.378(b); Mont. Code Ann. § 45-5-628(1); N.H. Rev. Stat. Ann. § 639:3(I); Ohio Rev. Code Ann. § 2919.22(A); 18 Pa. Stat. Ann. § 4304(a)(1).

requirement,[1721] but it is similarly difficult to determine what culpable mental state, if any, applies to those elements.

The MPC's endangering the welfare of children offense specifies a "knowingly" culpable mental state, but it is unclear if it applies to the fact that the accused has a "duty of care, protection or support."[1722] The MPC's persistent nonsupport offense, however, requires that the accused "know[] he is legally obliged to provide to a . . . child."[1723]

RCC § 22E-1503. ABUSE OF A VULNERABLE ADULT OR ELDERLY PERSON.
[Now RCC § 22E-1503. Criminal Abuse of a Vulnerable adult or Elderly Person.]

Relation to National Legal Trends. *The revised abuse of a vulnerable adult or elderly person offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, criminal codes in reformed jurisdictions generally support grading abuse of vulnerable adults and elderly persons statutes according to different degrees of harm, although only one does so with a gradation like "significant bodily injury." Sixteen of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1724] ("reformed jurisdictions") have specific abuse of a vulnerable adult or elderly person statutes.[1725] Only one of these jurisdictions incorporates an intermediate level of bodily harm into the offense similar to "significant bodily injury" in the revised abuse of a vulnerable adult or elderly person

[1721] Alaska Stat. Ann. § 11.51.100(a)(4); Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Ind. Code Ann. § 35-46-1-4(a)(3); Minn. Stat. Ann. §§ 609.376, 609. 378(a)(1); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1; N.D. Cent. Code Ann. §14-09-22.1(1); Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 948.21.

[1722] MPC § 230.4 ("knowingly endangers the child's welfare by violating a duty of care, protection or support."). The MPC's general rules of statutory construction, however, may supply a culpable mental state.

[1723] MPC § 230.5.

[1724] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1725] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

statute.[1726] However, many of the 16 reformed jurisdictions' vulnerable adult or elderly person abuse statutes differentiate low and severe levels of injury in their gradations.[1727]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Second, criminal codes in reformed jurisdictions support removal of "permanent bodily harm or death" of the vulnerable adult or elderly person as a separate basis for liability. Of the 16 reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes,[1728] only three grade base on whether death resulted.[1729] However, many of the 16 reformed jurisdictions' vulnerable adult or elderly person abuse statutes have clearly differentiated levels of injury.[1730]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Third, criminal codes in reformed jurisdictions provide mixed support for using mental injury as a basis for liability and grading on whether such conduct is done "purposely" or "recklessly." Sixteen of the 29 reformed jurisdictions have specific abuse

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[1726] Minn. Stat. Ann. § 609.233(3)(2).

[1727] Ala. Code § 38-9-7(b)-(e) (prohibiting "serious physical injury" and "physical injury."); Ark. Code Ann. § 5-28-103(b), (c) (prohibiting "serious physical injury or a substantial risk of death" and "physical injury."); Colo. Rev. Stat. Ann. § 18-6.5-103(2)(a), (2)(b), (2)(c) (prohibiting "death," "serious bodily injury," and "bodily injury."); Minn. Stat. Ann. § 609.233(3) (grading the offense based on whether "death," "great bodily harm," or "substantial bodily harm or the risk of death" resulted); N.Y. Penal Law §§ 260.32(1), (2), 260.34(1), (2) (prohibiting "physical injury" and "serious physical injury."); Tenn. Code Ann. §§ 71-6-117, 71-6-119(a) (prohibiting "serious mental or physical harm" in the higher gradation); Tex. Code Ann. § 22.04(a)(1), (a)(3) (prohibiting "serious bodily injury" and "bodily injury."); Utah Code Ann. § 76-5-111(2), (3) (prohibiting "serious physical injury" in the higher gradation); Wis. Stat. Ann. § 940.258(b)(1g), (b)(1m), (b)(2) (grading, in part, based on whether "death," "great bodily harm," or "bodily harm" resulted).

[1728] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[1729] Colo. Rev. Stat. Ann. § 18-6.5-103(2)(a); Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2); Wis. Stat. Ann. § 940.258.

[1730] Ala. Code § 38-9-7(b)-(e) (prohibiting "serious physical injury" and "physical injury."); Ark. Code Ann. § 5-28-103(b), (c) (prohibiting "serious physical injury or a substantial risk of death" and "physical injury."); Colo. Rev. Stat. Ann. § 18-6.5-103(2)(a), (2)(b), (2)(c) (prohibiting "death," "serious bodily injury," and "bodily injury."); Minn. Stat. Ann. § 609.233(3) (grading the offense based on whether "death," "great bodily harm," or "substantial bodily harm or the risk of death" resulted); N.Y. Penal Law §§ 260.32(1), (2), 260.34(1), (2) (prohibiting "physical injury" and "serious physical injury."); Tenn. Code Ann. §§ 71-6-117, 71-6-119(a) (prohibiting "serious mental or physical harm" in the higher gradation); Tex. Code Ann. § 22.04(a)(1), (a)(3) (prohibiting "serious bodily injury" and "bodily injury."); Utah Code Ann. § 76-5-111(2), (3) (prohibiting "serious physical injury" in the higher gradation); Wis. Stat. Ann. § 940.258(b)(1g), (b)(1m), (b)(2) (grading, in part, based on whether "death," "great bodily harm," or "bodily harm" resulted).

of a vulnerable adult or elderly person statutes.[1731] At least eight of the 16 reformed jurisdictions prohibit results like mental distress as in the current abuse of a vulnerable adult or elderly person statute, or behaviors that potentially could involve mental distress, such as harassment.[1732] Four of these eight states include "recklessly" as a culpable mental state,[1733] while the remaining four states are limited to culpable mental states of "knowingly,"[1734] or "willfully."[1735] Looking at the sixteen reformed jurisdictions'

[1731] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[1732] See, e.g., Ala. Code §§ 38-9-2(6), 38-9-7(f) (including "emotional abuse" and defining "emotional abuse," in part, as "[t]he willful or reckless infliction of emotional or mental anguish."); Tenn. Code Ann. §§ 71-6-102(1)(A); 71-6-117; 71-6-119 (prohibiting "abuse or neglect" and defining "abuse or neglect" as including "the infliction of . . . mental anguish."); Tex. Penal Code Ann. § 22.04(a)(2) (prohibiting, in part, "serious mental deficiency, impairment, or injury."); Utah Code Ann. §§ 76-5-111(1)(i), (3) (prohibiting, in part, "harm, abuse, or neglect," and defining " "harm" as "pain, mental anguish, emotional distress, hurt, physical or psychological damage, physical injury, suffering, or distress inflicted knowingly or intentionally."); Ariz. Rev. Stat. Ann. § 13-3623(D), (F)(3) (prohibiting "emotional abuse" and defining emotional abuse as "a pattern of ridiculing or demoing a vulnerable adult, making derogatory remarks to a vulnerable adult, verbally harassing a vulnerable adult or threatening to inflict physical or emotional harm on a vulnerable adult."); Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(D) ("harasses, intimidates."); S.D. Codified Laws Ann. § 22-46-1(4); 22-46-2 (prohibiting "emotionally or psychologically abus[ing]" and defining "emotional and psychological abuse" as "a caretaker's willful, malicious, and repeated infliction of: (a) A sexual act or he simulation of a sexual act directed at and without the consent of the elder or adult with a disability that involves nudity or is obscene; (b) Unreasonable confinement; (c) Harm or damage or destruction of the property of an elder or adult with a disability, including harm to or destruction of pets; or (d) Ridiculing or demeaning conduct, derogatory remarks, verbal harassment, or threats to inflict physical or emotional and psychological abuse, directed at an elder or adult with a disability."); Wis. Stat. Ann. §§ 940.258; 46.90(cm) (including "emotional abuse" and defining "emotional abuse" as "language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed.").

[1733] Ala. Code §§ 38-9-2(6), 38-9-7(f) (including "emotional abuse" and defining "emotional abuse," in part, as "[t]he willful or reckless infliction of emotional or mental anguish.");Tex. Penal Code Ann. § 22.04(a)(2), (e) (grading the offense on whether the culpable mental state was "intentionally or knowingly" or "recklessly."); Utah Code Ann. §§ 76-5-111(1)(i), (3) (prohibiting, in part, "harm, abuse, or neglect," defining "harm" as "pain, mental anguish, emotional distress, hurt, physical or psychological damage, physical injury, suffering, or distress inflicted knowingly or intentionally," and grading the offense based on whether the culpable mental state was "intentionally or knowingly," "recklessly," or "criminal negligence."); Wis. Stat. Ann. § 940.258(1)(ag), (2), (b) (including "emotional abuse" in the definition of "abuse" and grading the offense, in part, based on the culpable mental state of "intentionally," "recklessly," or "negligently.").

[1734] Tenn. Code Ann. §§ 71-6-102(1)(A); 71-6-117(a); 71-6-119(a); Ariz. Rev. Stat. Ann. § 13-3623(D) ("intentionally or knowingly.").

[1735] Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(D); S.D. Codified Laws Ann. § 22-46-1(4); 22-46-2 (prohibiting "emotionally or psychologically abus[ing]" and defining "emotional and psychological abuse" as "a

grading schemes for physical harm, nine of the jurisdictions include "recklessly" as a culpable mental state.[1736]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Fourth, reformed jurisdictions' criminal codes provide mixed support for requiring a culpable mental state of "recklessly" or "recklessly, under circumstances manifesting extreme indifference to human life" for physical harm in abuse of a vulnerable adult or elderly person statutes. None of the 16 reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes[1737] have a culpable mental state equivalent to "recklessly, under circumstances manifesting extreme indifference to human life." However, at least 12 of the 29 reformed jurisdictions do have this culpable mental state in the highest gradations of their assault statutes.[1738]

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caretaker's willful, malicious, and repeated infliction of: (a) A sexual act or he simulation of a sexual act directed at and without the consent of the elder or adult with a disability that involves nudity or is obscene; (b) Unreasonable confinement; (c) Harm or damage or destruction of the property of an elder or adult with a disability, including harm to or destruction of pets; or (d) Ridiculing or demeaning conduct, derogatory remarks, verbal harassment, or threats to inflict physical or emotional and psychological abuse, directed at an elder or adult with a disability.")."

[1736] Ala. Code § 38-9-7(b)-(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally" or "recklessly."); Ariz. Rev. Stat. Ann. § 13-3623(A), (B) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "criminal negligence."); Colo. Rev. Stat. Ann. § 18-6.5-103 (grading the offense, in part, based on whether the culpable mental state is "negligence," but also the culpable mental states required in the assault statutes); Ky. Rev. Stat. Ann. §§ 508.100(1), 508.110(1), 508.120(1) (grading the offense based on whether the culpable mental state is "intentionally," "wantonly," or "recklessly."); N.H. Rev. Stat. Ann. § 631.8(II), (III) (grading the offense, in part, based on whether the culpable mental state is "purposely" or "knowingly or recklessly."); N.Y. Penal Law §§ 260.32(1), (2), (3), 260.34(1), (2) (grading the offense, in part, based on whether the culpable mental state is "with intent," "recklessly," or "criminal negligence."); Tex. Code Ann. § 22.04(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly" or "recklessly."); Utah Code Ann. § 76-5-111(2), (3) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly," "recklessly," or "with criminal negligence."); Wis. Stat. Ann. § 940.258(2)a), (b) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "negligently.").

[1737] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[1738] *See, e.g.*, Ala. Code § 13A-6-20(a)(3); Alaska Stat. Ann. § 11.41.200(a)(3); Ark. Code Ann. § 5-13-201(a)(3); Colo. Rev. Stat. Ann. § 18-3-202(1)(c); Conn. Gen. Stat. Ann. §53a-59; Ky. Rev. Stat. Ann. § 508.010(1)(b); Me. Rev. Stat. tit. 17-A, § 208-B(1)(B); N.J. Stat. Ann. § 2C:12-1(b)(1); N.Y. Penal Law § 120.10(3); Or. Rev. Stat. Ann. § 163.65(1)(b); 18 Pa. Stat. Ann. § 2702(a)(1); S.D. Codified Laws § 22-18-1.1(1).

Nine of the 16 reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes[1739] include "recklessly" as a culpable mental state.[1740]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Fifth, criminal codes in reformed jurisdictions strongly support the elimination of a restriction on criminal abuse of a vulnerable adult or elderly person to physical harms committed by "corporal means." None of the sixteen reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes limits the offense to corporal means.[1741]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

RCC § 22E-1504. NEGLECT OF A VULNERABLE ADULT OR ELDERLY PERSON.
[Now RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.]

[1739] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[1740] Ala. Code § 38-9-7(b)-(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally" or "recklessly."); Ariz. Rev. Stat. Ann. § 13-3623(A), (B) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "criminal negligence."); Colo. Rev. Stat. Ann. § 18-6.5-103 (grading the offense, in part, based on whether the culpable mental state is "negligence," but also the culpable mental states required in the assault statutes); Ky. Rev. Stat. Ann. §§ 508.100(1), 508.110(1), 508.120(1) (grading the offense based on whether the culpable mental state is "intentionally," "wantonly," or "recklessly."); N.H. Rev. Stat. Ann. § 631.8(II), (III) (grading the offense, in part, based on whether the culpable mental state is "purposely" or "knowingly or recklessly."); N.Y. Penal Law §§ 260.32(1), (2), (3), 260.34(1), (2) (grading the offense, in part, based on whether the culpable mental state is "with intent," "recklessly," or "criminal negligence."); Tex. Code Ann. § 22.04(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly" or "recklessly."); Utah Code Ann. § 76-5-111(2), (3) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly," "recklessly," or "with criminal negligence."); Wis. Stat. Ann. § 940.258(2)a), (b) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "negligently.").

[1741] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

Relation to National Legal Trends. *The revised neglect of a vulnerable adult or elderly person offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, criminal codes in reformed jurisdictions generally support limiting neglect of a vulnerable adult or elderly person to conduct that does not actually harm a vulnerable adult or elderly person, as opposed to the current neglect statute, which partially grades on actual harm,[1742] and partially on a failure to discharge the required duty.[1743] Fourteen of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1744] (reformed jurisdictions) have offenses for endangering a vulnerable adult or elderly person.[1745] Ten of these states criminalize endangerment separately from abusing a vulnerable adult or elderly person, or criminalize endangerment but don't have a specific abuse offense.[1746] Nineteen of the 29 reformed jurisdictions have provisions or offenses for failing to provide for a vulnerable adult or elderly person[1747] like third degree in the revised neglect of a

[1742] 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).

[1743] 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.").

[1744] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[1745] Reformed jurisdictions may have endangering a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the endangering of a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, endangering a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any.

Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-201, 5-27-202, 5-27-203; Colo. Rev. Stat. Ann. § 18-6.5-103(6); Haw. Rev. Stat. Ann. § 709-905; 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-4; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 555; Mo. Ann. Stat. § 565.184(1)(2); N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law §§ 260.24, 260.25; N.D. Cent. Code Ann. § 12.1-31-07; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

[1746] Ark. Code Ann. §§ 5-27-201, 5-27-202, 5-27-203; Colo. Rev. Stat. Ann. § 18-6.5-103(6); Haw. Rev. Stat. Ann. § 709-905; Ind. Code Ann. § 35-46-1-4(a)(1); Me. Rev. Stat. tit. 17-A, § 555; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law §§ 260.24, 260.25; N.D. Cent. Code Ann. § 12.1-31-07.

[1747] Reformed jurisdictions may have failure to support a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses failure to support a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, failure to support a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Alaska Stat. Ann. § 11.51.210; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. § 18-6.5-103(f); 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-

vulnerable adult or elderly person statute. In eight of these reformed jurisdictions, failing to provide is criminalized separately from abuse offenses[1748] and in two of these jurisdictions it is graded differently than abuse.[1749]

The MPC does not have a general offense for neglecting a vulnerable adult or elderly person. However, it does have a persistent nonsupport offense for "persistently fail[ing] to provide support which he can provide and which he knows he is legally obliged to provide to a . . . dependent."[1750] "Dependent" is not defined, but may extend to individuals that are vulnerable adults or elderly persons as defined in the RCC.

Second, criminal codes in reformed jurisdictions provide mixed support for requiring a reckless culpable mental state as to whether neglected items or care are essential for the well-being of the vulnerable adult or elderly person. Due to the varying rules of construction in the 29 reformed jurisdictions, it is difficult to determine the culpable mental state, if any, for the element that the items or care are essential to the well-being of the vulnerable adult or elderly person. However, of the 19 reformed jurisdictions with failure to provide offenses or provisions,[1751] only three[1752] jurisdictions clearly codify a reasonable person or negligence standard for this element. One reformed

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117, 71-6-119; Utah. Code Ann. §§ 76-5-111; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[1748] Alaska Stat. Ann. § 11.51.210; Colo. Rev. Stat. Ann. § 18-6.5-103(f); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-4; N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; 18 Pa Stat. Ann. § 2713; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[1749] Ark. Code Ann. §§ 5-28-101, 5-28-103; Kan. Stat. Ann. § 21-5417(a)(3).

[1750] MPC § 230.5.

[1751] Reformed jurisdictions may have failure to support a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the failure to support a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, the failure to support a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Alaska Stat. Ann. § 11.51.210; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. § 18-6.5-103(f); 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Utah. Code Ann. §§ 76-5-111; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[1752] Ark. Code Ann. §§ 5-28-101(11)(B), 5-28-103(c)(1), (c)(2) (prohibiting "neglect[ing]" an adult endangered person or an adult impaired person" and defining "neglect," in part, as "[a] purposeful act or omission by a caregiver responsible for the care and supervision of an adult endangered person or an adult impaired person that constitutes negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an adult endangered person or an adult impaired person."); Colo. Rev. Stat. Ann. §§ 18-6.5-102(6)(a), 18-6.5-103(6) (prohibiting "caretaker neglect" and defining "caretaker neglect," in part, as "neglect that occurs when adequate food, clothing, shelter, psychological care, physical care, medical care, habilitation, supervision, or any other treatment necessary for the health or safety of an at-risk person is not secured for an at-risk person or is not provided by a caretaker in a timely manner and with the degree of care that a reasonable person in the same situation would exercise."); Utah Code Ann. § 76-5-111(n), (3) (prohibiting "neglect" and defining "neglect," in part, as "failure of a caretaker to provide care to a vulnerable adult in a timely manner and with the degree of care that a reasonable person in a like position would exercise.").

jurisdiction requires knowledge for this element[1753] and another jurisdiction requires "knows or reasonably should know."[1754]

Three of the remaining jurisdictions do not codify a culpable mental state for this element or for any element in the offense,[1755] but it is possible that case law or rules of statutory construction would provide a culpable mental state. The other 11 jurisdictions codify a culpable mental state in the statute,[1756] but it is unclear whether or how the culpable mental state applies to the element that the items or care are essential to the well-being of the vulnerable adult or elderly person. Most of these 11 jurisdictions are limited to the culpable mental states of "intentionally" or "knowingly,"[1757] but four include "recklessly"[1758] and two include criminal negligence.[1759]

The MPC does not have a general offense for neglecting a vulnerable adult or elderly person. However, it does have a persistent nonsupport offense for "persistently fail[ing] to provide support which he can provide and which he knows he is legally

[1753] N.D. Cent. Code Ann. § 12.1-37-07(2) ("caregiver who fails to perform acts that the caregiver knows are necessary to maintain or preserve the life or health of the eligible adult.");
[1754] 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(B).
[1755] Alaska Stat. Ann. § 11.51.210(a); N.J. Stat. Ann. § 2C:24-8(a); S.D. Codified Laws §§ 22-46-1, 22-46-2.
[1756] Ala. Code §§ 38-9-2, 38-9-7; Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.
[1757] Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3) (defining "support" without a culpable mental state, but requiring "knowingly or intentionally deprives the dependent of necessary support."); Kan. Stat. Ann. § 21-5417(a)(3) ("knowingly committing . . . omission or deprivation of treatment, goods or services that are necessary to maintain physical or mental health of such dependent adult."); Minn. Stat. Ann. §§ 609.233(1), (2) (defining "neglect" without a culpable mental state, but requiring "intentionally neglects" in the gross misdemeanor gradation and requiring "intentionally deprives a vulnerable adult of necessary food, clothing, shelter, health care, or supervision" in the felony gradation); Mo. Ann. Stat. § 565.184(2) ("intentionally fails to provide care, goods or services to an elderly person, a person with a disability, or a vulnerable person."); Tenn. Code Ann. §§ 71-6-102, 71-6-117(a), 71-6-119(a) (defining "neglect" without a culpable mental state, but requiring "knowingly" in the offense);
[1758] Ala. Code §§ 38-9-2(12), 38-9-7(b), (c), (d), (e) (codifying a definition of "neglect" with culpable mental state, but grading the neglect offense, in part, based on whether the culpable mental state is "intentionally" or "recklessly."); Ohio Rev. Code Ann § 2903.16(A), (B) (two gradations of the offense, one requiring "knowingly" and one requiring "recklessly" for "fail to provide . . . with any treatment, care, goods, or services that is necessary to maintain the health or safety."); 18 Pa Stat. Ann. § 2713(a)(1) "intentionally, knowingly, or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare."); Wis. Stat. Ann. § 940.285(1)(ag)(6), (2)(a), (b) (defining "abuse" without a culpable mental state, but grading the offense, in part, based on whether the culpable mental state was intentionally, recklessly, or negligently).
[1759] Or. Rev. Stat. Ann. §§ 163.205(1)(a), 163.200(1)(a) (two gradations of the offense, one requiring "intentionally or knowingly" and one requiring "with criminal negligence" for "with[holding] necessary and adequate food, physical care or medical attention."); Wash. Rev. Code Ann. §§ 9A.42.010(1), 9A.42.020(1), 9A.42.030(1), 9A.42.035(1), 9A.42.037(1)(a), (1)(b) (defining "basic necessities of life" without a culpable mental state, but requiring "with criminal negligence" for causing specified harms or risk of harm "by withholding any of the basic necessities of life.").

obliged to provide to a . . . dependent."[1760] "Dependent" is not defined, but may extend to individuals that are vulnerable adults or elderly persons as defined in the RCC.

Third, criminal codes in reformed jurisdictions codify a defense to either endangering or failing to provide for a vulnerable adult or elderly person that extends beyond spiritual healing. One[1761] of the 14 reformed jurisdictions with an endangering a vulnerable adult or elderly person statute[1762] codifies a defense that extends to a patient refusing care. Three[1763] of the 19 reformed jurisdictions with failure to provide

[1760] MPC § 230.5.

[1761] Ariz. Rev. Stat. Ann. § 13-3623(E)(1) ("This section does not apply to [a] health care provider as defined in § 36-3201 who permits a patient to die or the patient's condition to deteriorate by not providing health care if that patient refuses that care directly or indirectly through a health care directive as defined in § 36-3201, through a surrogate pursuant to § 36-3231 or through a court appointed guardian as provided for in title 14, chapter 5, article 3.").

[1762] Reformed jurisdictions may have endangering a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the endangering a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, endangering a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-201, 5-27-202, 5-27-203; Colo. Rev. Stat. Ann. § 18-6.5-103(6); Haw. Rev. Stat. Ann. § 709-905; 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-4; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 555; Mo. Ann. Stat. § 565.184(1)(2); N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law §§ 260.24, 260.25; N.D. Cent. Code Ann. § 12.1-31-07; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

[1763] Minn. Stat. Ann. § 609.233(2) ("A vulnerable adult is not neglected or deprived under subdivision 1 or 1a for the sole reason that: (1) the vulnerable adult or a person with authority to make health care decisions for the vulnerable adult under sections 144.651, 144A.44, 253B.03, or 524.5-101 to 524.5-502, or chapter 145B, 145C, or 252A, refuses consent or withdraws consent, consistent with that authority and within the boundary of reasonable medical practice, to any therapeutic conduct, including any care, service, or procedure to diagnose, maintain, or treat the physical or mental condition of the vulnerable adult or, where permitted under law, to provide nutrition and hydration parenterally or through intubation; this paragraph does not enlarge or diminish rights otherwise held under law by: (i) a vulnerable adult or a person acting on behalf of a vulnerable adult, including an involved family member, to consent to or refuse consent for therapeutic conduct; or (ii) a caregiver to offer or provide or refuse to offer or provide therapeutic conduct."); Or. Rev. Stat. Ann. § 163.206(3) (exempting "(1) . . . a person acting pursuant to a court order, an advance directive or a power of attorney for health care pursuant to ORS 127.505 to 127.660 or a POLST, as defined in ORS 127.663; (2) . . . a person withholding or withdrawing life-sustaining procedures or artificially administered nutrition and hydration pursuant to ORS 127.505 to 127.660; (3) When a competent person refuses food, physical care or medical care."); 18 Pa. Stat. and Cons. Stat. Ann. § 2713**(e) (**"A caretaker or any other individual or facility may offer an affirmative defense to charges filed pursuant to this section if the caretaker, individual or facility can demonstrate through a preponderance of the evidence that the alleged violations result directly from: (1) the caretaker's, individual's or facility's lawful compliance with a care-dependent person's living will as provided in 20 Pa.C.S. Ch. 54 (relating to health care); (2) the caretaker's, individual's or facility's lawful compliance with the care-dependent person's written, signed and witnessed instructions, executed when the care-dependent person is competent as to the treatment he wishes to receive; (3) the caretaker's, individual's or facility's lawful compliance with the direction of the care-dependent person's: (i) agent acting pursuant to a lawful durable power of attorney under 20 Pa.C.S. Ch. 56 (relating to powers of attorney), within the scope of that power; or (ii) health care agent acting pursuant to a health care power of attorney under 20 Pa.C.S. Ch. 54 Subch. C (relating to health care agents and representatives), within the scope of that power; (4) the caretaker's, individual's or facility's lawful compliance with a "Do Not Resuscitate" order written and signed by the care-dependent person's attending physician; or (5) the caretaker's, individual's or facility's lawful compliance with the direction of the care-dependent person's health care representative under 20 Pa.C.S. § 5461 (relating to

offenses[1764] have defenses for a vulnerable adult refusing care. An additional reformed jurisdiction has an "informed consent" defense to the prong of "abuse" that prohibits "deprivation of life-saving treatment."[1765]

The MPC does not have a general offense for neglecting a vulnerable adult or elderly person. However, it does have a persistent nonsupport offense for "persistently fail[ing] to provide support which he can provide and which he knows he is legally obliged to provide to a . . . dependent."[1766] "Dependent" is not defined, but may extend to individuals that are vulnerable adults or elderly persons as defined in the RCC. The MPC also has a general consent defense that provides the "consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense."[1767] The MPC has additional requirements for the consent defense when the conduct "causes or threatens bodily injury."[1768]

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decisions by health care representative), provided the care-dependent person has an end-stage medical condition or is permanently unconscious as these terms are defined in 20 Pa.C.S. § 5422 (relating to definitions) as determined and documented in the person's medical record by the person's attending physician."); S.D. Codified Laws § 22-46-1.1 ("For the purposes of this chapter, the term, neglect, does not include a decision that is made to not seek medical care for an elder or disabled adult upon the expressed desire of the elder or disabled adult; a decision to not seek medical care for an elder or disabled adult based upon a previously executed declaration, do-not-resuscitate order, or a power of attorney for health care; a decision to not seek medical care for an elder or disabled adult if otherwise authorized by law; or the failure to provide goods and services outside the means available for the elder or disabled adult.");

[1764] Reformed jurisdictions may have failure to support a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the failure to support a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, the failure to support a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Alaska Stat. Ann. § 11.51.210; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. § 18-6.5-103(f); 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Utah. Code Ann. §§ 76-5-111; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[1765] Utah Code Ann. § 76-5-111(b)(iv)(B) (including in the definition of "abuse" "deprivation of life-sustaining treatment, except "when informed consent, as defined in this section, has been obtained.").

[1766] MPC § 230.5.

[1767] MPC § 2.11.

[1768] MPC § 2.11(2) ("When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if: (a) the bodily injury consented to or threatened by the conduct consented to is not serious; or (b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or (c) the consent establishes a justification for the conduct under Article 3 of the Code.").

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

First, excluding fraud or deception or causing another to believe he or she is property of another from the definition of "coercion" has mixed support in state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1769] (reformed jurisdictions), only six define "coercion" for use in their respective human trafficking offenses.[1770] Of the jurisdictions that define "coercion," half do not include fraud or deception.[1771] None of the jurisdictions that define "coercion" include causing a person to believe that he or she is property of a person or business.

Second, revising the definition of "coercion" to include threatening to "limit a person's access to a controlled substance, as defined in D.C. Code § 48-901.02, or prescription medication" is not supported by state criminal codes. While only five reformed jurisdictions define "coercion" for use in their respective human trafficking offenses, all but one include controlling access to a controlled substance.[1772] However, none of these jurisdictions define "coercion" to include facilitating or controlling a person's access to addictive substance generally.

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

Omitting cross-references to various prostitution offenses from the definition of "commercial sex act" is supported by state criminal codes. A majority of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1773] (reformed jurisdictions) define "commercial sex act,"[1774] and none include the commission of prostitution and related offenses.

[1769] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[1770] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5, Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01, Wash. Rev. Code Ann. § 9A.40.010.

[1771] Ala. Code § 13A-6-151; Ind. Code Ann. § 35-42-3.5-0.5; Wash. Rev. Code Ann. § 9A.40.010.

[1772] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.

[1773] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[1774] Alaska Stat. Ann. § 11.41.360; Ala. Code § 13A-6-151; Ark. Code Ann. § 5-18-102; Colo. Rev. Stat. Ann. § 18-3-502; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Ind. Code Ann. § 35-42-4-4; Ky. Rev. Stat. Ann. § 529.010; Me. Rev. Stat. tit. 17-A, § 851; Mo. Ann. Stat. § 566.200; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01; N.H. Rev. Stat. Ann. § 633:6; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3001; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20A.01; Wash. Rev. Code Ann. § 9A.40.010; Wis. Stat. Ann. § 940.302.

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

Defining "labor" to exclude commercial sex acts has mixed support in state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1775] (reformed jurisdictions), only seven statutorily define "labor."[1776] None of these seven jurisdictions' definitions of "labor" explicitly exclude sexual activity, and one explicitly includes sexual activity.[1777] The remaining jurisdictions' definitions of "labor" do not specify whether commercial sex acts or other sexual activity is included. In addition, the Uniform Act on Prevention and Remedies for Human Trafficking defines "labor", but does not specify whether commercial sex acts are included.[1778]

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

Defining "services" to exclude commercial sex acts has mixed support in state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1779] (reformed jurisdictions), only a minority of reformed jurisdictions define the term "services."[1780] Of these states one explicitly includes sexual activity in the definition of "services"[1781] and one explicitly excludes sexual activity from the definition of "services."[1782] The remaining jurisdictions' definitions of "service" do not specify whether commercial sex acts or other sexual activity is included. In addition, the Uniform Act on Prevention and Remedies for Human Trafficking defines "services", and

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[1775] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[1776] Ark. Code Ann. § 5-18-102; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ky. Rev. Stat. Ann. § 529.010; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01; 18 Pa. Stat. Ann. § 3001.

[1777] Del. Code Ann. tit. 11, § 787.

[1778] UNIFORM ACT ON PREVENTION AND REMEDIES FOR HUMAN TRAFFICKING, National Conference of Commissioners on Uniform State Laws. The U.S. Department of Justice also drafted a model trafficking statute, which defines "labor" as "work of economic or financial value." However, commentary to the Department of Justice model act notes that "labor" includes "work activities which would, but for the coercion, be otherwise legitimate and legal. The legitimacy or legality of the work is to be determined by focusing on the job, rather than on the legal status or work authorization status of the worker." Department of Justice Model State Anti-Trafficking Criminal Statute. This implies that "labor" does not include commercial sex acts to the extent that commercial sex acts are otherwise illegal.

[1779] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[1780] Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ky. Rev. Stat. Ann. § 529.010; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.

[1781] 720 Ill. Comp. Stat. Ann. 5/10-9.

[1782] Haw. Rev. Stat. Ann. § 707-780.

specifies that "commercial sexual activities and sexually explicit performances shall be considered 'services.[.]"[1783]

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

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

The Supreme Court and lower courts broadly recognize that a criminal conviction, even if concurrent to a more serious conviction, is a separate punishment that has collateral consequences beyond the sentence.[1784] However, whether concurrent sentencing is or is not deemed appropriate for multiple offenses committed as part of the same act or course of conduct varies widely across jurisdictions.

The Model Penal Code (MPC) bars multiple convictions not only where one offense is a lesser included offense of another or includes inconsistent elements, but also, more generally, "where the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."[1785] Several states have followed the MPC in codifying such a bar to multiple offense liability.[1786]

Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1787] (reformed jurisdictions), none have

[1783] Uniform Act on Prevention and Remedies for Human Trafficking. National Conference of Commissioners on Uniform State Laws. The U.S. Department of Justice also drafted a model trafficking statute, which defines "services" to include "commercial sexual activity and sexually-explicit performances[.]"

[1784] *See, Ball v. United States*, 470 U.S. 856, 865 (1985) ("[A] separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.") (emphasis in original).

[1785] Model Penal Code 1.07(1) ("Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: (a) one offense is included in the other, as defined in Subsection (4) of this Section; or (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or (c) inconsistent findings of fact are required to establish the commission of the offenses; or (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.").

[1786] Multiple offense limitations 1 Crim. L. Def. § 68 ("Ala. Code § 13A-1-8(b)(4) (1982); Colo. Rev. Stat. § 18- 1-408(1)(d) (1978); Ga. Code Ann. § 16-1-7(a)(2) (Michie 1982); Hawaii Rev. Stat. § 701-109(1)(d) (1976); Mo. Ann. Stat. § 556.041(3) (Vernon 1979); Mont. Code Ann. § 46-11-502(4) (1983); N. J. Stat. Ann. § 2C:1-8(a)(4) (West 1982); Okla. Stat. Ann. tit. 21, § 11 (West 1983).").

[1787] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code

specific statutory provisions that explicitly bar multiple convictions for human trafficking related offenses. However, given the variety of states' approaches to merger, it is unclear[1788] how many jurisdictions permit multiple convictions for overlapping human trafficking offenses that arise from a single act or course of conduct.

Second, exempting the use of reasonable disciplinary measures to compel a child to perform household chores is not supported by other states' criminal codes. Only two reformed jurisdiction statutorily exempts the use of reasonable disciplinary measures to compel children to perform household chores from human trafficking offenses.[1789] Case law on this point in other jurisdictions was not researched. Several states have codified general defenses that apply when a parent, guardian, or school official uses reasonable force to maintain discipline or to promote the welfare of a child or incompetent person.[1790] It is unclear whether these general defenses would limit liability for forced labor or other human trafficking offenses.

RCC § 22E-1603. FORCED LABOR OR SERVICES.
[Now RCC § 22E-1601. Forced Labor or Services]

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

First, omitting causing a person to provide labor or services by means of fraud or deception from the forced labor or services offense is not supported by state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1791] (reformed jurisdictions), a majority of those jurisdictions that have codified an analogous forced labor offense include causing a person to provide labor or services by means of fraud or deception.[1792] Ten reformed jurisdictions' analogous forced labor or services offenses do not include causing a person to provide labor or services by means of fraud or deception.[1793]

General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[1788] Case law on this point in other jurisdictions was not researched.

[1789] Ariz. Rev. Stat. Ann. § 13-1308; N.H. Rev. Stat. Ann. § 633:7 (b).

[1790] *E.g.*, Ala. Code § 13A-3-24; Ariz. Rev. Stat. Ann. § 13-403; Conn. Gen. Stat. Ann. § 53a-18; Haw. Rev. Stat. Ann. § 703-309.

[1791] *See*, Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[1792] Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Conn. Gen. Stat. Ann. § 53a-192a; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; 18 Pa. Stat. Ann. § 3012; Tex. Penal Code Ann. § 20A.02.

[1793] Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-502, Colo. Rev. Stat. Ann. § 18-3-503; 720 Ill. Comp. Stat. Ann. 5/10-9; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.203; Mont. Code Ann. § 45-5-701, Mont. Code Ann. § 45-5-703; N.Y. Penal Law § 135.35; Or. Rev. Stat. Ann. § 163.264; Or. Rev. Stat. Ann. § 163.263; Tenn. Code Ann. § 39-13-307.

Second, revising forced labor to exclude causing a person to provide labor or services by facilitating access to addictive or controlled substances is not supported by national legal trends. A majority of the reformed jurisdictions' that have codified an analogous forced labor offense include controlling or facilitating access to a controlled substance.[1794] Six reformed jurisdictions' analogous forced labor or services offenses do not include causing a person to provide labor or services by any means involving controlled substances.[1795] However, excluding threats to limit another person's access to addictive substances that are not controlled substances is supported by state criminal codes. None of the reformed jurisdictions' that have codified an analogous forced labor offense include limiting, facilitating, or controlling a person's access to addictive substances other than controlled substances.[1796]

Third, authorizing enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age has mixed support in other states' criminal codes. Half of the reformed jurisdictions' that have codified an analogous forced labor offense allow for enhanced penalties when the complainant was under the age of 18.[1797]

RCC § 22E-1604. FORCED COMMERCIAL SEX.
[Now RCC § 22E-1602. Forced Commercial Sex.]

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

First, explicitly criminalizing forced commercial sex acts is consistent with state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1798] (hereinafter "reformed jurisdictions") that have a forced labor offense, half explicitly criminalize forced commercial sex acts either as part of the forced labor offense[1799], or through a separate offense.[1800] The remaining states do not explicitly criminalize forced

[1794] Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1306; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Mont. Code Ann. § 45-5-703; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; N.Y. Penal Law § 135.35; 18 Pa. Stat. Ann. § 3012; Tenn. Code Ann. § 39-13-307.
[1795] Conn. Gen. Stat. Ann. § 53a-192a, Conn. Gen. Stat. Ann. § 53a-192; 720 Ill. Comp. Stat. Ann. 5/10-9; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.010; Mo. Ann. Stat. § 566.203; Or. Rev. Stat. Ann. § 163.263, Or. Rev. Stat. Ann. § 163.264.
[1796] Ala. Code § 13A-6-152; Ariz. Rev. Stat. Ann. § 13-1306; Del. Code Ann. tit. 11, § 787; Mont. Code Ann. § 45-5-703; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; N.Y. Penal Law § 135.35; 18 Pa. Stat. Ann. § 3012; Tenn. Code Ann. § 39-13-307.
[1797] Ark. Code Ann. § 5-18-103; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; Minn. Stat. Ann. § 609.281; Mont. Code Ann. § 45-5-703; N.D. Cent. Code Ann. § 12.1-41-03; Tenn. Code Ann. § 39-13-307.
[1798] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[1799] Del. Code Ann. tit. 11, § 787; Ala. Code § 13A-6-151; Conn. Gen. Stat. Ann. § 53a-192a; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.010; N.H. Rev. Stat. Ann. § 633:7; 18 Pa. Stat. Ann. § 3012.
[1800] N.D. Cent. Code Ann. § 12.1-41-04.

commercial sex acts, but similar to the current D.C. Code, are ambiguous as to whether forced labor includes forced commercial sex acts.[1801]

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

RCC § 22E-1605. TRAFFICKING IN LABOR OR SERVICES.
[Now RCC § 22E-1603. Trafficking in Labor or Services]

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

First, criminalizing sex trafficking under a separate offense has mixed support from state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1802] (hereafter "reformed jurisdictions") that have a forced labor offense, a majority criminalize trafficking in labor or services and in commercial sex acts under the same statute.[1803] However, three of those states' statutes provide for higher maximum sentences when trafficking in commercial sex.[1804] A minority of reformed jurisdictions' codes include a separate trafficking in commercial sex acts offense.[1805]

Second, changing the trafficking in labor or services offense to exclude trafficking a person with recklessness that he or she is or will be caused to provide labor or services by means of fraud or deception is not supported by state criminal codes. A majority of the reformed jurisdictions' that have codified an analogous trafficking in labor or services offense include causing a person to provide labor or services by means of fraud or deception.[1806]

Third, changing the trafficking in labor and services offense to exclude trafficking a person who is or will be caused to provide labor or services by means of facilitating access to a controlled substance or addictive substance has mixed support from state

[1801] Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1306; 720 Ill. Comp. Stat. Ann. 5/10-9; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.203; Mont. Code Ann. § 45-5-703; Tenn. Code Ann. § 39-13-307; Tex. Penal Code Ann. § 20A.02.

[1802] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1803] Ala. Code § 13A-6-153; Ark. Code Ann. § 5-18-103; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; In. St. 35–42–3.5–1; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.110; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. § 3011; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

[1804] Ark. Code Ann. § 5-18-103; Mont. Code Ann. § 45-5-702; Or. Rev. Stat. Ann. § 163.266.

[1805] Mo. Ann. Stat. § 566.209; N.Y. Penal Law § 230.34; Tenn. Code Ann. § 39-13-309.

[1806] Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Conn. Gen. Stat. Ann. § 53a-192a; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; 18 Pa. Stat. Ann. § 3012; Tex. Penal Code Ann. § 20A.02.

criminal codes. A majority of the reformed jurisdictions that have codified an analogous trafficking in labor or services offense include trafficking a person who will be caused to provide labor or services by means of controlling or facilitating access to a controlled substance.[1807] However, excluding threats to limit another person's access to addictive substances that are not controlled substances is supported by national legal trends. None of the reformed jurisdictions that have codified an analogous trafficking in services or labor offense include trafficking a person who will be caused to provide labor or serves by means of limiting, facilitating, or controlling that person's access to addictive substances other than controlled substances.

Fourth, authorizing enhanced penalties if the trafficked person is under the age of 18, or was held for 180 days or more has mixed support from state criminal codes. Nearly half of the reformed jurisdictions that have codified an analogous trafficking in labor or services offense authorize enhanced penalties when the trafficked person is under the age of 18.[1808]

RCC § 22E-1606. TRAFFICKING IN COMMERCIAL SEX.
[RCC § 22E-1604. Trafficking in Commercial Sex]

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

First, criminalizing sex trafficking under a separate offense is not supported by state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1809] (hereinafter "reformed jurisdictions") that have a trafficking in labor or services offense, a majority criminalize trafficking in labor or services and trafficking commercial sex acts under the same statute.[1810] However, three those states' statutes provide for higher maximum sentences when trafficking in commercial sex.[1811] A minority of reformed jurisdictions' codes include a separate trafficking in commercial sex acts offense.[1812]

[1807] Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Ind. Code Ann. § 35-42-3.5-1; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; N.H. Rev. Stat. Ann. § 633:7; N.J. Stat. Ann. § 2C:13-8; N.Y. Penal Law § 135.35; 18 Pa. Stat. Ann. § 3011; Tenn. Code Ann. § 39-13-308; Wis. Stat. Ann. § 940.302.

[1808] Ark. Code Ann. § 5-18-103; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; 18 Kan. Stat. Ann. § 21-5426; 18 Ky. Rev. Stat. Ann. § 529.100; Minn. Stat. Ann. § 609.282; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; 18 S.D. Codified Laws § 22-49-2; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308.5.

[1809] *See*, Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1810] Alaska Stat. Ann. § 11.41.360; Ark. Code Ann. § 5-18-103; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.110; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3011; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

[1811] Kan. Stat. Ann. § 21-5426; Mont. Code Ann. § 45-5-702 (heightened penalty if trafficking involves sexual intercourse without consent); Or. Rev. Stat. Ann. § 163.266.

[1812] Mo. Ann. Stat. § 566.209; Tenn. Code Ann. § 39-13-309.

Second, changes to the trafficking in commercial sex offense made by incorporating the revised definition of coercion have mixed support in state criminal codes. Excluding fraud or deception or causing another to believe he or she is property of another from the definition of "coercion" has mixed support from national legal trends. Only six reformed jurisdictions define "coercion" for use in their respective human trafficking offenses.[1813] Of the jurisdictions that define "coercion," half do not include fraud or deception.[1814] None of the jurisdictions that define "coercion" include causing a person to believe that he or she is property of a person or business.

Third, revising the definition of "coercion" to include threatening to "limit a person's access to a controlled substance, as defined in D.C. Code § 48-901.02, or prescription medication" is not supported by state criminal codes. Of the jurisdictions that define "coercion" all but one include controlling access to a controlled substance.[1815] However, none of these jurisdictions define "coercion" to include facilitating or controlling a person's access to addictive substance generally.

Fourth, authorizing enhanced penalty for trafficking in commercial sex when the trafficked person is under the age of 18 is not supported by state criminal codes. Of the reformed jurisdictions that have codified an analogous trafficking in commercial sex acts offense, five include an enhancement if the trafficked person is under the age of 18.[1816]

Finally, it is unclear whether changes made to the Chapter 27 offenses are supported by state criminal codes. Staff did not comprehensively research prostitution offenses in other jurisdictions to determine which specific coercive means of compelling a person to engage in commercial sex acts constitute a criminal offense. However, some reformed jurisdictions do not codify any forms of coerced or compelled prostitution offenses, and instead criminalize such conduct under human trafficking offenses.[1817]

RCC § 22E-1607. SEX TRAFFICKING OF MINORS.
[Now RCC § 22E-1605. Sex Trafficking of Minors.]

[No National Legal Trends Section.]

RCC § 22E-1608. BENEFITTING FROM HUMAN TRAFFICKING.
[Now RCC § 22E-1606. Benfitting from Human Trafficking]

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

Dividing the benefitting from human trafficking offense into two penalty grades based on whether the accused benefitted from trafficking in labor or services, or from

[1813] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01; Wash. Rev. Code Ann. § 9A.40.010.
[1814] Ala. Code § 13A-6-151; Ind. Code Ann. § 35-42-3.5-0.5; Wash. Rev. Code Ann. § 9A.40.010.
[1815] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; IN ST 35–42–3.5–0.5; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.
[1816] Del. Code Ann. tit. 11, § 787; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; N.D. Cent. Code Ann. § 12.1-41-03; Tenn. Code Ann. § 39-13-307.
[1817] *E.g.*, Alaska Stat. Ann. §§ 11.66.100, 11.66.110, 11.66.120, 11.66.130, 11.66.135; Haw. Rev. Stat. Ann. §§ 712-1200, 712-1201, 712-1202; Ky. Rev. Stat. Ann. §§ 529.020, 529.040, 529.100.

trafficking in commercial sex is not supported by state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1818] (hereinafter "reformed jurisdictions") that have an analogous benefitting from human trafficking offense, only three[1819] distinguish between benefitting from labor trafficking or sex trafficking.

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

[RCC § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking.]

Relation to National Legal Trends. *Requiring that the revised misuse of documents offense involves a government identification document is supported by national legal trends.* Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1820] (reformed jurisdictions), only four codify an analogous misuse of documents offense. However, all four specify that the offense must involve a *government* identification document.[1821] In addition, nearly all of the remaining reformed jurisdictions include destroying, concealing, removing, confiscating, or possessing a *government* identification document to compel a person to provide labor or services as a form of forced labor or services.[1822]

[Now RCC § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking]

Relation to National Legal Trends. *Requiring that the revised misuse of documents offense involves a government identification document is supported by national legal trends.* Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1823]

[1818] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1819] Kan. Stat. Ann. § 21-5426; Mo. Ann. Stat. § 566.206; Mo. Ann. Stat. § 566.209; Tenn. Code Ann. § 39-13-308, Tenn. Code Ann. § 39-13-309.

[1820] *See*, Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[1821] Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.215; Ohio Rev. Code Ann. § 2905.33; 18 Pa. Stat. Ann. § 3014.

[1822] Ala. Code § 13A-6-151; Ark. Code Ann. § 5-18-102; Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-502; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.215; N.H. Rev. Stat. Ann. § 633:7; N.J. Stat. Ann. § 2C:13-8; Ohio Rev. Code Ann. § 2905.33; Or. Rev. Stat. Ann. § 163.263; 18 Pa. Stat. Ann. § 3014; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20A.02; Wis. Stat. Ann. § 940.302.

[1823] *See*, Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa,

(reformed jurisdictions), only four codify an analogous misuse of documents offense. However, all four specify that the offense must involve a *government* identification document.[1824] In addition, nearly all of the remaining reformed jurisdictions include destroying, concealing, removing, confiscating, or possessing a *government* identification document to compel a person to provide labor or services as a form of forced labor or services.[1825]

RCC § 22E-1610. SEX TRAFFICKING PATRONAGE.
[Now RCC § 22E-1608 Commercial Sex with a Trafficked Person]

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

Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1826] only five have codified an analogous sex trafficking patronage offense.[1827] The American Law Institute's September 2018 draft proposal for human trafficking offenses includes a sex trafficking patronage offense.[1828]

RCC § 22E-1611. FORFEITURE.
[RCC § 22E-1609. Forfeiture.]

[No National Legal Trends Section.]

RCC § 22E-1612. REPUTATION OR OPINION EVIDENCE.
[Now RCC § 22E-1609. Reputation or Opinion Evidence.]

[No National Legal Trends Section.]

Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[1824] Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.215; Ohio Rev. Code Ann. § 2905.33; 18 Pa. Stat. Ann. § 3014.

[1825] Ala. Code § 13A-6-151; Ark. Code Ann. § 5-18-102; Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-502; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.215; N.H. Rev. Stat. Ann. § 633:7; N.J. Stat. Ann. § 2C:13-8; Ohio Rev. Code Ann. § 2905.33; Or. Rev. Stat. Ann. § 163.263; 18 Pa. Stat. Ann. § 3014; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20A.02; Wis. Stat. Ann. § 940.302.

[1826] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1827] Ark. Code Ann. § 5-18-104; Mont. Code Ann. § 45-5-705; N.D. Cent. Code Ann. § 12.1-41-05; S.D. Codified Laws § 22-49-4; Tenn. Code Ann. § 39-13-309.

[1828] Model Penal Code: Sexual Assault and Related Offenses. Preliminary Draft No. 9, September 14, 2018. Section 213.9(2). The ALI project to revise the Model Penal Code's sex offenses is an ongoing project and its drafts may be subject to change.

RCC § 22E-1613. CIVIL ACTION.
[Now RCC § 22E-1611. Civil Action.]

[No National Legal Trends Section.]

Chapter 18. Invasions of Privacy

RCC § 22E-1801. STALKING.
[Now RCC § 22E-1206. Stalking.]

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

Stalking is a relatively new offense, originating in California in 1990. Today, all 50 states have criminalized stalking.[1829] Twenty-nine states (hereafter "reform jurisdictions") with stalking statutes also have comprehensively modernized their criminal laws based in part on the Model Penal Code.[1830] Many state stalking statutes have been influenced by model language published by the Department of Justice in 1993[1831] and a revised model statute published by the National Center for Victims of Crime in 2007.[1832] However, constitutional challenges on grounds of vagueness and

[1829] Reform jurisdictions: Ala. Code § 13A-6-90.1; Alaska Stat. Ann. § 11.41.270; Ariz. Rev. Stat. Ann. § 13-2923; Ark. Code Ann. § 5-71-229; Colo. Rev. Stat. Ann. § 18-3-602; Conn. Gen. Stat. Ann. § 53a-181e; Del. Code Ann. tit. 11, § 1312; Haw. Rev. Stat. Ann. § 711-1106.5 ("Harassment by Stalking"); 720 Ill. Comp. Stat. Ann. 5/12-7(a); Ind. Code Ann. § 35-45-10-5; Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. § 508.150; Me. Rev. Stat. tit. 17-A, § 210-A; Minn. Stat. Ann. § 609.749; Mo. Ann. Stat. § 565.227; Mont. Code Ann. § 45-5-220; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(2); Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws § 22-19A-1; Tenn. Code Ann. § 39-17-315; Tex. Penal Code Ann. § 42.072; Utah Code Ann. § 76-5-106.5; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32. Non-reform jurisdictions: Cal. Penal Code § 646.9; Fla. Stat. Ann. § 784.048; Ga. Code Ann. §§ 16-5-90 – 92; Idaho Code Ann. §§ 18-7905 – 7906; Iowa Code Ann. § 708.11; La. Stat. Ann. § 14:40.2; Md. Code Ann., Crim. Law § 3-802; Mass. Gen. Laws Ann. ch. 265, § 43; Mich. Comp. Laws Ann. §§ 750.411h – i; Miss. Code. Ann. § 97-3-107; Neb. Rev. Stat. Ann. § 28-311.03; Nev. Rev. Stat. Ann. § 200.575; N.M. Stat. Ann. §§ 30-3A-3 – 3.1; N.C. Gen. Stat. Ann. § 14-277.3A; Okla. Stat. Ann. tit. 21, § 1173; 11 R.I. Gen. Laws Ann. § 11-59-2; S.C. Code Ann. § 16-3-1730; Vt. Stat. Ann. tit. 13, §§ 1061 – 1064; Va. Code Ann. § 18.2-60.3; W. Va. Code Ann. § 61-2-9a; Wyo. Stat. Ann. § 6-2-506

[1830] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[1831] National Criminal Justice Association, *Project to Develop a Model Anti-Stalking Code for States*, Washington, DC: U.S. Department of Justice, National Institute of Justice, October 1993, NCJ 144477.

[1832] *See* The National Center for Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, January 2007, *available at* https://victimsofcrime.org/docs/default-source/src/model-stalking-code.pdf?sfvrsn=12.

overbreadth have been common.[1833] Sixteen states are now considering legislation to amend their stalking codes.[1834]

First, five states require that the accused receive a warning before stalking liability attaches.[1835] Unlike these states, however, the RCC requires notice only with regard to unwanted communications; no prior warning is required when the accused physically follows, physically monitors, or commits a crime against the victim.

Second, four reform jurisdictions criminalize conduct the actor should have known *would* cause or *is likely* to cause a reasonable person to feel frightened or distressed without also requiring that the conduct *did* cause fear or distress.[1836] One of those four statutes was found to be facially unconstitutional.[1837] The majority of reform jurisdictions require that the offender's conduct *actually cause* fear or distress, not merely that the conduct *would be* disturbing.[1838] Few reform jurisdictions have any stalking liability for simple negligence, whether or not fear or distress actually occurs.[1839]

[1833] By 1996, 19 states defended their stalking statutes against facial challenges. National Institute of Justice, *Domestic Violence, Stalking, and Antistalking Legislation: An Annual Report to Congress under the Violence Against Women Act*, April 1996, at page 7. Content neutrality is an important feature of any stalking or harassment statute's ability to pass constitutional muster. *See* Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1303 (2005); *see also People v. Dietze*, 75 N.Y.2d 47, 53–54 (1989); *People v. Golb*, 23 N.Y.3d 455, 15 N.E.3d 805 (2014); *Musselman v. Com.*, 705 S.W.2d 476 (Ky. 1986); *State v. Moulton*, 991 A.2d 728, 733+, (Conn.App. Apr. 13, 2010), (NO. 29617); *State v. Reed*, 176 Conn. App. 537 (2017); *State v. LaFontaine*, 16 A.3d 1281, 1283+, (Conn.App. May 10, 2011), (NO. 31284); *State v. Nowacki*, 111 A.3d 911, 915+, (Conn.App. Mar. 10, 2015), (NO. 34577); *State v. Brown* (App. Div.2 2004) 207 Ariz. 231, 85 P.3d 109, review denied.

[1834] Delaware, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Washington, and Wisconsin. 2017 DE S.B. 209; 2017 IL H.B. 5663; 2017 IA H.F. 589; 2018 LA H.B. 282; 2017 MA S.B. 2200; 2017 MN S.F. 2940; 2018 MS H.B. 744; 2017 NH H.B. 1627; 2018 NJ A.B. 4244; 2017 NY A.B. 7662; 2017 NC H.B. 186; 2017 PA H.B. 2437; 2017 RI S.B. 340; 2017 TN S.B. 200; 2017 WA H.B. 2254; 2017 WI S.B. 568.

[1835] Ala. Code § 13A-6-90.1; Conn. Gen. Stat. Ann. § 53a-181d(b)(2); N.Y. Penal Law § 120.45; S.C. Code Ann. § 16-3-1700(a)(2)(requires notice or a police report); Va. Code Ann. § 18.2-60.3; *see also* Md. Code Ann., Crim. Law § 3-803 ("Harassment").

[1836] Del. Code Ann. tit. 11, § 1312; 720 Ill. Comp. Stat. Ann. 5/12-7; N.Y. Penal Law § 120.45; Utah Code Ann. § 76-5-106.5.

[1837] *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017).

[1838] Ala. Code § 13A-6-90.1; Alaska Stat. Ann. § 11.41.270; Ariz. Rev. Stat. Ann. § 13-2923; Colo. Rev. Stat. Ann. § 18-3-602; Conn. Gen. Stat. Ann. § 53a-181e; Ind. Code Ann. §§ 35-45-10-5 and 35-45-10-1("Definitions"); Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. §§ 508.150 and 508.130 ("Definitions"); Minn. Stat. Ann. § 609.749; Mont. Code Ann. § 45-5-220; N.H. Rev. Stat. Ann. § 633:3-a; N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(2); Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws §§ 22-19A-1 and 22-19A-4 ("Definitions"); Tex. Penal Code Ann. § 42.072; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32. Two reform states do not expressly require fear or distress at all and instead require only harassment, annoyance, or alarm. Haw. Rev. Stat. Ann. § 711-1106.5 ("Harassment by Stalking"); S.D. Codified Laws § 22-19A-1.

[1839] *See* Minn. Stat. Ann. § 609.749; Tex. Penal Code Ann. § 42.072; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32; Del. Code Ann. tit. 11, § 1312; 720 Ill. Comp. Stat. Ann. 5/12-7; N.Y. Penal Law § 120.45; Utah Code Ann. § 76-5-106.5.

Third, it is unclear to what extent other jurisdictions' stalking statutes exclude electronic monitoring. Most jurisdictions' statutes do not precisely describe the type of misconduct that may establish the basis of a stalking charge.[1840] This may be due to the fact that many jurisdictions' statutes are heavily influenced by model stalking codes that were designed to be easily implemented by every state and, therefore, do not reference specific offenses under any individual state's criminal code.

Fourth, 10 reform states include explicitly prohibit contacting the stalking victim at home, work or school.[1841]

Fifth, no other jurisdiction's stalking statute expressly authorizes multiple convictions for stalking and identity theft based on the same facts.[1842] Only three states include misuse of personal identifying information as a means of stalking.[1843] Only Maryland addresses the issue of concurrent sentencing for stalking and another offense.[1844]

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

First, most jurisdictions do not proscribe in their stalking statutes communications "about" a person. Eight reform states define "course of conduct" to include "communicating to or about a person."[1845] This definition apparently was adopted from the model code stalking code published in 2007.[1846]

[1840] For example, some statutes provide that a "credible threat" is a predicate for stalking liability, without explaining what the person must threaten to do. Instead, these statutes define "credible threat" as essentially any communication or conduct that expressly or impliedly threatens some other conduct that a would cause a reasonable person to feel frightened or disturbed. *See* Ala. Code § 13A-6-92(b); Colo. Rev. Stat. Ann. § 18-3-602(2)(b); S.D. Codified Laws § 22-19A-6; Tenn. Code Ann. § 39-17-315(c)(1)(D); Cal. Penal Code § 646.9(g); Fla. Stat. Ann. § 784.048(1)(c); *but see* Mich. Comp. Laws Ann. § 750.411i; Miss. Code. Ann. § 97-3-107(8)(b); W. Va. Code Ann. § 61-2-9a(f)(2).

[1841] Alaska Stat. Ann. § 11.41.270(b)(3)(C); 720 Ill. Comp. Stat. Ann. 5/12-7(a)(c)(5)-(7); Kan. Stat. Ann. § 21-5427(f)(1)(C); N.H. Rev. Stat. Ann. § 633:3-a(II)(a)(3); Ohio Rev. Code Ann. §§ 2903.211(B)(2)(c) and (h); Or. Rev. Stat. Ann. § 163.730(3)(j); Tenn. Code Ann. § 39-17-315(a)(5)(C); Utah Code Ann. §§ 76-5-106.5(1)(B)(ii)(B)-(C); Wash. Rev. Code Ann. § 9A.46.110(6)(b); Wis. Stat. Ann. §§ 940.32(1)(a)(3) and (4).

[1842] "A person shall not be sentenced consecutively for stalking and identity theft based on the same act or course of conduct." D.C. Code § 22-3134(d).

[1843] Me. Rev. Stat. tit. 17-A, § 210-A(2)(A); Minn. Stat. Ann. § 609.749(Subd. 2)(8); Wis. Stat. Ann. § 940.32(2m)(c).

[1844] Md. Code Ann., Crim. Law § 3-802 (e) ("A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any other crime based on the acts establishing a violation of this section.").

[1845] Ark. Code Ann. § 5-71-229(f)(1)(A); Del. Code Ann. tit. 11, § 1312(e)(1); 720 Ill. Comp. Stat. Ann. 5/12-7(c)(1); Me. Rev. Stat. tit. 17-A, § 210-A(2)(A); N.J. Stat. Ann. § 2C:12-10(a)(1); Ohio Rev. Code Ann. §§ 2903.211(A)(2) and (D)(7) (making it unlawful to "post a message" about an individual); Utah Code Ann. § 76-5-106.5(1)(B)(i); Wis. Stat. Ann. § 940.32(1)(1)(7). Case law research was not conducted to determine whether phrases such as "any conduct" or "any two acts" have been understood to include communications about an individual.

[1846] *See Revised Model Code* at pages 24-25. The National Center for Victims of Crime may have aimed to punish a specific type of conduct by this language. *See id.*, at page 47 ("It is also designed to cover stalking tactics in which stalkers indirectly harass victims through third parties. For example, stalkers have posted messages on the Internet suggesting that victims like to be raped and listing the victims' addresses, thereby

Second, most jurisdictions codify exceptions for protected speech and other actions undertaken with a "legitimate purpose" or "proper authority."[1847] Some states provide explicit exceptions for: picketers;[1848] journalists;[1849] law enforcement officers and private investigators;[1850] insurance investigators;[1851] process servers;[1852] persons authorized by a court order or monitoring compliance with a court order;[1853] persons monitoring labor laws;[1854] and persons engaged in lawful business activity.[1855]

Third, 19 states statutorily require a continuity of purpose in the conduct constituting stalking.[1856]

Fourth, only one other jurisdiction, Minnesota, has a provision that bases jurisdiction for certain stalking offenses on the victim's state of residency.[1857]

Fifth, nineteen reform jurisdictions (a majority) expressly authorize an increased penalty for persons with a previous stalking conviction.[1858] However, no reform states have an additional enhancement for a third time stalking offender.

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inciting third parties to take action against victims."). Such conduct may either be protected by the First Amendment or be punishable as solicitation under RCC § 22E-302, depending on the speaker's word choice and mental state.

[1847] Ala. Code § 13A-6-92(c); Ariz. Rev. Stat. Ann. § 13-2923(D)(1)(a)(iii); Conn. Gen. Stat. Ann. § 53a-181d(b)(1); Del. Code Ann. tit. 11, § 1312(j); Haw. Rev. Stat. Ann. § 711-1106.5(1); Kan. Stat. Ann. § 21-5427(f)(1); Ky. Rev. Stat. Ann. § 508.130(1)(a)(3); Mo. Ann. Stat. § 565.225(1); N.H. Rev. Stat. Ann. § 633:3-a(II)(a); N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(c); 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws § 22-19A-4; Tenn. Code Ann. § 39-17-315(a)(3); Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32(4)(a)(3)(b). Case law research was not performed to determine which activities courts have found to be legitimate in each state.

[1848] Cal. Penal Code § 646.9(labor picketing); Del. Code Ann. tit. 11, § 1312(i) (lawful picketing); Fla. Stat. Ann. § 784.048; 720 Ill. Comp. Stat. Ann. 5/12-7(1)(ii)(labor-related picketing); Nev. Rev. Stat. Ann. § 200.575(f)(1) (labor-related picketing); N.J. Stat. Ann. § 2C:12-10l Wis. Stat. Ann. § 940.32(4)(a)(3) (peaceful picketing or patrolling); W. Va. Code Ann. § 61-2-9a(g); Wyo. Stat. Ann. § 6-2-506.

[1849] Nev. Rev. Stat. Ann. § 200.575(f)(2).

[1850] Del. Code Ann. tit. 11, § 1312(j); Mo. Ann. Stat. § 565.225(4); La. Stat. Ann. § 14:40.2(G)(1)("unless the investigator was retained for the purpose of harassing the victim"); S.C. Code Ann. § 16-3-1700; Va. Code Ann. § 18.2-60.3; N.D. Cent. Code Ann. § 12.1-17-07.1(4)(affirmative defense).

[1851] La. Stat. Ann. §§ 14:40.2(H) and (I).

[1852] S.C. Code Ann. § 16-3-1700.

[1853] Nev. Rev. Stat. Ann. § 200.575(f); Md. Code Ann., Crim. Law § 3-802(b)(1).

[1854] 720 Ill. Comp. Stat. Ann. 5/12-7(1)(i); Wis. Stat. Ann. § 940.32(5).

[1855] Ga. Code Ann. § 16-5-92; Md. Code Ann., Crim. Law § 3-802(b)(2); Nev. Rev. Stat. Ann. § 200.575(f)(3); N.M. Stat. Ann. § 30-3A-3(B)(1).

[1856] Ala. Code § 13A-6-92; Cal. Penal Code § 646.9; Colo. Rev. Stat. Ann. § 18-3-602; Fla. Stat. Ann. § 784.048; Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. § 508.130; La. Stat. Ann. § 14:40.2 (a "series of acts" "evidencing an intent to inflict a continuity of emotional distress upon the person"); Mich. Comp. Laws Ann. § 750.411i(a); Miss. Code. Ann. § 97-3-107; Nev. Rev. Stat. Ann. § 200.575; N.H. Rev. Stat. Ann. § 633:3-a; N.D. Cent. Code Ann. § 12.1-17-07.1; Okla. Stat. Ann. tit. 21, § 1173; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1 ("continuity of conduct"); S.C. Code Ann. § 16-3-1700; S.D. Codified Laws § 22-19A-5; Tenn. Code Ann. § 39-17-315; Wis. Stat. Ann. § 940.32; Wyo. Stat. Ann. § 6-2-506.

[1857] Minn. Stat. Ann. § 609.749(Subd. 1b)(b); D.C. Code § 22-3135(b) (extending jurisdiction to communications if "the specific individual lives in the District of Columbia" and "it can be electronically accessed in the District of Columbia."). By contrast, the model code from 2007 provides, "As long as one of the acts that is part of the course of conduct was initiated in or had an effect on the victim in this jurisdiction, the defendant may be prosecuted in this jurisdiction. *Revised Model Code* at page 25.

[1858] Alaska Stat. Ann. § 11.41.260(5); Ark. Code Ann. § 5-71-229(a)(1)(B); Conn. Gen. Stat. Ann. § 53a-181c(a)(1); Del. Code Ann. tit. 11, § 1312(g); Haw. Rev. Stat. Ann. § 711-1106.4; Ind. Code Ann. § 35-45-

10-5(c)(2); Kan. Stat. Ann. § 21-5427; Me. Rev. Stat. tit. 17-A, § 210-A(1)(C); Minn. Stat. Ann. § 609.749; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law §§ 120.50 and 120.55; Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732(2)(b); 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; Tenn. Code Ann. § 39-17-315; Utah Code Ann. § 76-5-106.5; Wash. Rev. Code Ann. § 9A.46.110(5)(b); Wis. Stat. Ann. § 940.32. Some penalty provisions require the previous conviction to involve the same victim or to have occurred within five years.

Subtitle III. Property Offenses.

Chapter 20. Property Offense Subtitle Provisions.

RCC § 22E-2001. PROPERTY OFFENSE DEFINITIONS. [Now part of RCC § 22E-701. Index of Definitions.]

In this subtitle, the term:

(1) "Attorney General" means the Attorney General for the District of Columbia.

Relation to Current District Law. The RCC definition of "Attorney General" is identical to the statutory definition under current law.

(2) "Building" means a structure affixed to land that is designed to contain one or more human beings.

Relation to National Legal Trends. The Model Penal Code (MPC) does not provide a definition for "building." However, it does provide a definition for "occupied structure" that is similar.[1859]

(3) "Business yard" means securely fenced or walled land where goods are stored or merchandise is traded.

Relation to National Legal Trends. The Model Penal Code (MPC) does not have a similar definition.

(4) "Check" means any written instrument for payment of money by a financial institution.

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

(5) "Coercion" means causing another person to fear that, unless that person engages in particular conduct, then another person will:

(A) Inflict bodily injury on another person;
(B) Damage or destroy the property of another person;
(C) Kidnap another person;
(D) Commit any other offense;
(E) Accuse another person of a crime;
(F) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule;

[1859] MPC § 221.0 ("'occupied structure' means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present."). The MPC does, however, employs the word "building" in the same offense definitions as "occupied structure," suggesting the two terms are intended to have different meanings.

(G) Notify a law enforcement official about a person's undocumented or illegal immigration status.

(H) Inflict a wrongful economic injury on another person;

(I) Take or withhold action as an official, or take action under color or pretense of right; or

(J) Perform any other act that is calculated to cause material harm to another person's health, safety, business, career, reputation, or personal relationships.

Relation to National Legal Trends. The Model Penal Code (MPC) has no definition of "coercion." However, it has a similar list of threatening conduct in the definition of "theft by extortion."[1860] Additionally, within the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[1861] the three additions to the list of prohibited threats in coercion (subsections (D), (G) and (J)) are used in other reformed code jurisdictions.[1862]

(6) "Consent" means words or actions that indicate an agreement to particular conduct. Consent includes words or actions that indicate indifference towards particular conduct. Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.

Relation to National Legal Trends. The Model Penal Code (MPC) has no

[1860] The conduct the MPC includes is: "threatening to: (1) inflict bodily injury on anyone or commit any other criminal offense; or (2) accuse anyone of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action; or (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit the actor." MPC § 223.4.

[1861] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1862] Other state statutes that include threats to report a person's immigration status include: Cal. Penal Code § 519; Colo. Rev. Stat. Ann. § 18-3-207; Md. Code Ann., Crim. Law § 3-701; Or. Rev. Stat. Ann. § 164.075; Va. Code Ann. § 18.2-59. Some of these states also include threatened destruction of immigration documentation, such as green cards. Other states that include threats of to commit any crime include: Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.41.520; Ariz. Rev. Stat. Ann. § 13-1804; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Ky. Rev. Stat. Ann. § 514.080; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11 (threaten to commit any felony); Or. Rev. Stat. Ann. § 164.075; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406. And states that include a threat to materially harm a list of designated interests include: Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.41.520; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Utah Code Ann. § 76-6-406; Wash. Rev. Code Ann. § 9A.04.110.

equivalent definition, although it does use the term "consent" in some provisions.[1863] Other states and commentators have definitions that are very similar to the RCC definition.[1864] The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and has provided a definition of "consent" that is similar to the RCC's.[1865]

(7) "Court" means the Superior Court of the District of Columbia.
[No national legal trend section.]

(8) "Deceive" and "deception" mean:
- **(A) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions.**
- **(B) Preventing another person from acquiring material information;**
- **(C) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or**
- **(D) Failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record;**
- **(E) Provided that the term "deception" does not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.**

Relation to National Legal Trends. The "deception" definition is not broadly supported by law in a majority of jurisdictions, but is largely consistent with law in a significant minority of jurisdictions with reformed criminal codes. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[1866]

[1863] The clearest example is in the MPC's affirmative consent defense. Model Penal Code § 2.11.

[1864] Wash. Rev. Code Ann. § 9A.44.010(7) ("Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."). *See also* Stephen J. Schulhofer, *Consent: What it Means and Why It's Time To Require It*, 47 U. PAC. L. REV. 665, 669 (2016). Schulhofer offers a tripartite definition of consent specific to sexual assault. The first part of the definition contains similar language to the RCC definition of consent: "'Consent' means a person's behavior, including words and conduct -- both action and inaction -- that communicates the person's willingness to engage in a specific act of sexual penetration or sexual conduct."

[1865] Model Penal Code: Sexual Assault and Related Offenses § 213.0(3) (Tentative Draft No. 3, April 6, 2017) ("'Consent' . . . means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact. Consent may be express or it may be inferred from behavior -- both action and inaction -- in the context of all the circumstances.").

[1866] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa,

nearly half,[1867] as well as the Model Penal Code[1868] (MPC), have statutory definitions of "deception," either in standalone form, or incorporated into a specific offense.[1869] The "deception" definition is broadly consistent with the definitions in the MPC and other jurisdictions, with a few exceptions.

First, only a minority of the reformed code jurisdictions define "deception" to require materiality.[1870] However, the MPC[1871] and six states require that the false impression must be of "pecuniary significance."[1872]

Second, although the revised "deception" definition is consistent with the MPC[1873] in including a failure to correct a false impression when the defendant has a fiduciary duty or is in any other confidential relationship, most reformed code jurisdictions with statutory "deception" definitions have not followed this approach. Only three reformed code jurisdictions[1874] with statutory "deception" definitions criminalize failure to correct a false impression when the actor has a legal duty to do so.

Third, the MPC[1875] and a majority of reformed code jurisdictions with statutory "deception" definitions also include false impressions as to a person's state of mind.[1876] The definition includes false impressions as to state of mind insofar as the state of mind relates to false intentions to perform acts in the future. However, false impressions as to states of mind more generally are not included in the definition.

(9) "Deprive" means:

(A) To withhold property or cause it to be withheld from an owner permanently, or for so extended a period or under such circumstances that a substantial portion of its value or its benefit is lost to that person; or

(B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

Relation to National Legal Trends. The Model Penal Code (MPC) has a definition of "deprive" that is substantively similar to the revised definition, although the

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Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1867] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 843; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010 ; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401; Wash. Rev. Code Ann. § 9A.56.010.

[1868] MPC § 223.3.

[1869] For example, the MPC does include a general deception definition, but instead defines the types of deceptions that would constitute theft by deception. MPC § 223.3.

[1870] Mo. Ann. Stat. § 570.010; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[1871] MPC § 223.3.

[1872] Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.

[1873] MPC § 223.3.

[1874] Ala. Code § 13A-8-1; N.H. Rev. Stat. Ann. § 637:4; S.D. Codified Laws § 22-30A-3.

[1875] MPC § 223.3.

[1876] Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-36-101; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922.

MPC does not include language that explicitly includes causing another person to lose a substantial portion of the value or benefit of the property.[1877] The MPC's approach has been adopted by a majority of the 29 states[1878] that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1879] (hereafter "reformed code jurisdictions"). Most of these reformed code jurisdictions explicitly include in their definitions of "deprive" causing the other person to lose a significant portion of the value or benefit of the property.[1880]

(10) "Dwelling" means a structure that is either designed for lodging or residing overnight, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each unit is an individual dwelling.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "dwelling."[1881] Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[1882] six use substantially similar definitions of "dwelling."[1883]

[1877] MPC § 223.0(1) ("'deprive' means: (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it."

[1878] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code § 5-36-101; Conn. Gen. Stat. Ann. § 53a-118; Del. Code Ann. tit. 11, § 857; Haw. Rev. Stat. Ann. § 708-800; 720 Ill. Comp. Stat. Ann. 5/15-3; Ky. Rev. Stat. Ann. § 514.010; Me. Rev. Stat. tit. 17-A, § 352; Mo. Ann. Stat. § 570.010; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1; N.Y. Penal Law § 155.00; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.005; 18 Pa. Stat. Ann. § 3901; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[1879] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1880] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code § 5-36-101; Conn. Gen. Stat. Ann. § 53a-118; Del. Code Ann. tit. 11, § 857; Haw. Rev. Stat. Ann. § 708-800; Me. Rev. Stat. tit. 17-A, § 352; N.H. Rev. Stat. Ann. § 637:2; N.Y. Penal Law § 155.00; Or. Rev. Stat. Ann. § 164.005; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[1881] The MPC does provide a definition for "occupied structure," which states that the term "means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." MPC § 211.0. However, the MPC also uses the term "dwelling," which suggests that "occupied structure" and "dwelling" are intended to have different meanings.

[1882] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1883] Ala. Code § 13A-7-1; Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-39-101; Haw. Rev. Stat. Ann. § 708-800; Kan. Stat. Ann. § 21-5111; Tenn. Code Ann. § 39-14-401. Seven other states only refer to a place that is "usually used," seemingly not including places that are "designed for" or "adapted for use" as a place of lodging. Conn. Gen. Stat. Ann. § 53a-100; Del. Code Ann. tit. 11, § 829; Ky. Rev. Stat. Ann.

(11) "Effective consent" means consent obtained by means other than coercion or deception.

Relation to National Legal Trends. Although courts have long struggled with related issues,[1884] distinguishing offenses using the same principles of consent and "effective consent" is rare in other jurisdictions' statutes.

Two states, Texas and Tennessee, codify a definition of "effective consent" for use in property offenses,[1885] and case law in one state has used the distinction in the context of burglary.[1886] The Texas and Tennessee statutes first identify

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§ 511.010; N.Y. Penal Law § 140.00; Or. Rev. Stat. Ann. § 164.205; Tex. Penal Code Ann. § 30.01; Utah Code Ann. § 76-6-201. The remaining states either provide no definition or use the MPC's "occupied structure" definition or something similar.

[1884] For example, the line between "mere puffery" and outright deception sufficient to create criminal liability is frequently litigated. *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 (2d Cir. 1970) (holding that "claims or statements in advertising may go beyond mere puffing and enter the realm of fraud where the product must inherently fail to do what is claimed for it.").

[1885] Texas defines "effective consent" as: "consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." Tex. Penal Code Ann. § 31.01(3). This definition of "effective consent" is specific to the property offenses; Texas also has a general "effective consent" definition that applies broadly to the entire penal code. Tex. Penal Code Ann. § 1.07(19). The only difference between the two definitions is that the property-specific definition does not include "force" subsection (3)(A), and subsection (3)(E) in the property-specific section above is not included in the general definition. Tennessee defines effective consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion; (B) Given by a person the defendant knows is not authorized to act as an agent; (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or (D) Given solely to detect the commission of an offense." Tenn. Code Ann. § 39-11-106(9). And Missouri also has a definition. Mo. Ann. Stat. § 556.061 ("consent or lack of consent may be expressed or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of youth, mental disease or defect, intoxication, a drug-induced state, or any other reason is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) It is induced by force, duress or deception"). Unlike Tennessee and Texas, however, Missouri does not define force, duress, or deception. This gives very little guidance when attempting to ascertain what kinds of pressures may vitiate "consent" in Missouri. For example, will "assent" induced by any deception fail to constitute assent? Will the smallest amount of duress do the same? If not, then what degree of duress or deception is sufficient to meet the law's demand? Ultimately, while Missouri's definition of "consent" is useful, it is also inadequate. The Revised Criminal Code differs from Missouri in that it sets out not only the kinds of pressures render consent ineffective, but also the degree of pressure that must be brought to bear against the victim. The kinds of pressures are identified other in the offense definitions (e.g., deception in fraud, RCC § 22A-2201), or by the definition of effective consent. The degree of pressure is identified in the definitions of force, coercion, and deception themselves.

[1886] Minnesota's burglary offense distinguishes between entries *without consent* and entries made "by using artifice, trick, or misrepresentation to obtain consent to enter." See *State v. Zenanko*, 552 N.W.2d 541, 542 (Minn. 1996) (affirming conviction of defendant who "misrepresented his purpose for being [in the

"consent" as a basic foundation for finding effective consent (or in the case of Tennessee, "assent" and then "consent") then the statutes provide a list of circumstances that render consent ineffective. In addition, Texas and Tennessee both state that consent given by certain people (generally, people with disabilities or children) is ineffective.[1887] Also, both Texas and Tennessee address the issue of consent given to detect the commission of an offense.[1888] The RCC does not address the issue of incompetence or consent given to detect the commission of an offense, but otherwise closely resembles these jurisdictions' statutes.

The Model Penal Code (MPC) contains a definition of "ineffective consent" in its General Part, in its description of the affirmative consent defense.[1889] But that definition of ineffective consent does not appear to be applicable anywhere else in the MPC.

The relative lack statutory or case law use of the conceptual distinction between consent and "effective consent" may be due to the relatively recent origin of scholarly work on the topic.[1890] However, in recent years, use of the conceptual

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dwelling] and gained entry by ruse") (internal quotations omitted), citing *State v. Van Meveren*, 290 N.W.2d 631, 632 (Minn. 1980) (affirming conviction of defendant who gained entrance to a dwelling by telling the occupant he needed to use the occupant's bathroom, and after entering, immediately began to sexually assault the occupant). *See* Minn. Stat. Ann. § 609.581. By comparison, the RCC says that burglary can be committed without consent and with consent obtained by deception. The RCC also covers burglaries committed with consent obtained by coercion.

[1887] Tex. Penal Code Ann. § 31.01(3)(C) and (3)(E); Tenn. Code Ann. § 39-11-106(9)(C).

[1888] Tex. Penal Code Ann. § 31.01(3)(D); Tenn. Code Ann. § 39-11-106(9)(D). The effect of this provision, it would seem, is to provide complete liability for an offense when a police officer makes a transaction with a criminal in an undercover operation. For example, when attempting to catch a defendant engaged in fraud, a police officer might pose as an innocent and unsuspecting victim. When the defendant tries to deceive the officer into giving money, the officer would clearly be aware of the defendant's deception. If thereafter convicted, the defendant might argue that the officer's consent to the transaction was not "obtained by deception," and therefore, that the defendant is not guilty of fraud. Rather, the defendant would seemingly be at most guilty of attempted theft, because the defendant mistakenly believed the consent *was* induced by the defendant's deception. The definition of effective consent operating in Texas and Tennessee obviate this defense. *See Smith v. States*, 766 S.W.2d 544 (Tex. App. 1989). Similar facts are at work in *Fussell v. United States*, 505 A.2d 72 (D.C. 1986), and the DCCA reversed the defendant's conviction entirely. *Id*. at 73.

[1889] Model Penal Code § 2.11(3) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.").

[1890] In large part, the conceptual structure involved in thinking through consent and effective consent—as well as the attendant pressures of force, coercion, and deception—is based on the influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 Ohio St. J. Crim. L. 333, 333 (2004). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

distinction between "effective consent" and simple consent has become widespread among new proposals for substantive criminal law.[1891]

(12) "Elderly person" means a person who is 65 years of age or older.

Relation to National Legal Trends. The MPC does not define "elderly person."

Relation to National Legal Trends. The MPC does not define "elderly person."

(13) "Fair market value" means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define "fair market value," but also does not codify fair market value as a method for determining "value."[1892] At least two of the 29 states[1893] that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1894] (hereafter "reformed code jurisdictions") statutorily define "fair market value" for their theft offenses.[1895]

(14) "Financial injury" means all monetary costs, debts, or obligations incurred by a person as a result of another person's criminal act, including, but not limited to:

(A) The costs of clearing the person's credit rating, credit history, criminal record, or any other official record;

(B) The expenses related to any civil or administrative proceeding to satisfy or contest a debt, lien, judgment, or other obligation of the person,;

[1891] James Grimmelmann, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1517 (2016) (applying conceptual distinctions in consent to offenses involving computers); Stuart P. Green, *Introduction: Symposium on Thirteen Ways to Steal A Bicycle*, 47 NEW ENG. L. REV. 795 (2013) (discussing the use of differences of consent within the context of property offenses); Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 70 (2012) (using Westen's consent framework to discuss the ethics of prostitution); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016).

[1892] MPC § 223.1(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal.").

[1893] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code § 5-36-101; Conn. Gen. Stat. Ann. § 53a-118; Del. Code Ann. tit. 11, § 857; Haw. Rev. Stat. Ann. § 708-800; 720 Ill. Comp. Stat. Ann. 5/15-3; Ky. Rev. Stat. Ann. § 514.010; Me. Rev. Stat. tit. 17-A, § 352; Mo. Ann. Stat. § 570.010; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1; N.Y. Penal Law § 155.00; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.005; 18 Pa. Stat. Ann. § 3901; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[1894] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 New Crim. L. Rev. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1895] Ariz. Rev. Stat. Ann. § 13-1804; Ohio Rev. Code Ann. § 2913.61.

(C) The costs of repairing or replacing damaged or stolen property;

(D) Lost time or wages, or any similar monetary benefit forgone while the person is seeking redress for damages; and

(E) Legal fees.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "financial injury."

(15) "Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, moped, truck, truck tractor, truck tractor with semitrailer or trailer, bus, or other vehicle propelled by an internal-combustion engine or electricity, including any non-operational vehicle that is being restored or repaired.

Relation to National Legal Trends. The revised definition of "motor vehicle" is substantively similar to the definitions of "motor vehicle" and "vehicle" in the states with UUV statutes that define these terms.[1896] In addition, a majority of states include aircraft and watercraft in their UUV statutes. By expanding the scope of the definition of "motor vehicle," and, in turn, the scope of the revised UUV offense, the revised definition reflects the national trends for the scope of UUV. The Model Penal Code (MPC) does not use the term motor vehicle for its UUV statute, but codifies as elements of the offense "automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle."[1897]

(16) "Occupant" means a person holding a possessory interest in property that the accused is not privileged to interfere with.

Relation to National Legal Trends. The Model Penal Code (MPC) has no equivalent definition. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part,[1898] two have definitions that resemble the RCC's definition of "occupant."[1899]

[1896] Ala. Code §§ 13A-8-11 and 13A-8-1; Ariz. Rev. Stat. Ann. §§ 13-1803, 13-1803, and 13-105; Ark. Code Ann. §§ 5-36-108 and 5-36-101; Alaska Stat. Ann. § 11.46.360(a)(1); Colo. Rev. Stat. Ann. § 18-4-409; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 708-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. §§ 514.100 and 514.010; Me. Rev. Stat. tit. 17-A, §360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03(A); Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-406; Tex. Penal Code Ann. §31.07; Minn. Stat Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; N.C. Gen. Stat. Ann. § 14-72.2; Iowa Code Ann. § 714.7; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. §§ 943.23 and 939.22.

[1897] MPC § 223.9.

[1898] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1899] Tenn. Code Ann. § 39-14-401 ("Occupied" means the condition of or other building"); Utah Code Ann. § 76-6-409.3 ("'Tenant or occupant' includes any person, including the owner, who occupies the whole or part of any building, whether alone or with others.").

(17) "Owner" means a person holding an interest in property that the accused is not privileged to interfere with.

Relation to National Legal Trends. The Model Penal Code (MPC) does not codify a definition of "owner," although it uses the term in at least one of its property offenses.[1900]

Several of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1901] have a definition of "owner" that is similar to the definition in the RCC, but the precise language varies.[1902]

(18) "Payment card" means an instrument of any kind, including an instrument known as a credit card or debit card, issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card. "Payment card" includes the number or description of the instrument.

Relation to National Legal Trends. The Model Penal Code (MPC) defines "credit card" as "a writing or other evidence of an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer."[1903] It is unclear if the MPC definition includes not only actual cards, but also the numbers or descriptions of those cards.[1904]

(19) "Person" means an individual, whether living or dead, a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, governmental instrumentality, or any other legal entity.

Relation to National Legal Trends. The Model Penal Code (MPC) defines "person" for its entire code as "include[s] any natural person and, where relevant, a corporation or an unincorporated association."[1905] The Proposed Federal Criminal Code has a similar definition for its entire code.[1906]

Many of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1907] (hereafter "reformed code jurisdictions") have a definition of "person," but the precise language varies.

[1900] MPC § 223.9 (unauthorized use of a vehicle).

[1901] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1902] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/15-2; Conn. Gen. Stat. Ann. § 53a-118; Tenn. Code Ann. § 39-11-106; Haw. Rev. Stat. Ann. § 708-800.

[1903] MPC § 224.6.

[1904] See Commentary to MPC § 224.6.

[1905] MPC § 1.13.

[1906] Proposed Federal Criminal Code § 109(ae) ("'Person' means a human being and a corporation or organization as defined in section 409.").

[1907] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

(20) "Property" means anything of value. The term "property" includes, but is not limited to:

(A) Real property, including things growing on, affixed to, or found on land;

(B) Tangible or intangible personal property;

(C) Services;

(D) Credit;

(E) Debt; and

(F) A government-issued license, permit, or benefit.

Relation to National Legal Trends. The Model Penal Code (MPC) defines "property" as "anything of value" and has an open-ended list of items that are of value, such as real estate and tangible and intangible personal property.[1908] The Proposed Federal Criminal Code has as a similar definition.[1909]

Many of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1910] have a definition of "property," but the precise language varies.[1911]

(21) "Property of another" means 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 term "property of another" does not include any property in the possession of the accused that the other person has only a security interest in.

Relation to National Legal Trends. The Model Penal Code (MPC) has a definition of "property of another"[1912] that is substantively identical to the revised definition in the RCC, as does the Proposed Federal Criminal Code.[1913] Specifically, the

[1908] MPC § 223.0(6) ("'property' means anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.").

[1909] Proposed Federal Criminal Code § 1741(f) ("'property' means any money, tangible or intangible personal property, property (whether real or personal) the location of which can be changed (including things growing on, affixed to, or found in land and documents although the rights represented thereby have no physical location), contract right, chose-in-action, interest in or claim to wealth, credit, or any other article or thing of value of any kind. 'Property' also means real property the location of which cannot be moved if the offense involves transfer or attempted transfer of an interest in the property.").

[1910] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1911] *See, e.g.*, Tenn. Code Ann. § 39-11-106; Kan. Stat. Ann. § 21-5111; Ark. Code Ann. § 5-36-101; N.H. Rev. Stat. Ann. § 637:2.

[1912] MPC § 223.0(7) ("property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.").

definitions in the MPC[1914] and the Proposed Federal Criminal Code[1915] have a more narrow exclusion of security interests than D.C. definition currently does. The security interest exclusion in these models only applies to property in the possession of the defendant in which the other person, the complaining witness or victim of the crime, has a security interest.

The MPC's definition of "property of another" has been widely adopted by the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1916] (hereafter "reformed code jurisdictions"). With regards to the security interest exclusion, the reformed code jurisdictions with a security interest exclusion similar to D.C.'s clearly apply it only to property in the possession of the defendant in which the other person, the complaining witness or victim of the crime, has a security interest.[1917]

The MPC, Proposed Federal Criminal Code, and reformed code jurisdictions' definitions of "property of another" support other changes to the revised definition of "property of another" in the RCC. For instance, the MPC[1918] and jurisdictions[1919] do not include "without consent" as the current definition of "property of another" does in D.C.[1920] The Proposed Federal Criminal Code does.[1921]

[1913] Proposed Federal Criminal Code § 1741(g) ("'Property of another' means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. 'Owner' means any person or a government with an interest in property that is 'property of another' as far as the actor is concerned.").

[1914] MPC § 223.0(7).

[1915] Proposed Federal Criminal Code § 1741(g).

[1916] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 New Crim. L. Rev. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1917] For some of these jurisdictions, the term "owner" is used instead of "property of another," or the security interest exception is codified as a general statement of principle rather than as part of a definition. *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 857; Ky. Rev. Stat. Ann. § 514.010; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1; N.D. Cent. Code Ann. § 12.1-23-10; 18 Pa. Cons. Stat. Ann. § 3901; S.D. Codified Laws § 22-1-2; Me. Rev. Stat. tit. 17-A, § 352.

[1918] MPC § 223.0(7) ("property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.").

[1919] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 857; Ky. Rev. Stat. Ann. § 514.010; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1.

[1920] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property

The Model Penal Code (MPC) definition of "property of another" includes a statement "regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband."[1922] Many of the jurisdictions that have comprehensively reformed their criminal codes influenced by the MPC and have a general part also include such a statement.[1923]

(22) "Services" includes, but is not limited to:

(A) Labor, whether professional or nonprofessional;

(B) The use of vehicles or equipment;

(C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;

(D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;

(E) Admission to public exhibitions or places of entertainment; and

(F) Educational and hospital services, accommodations, and other related services.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define "services." The Proposed Federal Criminal Code does, with close-ended list of items that constitute "services."[1924]

Many of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1925] have a definition of "services," but the precise language varies.[1926]

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of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").

[1921] Proposed Federal Criminal Code § 1741(g) ("'Property of another' means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. 'Owner' means any person or a government with an interest in property that is 'property of another' as far as the actor is concerned.").

[1922] MPC § 223.0(7).

[1923] *See, e.g.*, Alaska Stat. Ann. § 11.46.990; Del. Code Ann. tit. 11, § 857; S.D. Codified Laws § 22-1-2; Ky. Rev. Stat. Ann. § 514.010.

[1924] Proposed Federal Criminal Code § 1741(i) ("'Services' means labor, professional service, transportation, telephone, mail or other public service, gas, electricity and other public utility services, accommodations in hotels, restaurants or elsewhere, admission to exhibitions, and use of vehicles or other property.").

[1925] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1926] *See, e.g.*, Ala. Code § 13A-8-10; Haw. Rev. Stat. Ann. § 708-800; Me. Rev. Stat. Ann. tit. 17-A, § 357; S.D. Codified Laws § 22-1-2.

(23) "United States Attorney" means the United States Attorney for the District of Columbia.

Relation to Current District Law. The RCC definition of "United States Attorney" is identical to the statutory definition under current law.[1927]

(24) "Value" means:

(A) The fair market value of the property at the time and place of the offense; or

(B) If the fair market value cannot be ascertained:

(i) For property other than a written instrument, the cost of replacement of the property within a reasonable time after the offense;

(ii) For a written instrument constituting evidence of debt, such as a check, draft, or promissory note, the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied; and

(iii) For any other written instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument.

(C) Notwithstanding subsections (A) and (B) of this section, the value of a payment card is $[X] and the value of an unendorsed check is $[X].

Relation to National Legal Trends. The Model Penal Code (MPC) determines "value" for its theft and theft related offenses as "the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal."[1928] The MPC's approach has been adopted by a minority of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1929] (hereafter "reformed code jurisdictions"). The Proposed Federal Criminal Code has a similar approach, "The amount involved in a theft . . . shall be the highest value by any reasonable standard, regardless of the actor's knowledge of such value, of the property or services which were stolen by the actor, or which the actor believed that he was stealing, or which the actor could reasonably have anticipated to have been the property or services involved."[1930]

[1927] D.C. Code § 22-932(3).

[1928] MPC § 223.1(2)(c).

[1929] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1930] Proposed Federal Criminal Code § 1735(7).

The majority of the reformed code jurisdictions have adopted definitions of "value" that are substantively similar or identical to the RCC definition of "value,"[1931] with the exception of the payment card and unendorsed check provision in subsection (c). However, at least one reformed code jurisdiction has a similar provision.[1932]

(25) "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 his or her daily needs or safeguard his or her person, property, or legal interests.

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "vulnerable adult."

(26) "Written instrument" includes, but is not limited to, any:

(A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28;

(B) A will, contract, deed, or any other document purporting to have legal or evidentiary significance;

(C) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity;

(D) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items;

(E) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or

(F) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.

Relation to National Legal Trends. The Model Penal Code (MPC) defines the term "writing" more generally, to include a "printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege, or identification."[1933] The specific list of items and documents that constitute a "writing" is not identical to that used in the definition of

[1931] Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.980; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code Ann. § 5-36-101; Conn. Gen. Stat. Ann. § 53a-121; Del. Code Ann. tit. 11, § 224; Haw. Rev. Stat. Ann. § 708-801; Me. Rev. Stat. tit. 17-A, § 352; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.020; Mont. Code Ann. § 45-2-101; N.Y. Penal Law § 155.20; Or. Rev. Stat. Ann. § 164.115; 18 Pa. Stat. Ann. § 3903; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.08; Wash. Rev. Code Ann. § 9A.56.010.

[1932] N.H. Rev. Stat. Ann. § 637:2(V)(c).

[1933] MPC § 224.1.

"written instrument," but both definitions are intended to be broad enough to capture virtually any form of written information.

RCC § 22E-2002. AGGREGATION TO DETERMINE PROPERTY OFFENSE GRADES.
[Now RCC § 22E-2001. Aggregation to Determine Property Offense Grades.]

Relation to National Legal Trends. The revised aggregation statute follows many jurisdictions[1934] which have statutes that closely follow the Model Penal Code (MPC)[1935] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[1936] However, many other jurisdictions' aggregation statutes are silent as to damage to property offenses, nor does the MPC's Criminal Mischief[1937] offense explicitly provide for aggregation.

RCC § 22E-2003. LIMITATION ON CONVICTIONS FOR MULTIPLE RELATED PROPERTY OFFENSES.
[Now addressed in RCC § 22E-214. Merger of Related Offenses.]

Relation to National Legal Trends. *The RCC limitation on multiple convictions statute's above-mentioned substantive changes to current District law have mixed support under national legal trends.*

The Supreme Court and lower courts broadly recognize that a criminal conviction, even if concurrent to a more serious conviction, is a separate punishment that has collateral consequences beyond the sentence.[1938] However, whether concurrent sentencing is or is not deemed appropriate for multiple offenses committed as part of the same act or course of conduct varies widely across jurisdictions.

[1934] Alaska Stat. Ann. § 11.46.980; Ark. Code Ann. § 5-36-102; Conn. Gen. Stat. Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md. Code Ann., Crim. Law § 7-103; Me. Rev. Stat. Ann., tit. 17-A, § 352; Neb. Rev. St. § 28-518; N. H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N. D. Cent. Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; 18 Pa. Stat. Ann. § 3903; S. D. Cod. Laws § 22-30A-18; Tex. Penal Code § 31.09.

[1935] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.").

[1936] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[1937] Model Penal Code § 220.3.

[1938] *See Ball v. United States*, 470 U.S. 856, 865 (1985) ("[A] separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.") (emphasis in original).

The MPC bars multiple convictions not only where one offense is a lesser included offenses of another or includes inconsistent elements, but also, more generally, "where the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."[1939] Several states have followed the MPC in codifying such a bar to multiple offense liability.[1940]

Some jurisdictions by statute bar multiple convictions arising out of the same act or course of conduct for most or all crimes.[1941] Inversely, some jurisdictions specifically allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[1942]

For theft and overlapping offenses like RSP and UUV, liability for both offenses for the same act or course of conduct is generally limited by either statute or case law specific to those offenses. In several states, multiple convictions for these offenses are barred because they are alternative means of committing the same consolidated "theft" offense.[1943] In many other states, these overlapping theft-type offenses are statutorily barred from providing liability for multiple convictions,[1944] or case law bars such

[1939] Model Penal Code 1.07(1) ("Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: (a) one offense is included in the other, as defined in Subsection (4) of this Section; or (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or (c) inconsistent findings of fact are required to establish the commission of the offenses; or (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.").

[1940] § 68 Multiple offense limitations 1 Crim. L. Def. § 68 ("Ala. Code § 13A-1-8(b)(4) (1982); Colo. Rev. Stat. § 18-1-408(1)(d) (1978); Ga. Code Ann. § 16-1-7(a)(2) (Michie 1982); Hawaii Rev. Stat. § 701-109(1)(d) (1976); Mo. Ann. Stat. § 556.041(3) (Vernon 1979); Mont. Code Ann. § 46-11-502(4) (1983); N. J. Stat. Ann. § 2C:1-8(a)(4) (West 1982); Okla. Stat. Ann. tit. 21, § 11 (West 1983).").

[1941] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654 ("An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.").

[1942] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[1943] The following define RSP as a means of committing theft: Alaska Stat. Ann. § 11.46.100; Ariz. Rev. Stat. Ann. § 13-1802; Ark. Code Ann. § 5-36-106; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Ga. Code Ann. § 16-8-7; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2401; Iowa Code Ann. § 714.1; 720 Ill. Comp. Stat. Ann. 5/16-1; Kan. Stat. Ann. § 21-5801; Md. Code Ann., Crim. Law § 7-104; Me. Rev. Stat. tit. 17-A, § 359; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-517; Nev. Rev. Stat. Ann. § 205.0832; N.H. Rev. Stat. Ann. § 637:7; N.J. Stat. Ann. § 2C:20-7; N.D. Cent. Code Ann. § 12.1-23-02; Or. Rev. Stat. Ann. § 164.015; 18 Pa. Stat. and Cons. Stat. Ann. § 3925; S.D. Codified Laws § 22-30A-7; Tenn. Code Ann. § 39-14-101; Tex. Penal Code Ann. § 31.02; Utah Code Ann. § 76-6-403. Similarly, the following states define UUV as a type of theft: Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360, or merger at sentencing, Md. Code Ann., Crim. Law § 7-105(2).

[1944] The following states have statutory provisions that prevent convictions for theft and RSP for the same property involved in the same transaction: Del. Code Ann. tit. 11, § 856; Cal. Penal Code § 496; Fla. Stat. Ann. § 812.025; La. Civ. Code Ann. r.P. art. 482.

liability.[1945] The MPC and the Proposed Federal Criminal Code do not explicitly prohibit convictions for both theft and UUV for the same act or course of conduct, but the commentary for each[1946] recognizes that UUV is necessary to punish conduct that falls short of theft. Similarly, the MPC[1947] and the Proposed Federal Criminal Code,[1948] prohibit a defendant from being convicted of both RSP and theft in regards to the same property involved in a single act or course of conduct.

For other property offenses, statutory provisions generally do not bar multiple convictions for the same act or course of conduct.[1949]

There is no consensus expert opinion on how to handle multiple convictions arising out of the same act or course of conduct. As the American Law Institute (ALI) Sentencing Project Commentary recently stated: "No American jurisdiction has formulated a satisfactory approach to the punishment of offenders convicted of multiple current offenses, in large part because of the complexity of the task."[1950] The ALI Sentencing Project's new recommendations are that sentencing guideline regimes shall include a general presumption in favor of concurrent sentences,[1951] but the ALI does not specifically address multiple convictions for substantially overlapping offenses.

Chapter 21. Theft Offenses

RCC § 22E-2101. THEFT.

[1945] The following states prohibit convictions for theft and RSP for the same property involved in the same transaction through case law: *Com. v. Corcoran*, 69 Mass. App. Ct. 123, 125, 866 N.E.2d 948, 950 (2007); *State v. Perry*, 305 N.C. 225, 236–37, 287 S.E.2d 810, 817 (1982*) overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010); *Jackson v. Com.*, 670 S.W.2d 828, 832–33 (Ky. 1984) *disapproved of on other grounds by Cooley v. Com.*, 821 S.W.2d 90 (Ky. 1991); *State v. Bleau*, 139 Vt. 305, 308–09, 428 A.2d 1097, 1099 (1981); *State v. Melick*, 131 Wash. App. 835, 840–41, 129 P.3d 816, 818–19 (2006); *City of Maumee v. Geiger*, 45 Ohio St. 2d 238, 244, 344 N.E.2d 133, 137 (1976); *Hammon v. State*, 1995 OK CR 33, 898 P.2d 1287, 1304 CHECK CITE; *State v. Taylor*, 176 W. Va. 671, 676, 346 S.E.2d 822, 827 (1986); *Starks v. Com.*, 225 Va. 48, 54, 301 S.E.2d 152, 156 (1983).In five states views UUV as a lesser included offense, thus preventing convictions for both. *See State v. Willis*, 673 A.2d 1233, 1240 (Del. Super. Ct. 1995); *Jackson v. State*, 270 S.W.3d 649, 652 (Tex. App. 2008); *State v. Shults*, 169 Mont. 33, 35-36 (1976); *Reyna-Abarca v. People*, 2017 WL 745876, 10 (Colo. 2017); *Greer v. State*, 77 Ark. App. 180, 184 (2002).

[1946] MPC § 223.9 cmt. at 271 (discussing the requirements for theft under the MPC and noting that "Nevertheless, there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another."); Proposed Federal Criminal Code § 1736 cmt. at 212 (discussing the requirements for theft under the proposed revised federal criminal code and noting that "In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most 'joyriding' cases may be avoided.").

[1947] MPC § 223.6 (defining RSP as a theft).

[1948] Proposed Federal Criminal Code § 1732(c) (including RSP in theft).

[1949] Research was not performed to determine whether these other jurisdictions' statutes were structured as lesser included offenses of one another which would bar multiple convictions.

[1950] American Law Institute, Model Penal Code: Sentencing, Commentary to § 6B.08 (Proposed Final Draft, April 2017).

[1951] American Law Institute, Model Penal Code: Sentencing, § 6B.08(2) (Proposed Final Draft, April 2017).

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

First, eliminating dual liability for theft by deception under the current theft and fraud statutes follows a strong majority of jurisdictions' nationwide. Most jurisdictions,[1952] including nearly all jurisdictions with reformed criminal codes, as well as the American Law Institute's Model Penal Code (MPC),[1953] consolidate theft-type offenses such that a theft by deception can only result in one conviction. The Proposed Federal Criminal Code includes deceptive theft as a type of theft, but does not have a broad fraud statute that overlaps with it.[1954] The RCC's specific manner of eliminating the dual liability for theft by deception—by removing such liability from the revised theft statute and transferring it to the revised fraud statute—is unusual. However, few jurisdictions have separate fraud statutes of general applicability[1955] like the District's current fraud statute[1956] and, as noted above, most jurisdictions rely on a sweeping consolidation of all theft-type offenses. However, the RCC solves the problem of dual liability without instituting a broader change to current District law to consolidate theft-type offenses.

Second, limiting the offense to "with intent to deprive the other of the property" and deleting "with intent to appropriate" as an alternative basis of liability in the revised theft offense is broadly supported by law in other jurisdictions. The equivalent theft laws in the 50 states, the MPC,[1957] and the Proposed Federal Criminal Code[1958] overwhelmingly require intent or purpose to "deprive" in their theft offenses, and have definitions of "deprive" that require permanent or substantial interference with the property. There appear to be just three states with theft statutes that clearly include an intent or purpose to temporarily interfere with property.[1959] Limiting the revised theft

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[1952] Alaska Stat. Ann. § 11.46.100; Ala. Code § 13A-8-2; Ark. Code Ann. § 5-36-103; Ariz. Rev. Stat. Ann. § 13-1802; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, §§ 843 and 844; Ga. Code Ann. § 16-8-12; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. §§ 35-43-4-1 and -2; Kan. Stat. Ann. § 21-5801; La. Stat. Ann. § 14:67; Me. Rev. Stat. tit. 17-A, §§ 351 and 354; Md. Code Ann., Crim. Law § 7-104; Mass. Gen. Laws Ann. ch. 266, § 30; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-512; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; N.Y. Penal Law § 155.05; N.D. Cent. Code Ann. § 12.1-23-02; Ohio Rev. Code Ann. § 2913.02; Okla. Stat. Ann. tit. 21, § 1701; Or. Rev. Stat. Ann. § 164.015; 18 Pa. Stat. and Cons. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tenn. Code Ann. §§ 39-11-106 and 39-14-103; Tex. Penal Code Ann. §§ 31.01 and 31.03; Utah Code Ann. § 76-6-405; Wash. Rev. Code Ann. § 9A.56.020; Wis. Stat. Ann. § 943.20.

[1953] MPC § 223.1.

[1954] Proposed Federal Criminal Code § 1732.

[1955] Alaska Stat. Ann. § 11.46.600; Ariz. Rev. Stat. Ann. § 13-2310; Fla. Stat. Ann. § 817.034; Mich. Comp. Laws Ann. § 750.218; N.M. Stat. Ann. § 30-16-6; N.Y. Penal Law § 190.65. Colorado has an offense called "Charitable Fraud", though it is defined broadly enough that it could arguably be construed as a general fraud offense. Colo. Rev. Stat. Ann. § 6-16-111.

[1956] D.C. Code § 22-3221.

[1957] MPC § 223.2.

[1958] Proposed Federal Criminal Code § 1732.

[1959] Fla. Stat. § 812.014 ("A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently" deprive or appropriate."); Ga. Code Ann. § 16-8-12; 13; -1 (requiring intent to deprive for theft by taking and theft by

offense to "with purpose to deprive" and eliminating "with intent to appropriate" will conform D.C.'s revised theft statute to the national trend, as well as improve the proportionality of the revised offense.

Third, regarding the bar on multiple convictions for the revised theft offense and overlapping property offenses, a generalization to other jurisdictions for all the offenses would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offense similar to the revised theft offense and other overlapping property offenses. For example, where the offense most like the revised theft offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences statute[1960] or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[1961] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[1962]

Specifically, regarding theft, unauthorized use of a motor vehicle (UUV), and receiving stolen property (RSP), a majority of American jurisdictions prohibit multiple convictions arising from the same act or course of conduct, as well as the Model Penal Code (MPC) and the Proposed Federal Criminal Code. In several states, multiple convictions for these offenses are barred because they are alternative means of committing the same consolidated "theft" offense.[1963] In many other states, these overlapping theft-type offenses are statutorily barred from providing liability for multiple convictions,[1964] or case law bars such liability.[1965] The MPC and the Proposed Federal

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deception, but defining "deprive," in part, as "to withhold property of another permanently or temporarily."); *State v. Crittenden*, 146 Wash. App. 361, 370, 189 P.3d 849, 853 (2008) (stating that the crime of theft in Wash. Rev. Code Ann. § 9A.56.020 requires as an element an "intent to deprive," but that it is not an intent to permanently deprive).

[1960] D.C. Code § 22-3203.

[1961] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[1962] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[1963] The following define RSP as a means of committing theft: Alaska Stat. Ann. § 11.46.100; Ariz. Rev. Stat. Ann. § 13-1802; Ark. Code Ann. § 5-36-106; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Ga. Code Ann. § 16-8-7; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2401; Iowa Code Ann. § 714.1; 720 Ill. Comp. Stat. Ann. 5/16-1; Kan. Stat. Ann. § 21-5801; Md. Code Ann., Crim. Law § 7-104; Me. Rev. Stat. tit. 17-A, § 359; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-517; Nev. Rev. Stat. Ann. § 205.0832; N.H. Rev. Stat. Ann. § 637:7; N.J. Stat. Ann. § 2C:20-7; N.D. Cent. Code Ann. § 12.1-23-02; Or. Rev. Stat. Ann. § 164.015; 18 Pa. Stat. and Cons. Stat. Ann. § 3925; S.D. Codified Laws § 22-30A-7; Tenn. Code Ann. § 39-14-101; Tex. Penal Code Ann. § 31.02; Utah Code Ann. § 76-6-403.

Similarly, the following states define UUV as a type of theft: Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360.

[1964] The following states have statutory provisions that prevent convictions for theft and RSP for the same property involved in the same transaction: Del. Code Ann. tit. 11, § 856; Cal. Penal Code § 496; Fla. Stat. Ann. § 812.025; La. Civ. Code Ann. r.P. art. 482. One state prohibits convictions for both UUV and theft for the same property involved in the same transaction through merger at sentencing. Md. Code Ann., Crim. Law § 7-105(2).

Criminal Code do not explicitly prohibit convictions for both theft and UUV for the same act or course of conduct, but the commentary for each[1966] recognizes that UUV is necessary to punish conduct that falls short of theft. Similarly, the MPC[1967] and the Proposed Federal Criminal Code,[1968] prohibit a defendant from being convicted of both RSP and theft in regards to the same property involved in a single act or course of conduct.

Fourth, the revised theft offense's expansion to five gradations, ranging to a value of $250,000 or more and including a provision effectively elevating the worth of low-value cars, reflect national trends. The overwhelming majority of the 50 states[1969] as well as the MPC[1970] and Proposed Federal Criminal Code[1971] have more than two grades of penalties for theft, unlike the current District theft statute, which is limited to two grades. Amongst the 50 states, four or five gradations are the most common numbers.[1972] A

[1965] The following states prohibit convictions for theft and RSP for the same property involved in the same transaction through case law: *Com. v. Corcoran*, 69 Mass. App. Ct. 123, 125, 866 N.E.2d 948, 950 (2007); *State v. Perry*, 305 N.C. 225, 236–37, 287 S.E.2d 810, 817 (1982*) overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010); *Jackson v. Com.*, 670 S.W.2d 828, 832–33 (Ky. 1984) *disapproved of on other grounds by Cooley v. Com.*, 821 S.W.2d 90 (Ky. 1991); *State v. Bleau*, 139 Vt. 305, 308–09, 428 A.2d 1097, 1099 (1981); *State v. Melick*, 131 Wash. App. 835, 840–41, 129 P.3d 816, 818–19 (2006); *City of Maumee v. Geiger*, 45 Ohio St. 2d 238, 244, 344 N.E.2d 133, 137 (1976); *Hammon v. State*, 1995 OK CR 33, 898 P.2d 1287, 1304; *State v. Taylor*, 176 W. Va. 671, 676, 346 S.E.2d 822, 827 (1986); *Starks v. Com.*, 225 Va. 48, 54, 301 S.E.2d 152, 156 (1983).
Five states view UUV as a lesser included offense, thus preventing convictions for both. *See State v. Willis*, 673 A.2d 1233, 1240 (Del. Super. Ct. 1995); *Jackson v. State*, 270 S.W.3d 649, 652 (Tex. App. 2008); *State v. Shults*, 169 Mont. 33, 35-36 (1976); *Reyna-Abarca v. People*, 2017 WL 745876, 10 (Colo. 2017); *Greer v. State*, 77 Ark. App. 180, 184 (2002).

[1966] MPC § 223.9 cmt. at 271 (discussing the requirements for theft under the MPC and noting that "Nevertheless, there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another."); Proposed Federal Criminal Code § 1736 cmt. at 212 (discussing the requirements for theft under the proposed revised federal criminal code and noting that "In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most 'joyriding' cases may be avoided.").

[1967] MPC § 223.6 (defining RSP as a theft).

[1968] Proposed Federal Criminal Code § 1732(c) (including RSP in theft).

[1969] Only 9 states' theft offenses are limited to two grades based on value. Mass. Gen. Laws Ann. ch. 266, § 30(1); Mont. Code Ann. § 45-6-301; N.C. Gen. Stat. Ann. § 14-73.1; Okla. Stat. Ann. tit. 21, § 1704 and § 1705; 11 R.I. Gen. Laws Ann. § 11-41-5 and § 11-41-7; Vt. Stat. Ann. tit. 13 § 2501, § 2502, § 2503; Va. Code Ann. § 18.2-95 and -96; W.Va. Code Ann. § 61-3-13; Wyo. Stat. Ann. § 6-3-402. However, most of these states have additional grades or additional qualifications within the two grades, such as theft of a firearm, theft of a motor vehicle, etc., further emphasizing that D.C.'s two grade system is one of the narrowest in the country.

[1970] MPC § 223.1(2) (establishing 3 grades of theft).

[1971] Proposed Federal Criminal Code § 1735 (establishing 5 grades of theft).

[1972] In determining how many "grades" a state has, enhancements were excluded as were separate offenses for theft of a motor vehicle or theft from a person. Ala. Code §§ 13A-8-3, -4, -4.1-5; Alaska Stat. Ann. § 11.46.120, .130, .140, .150; Ark. Code Ann. § 5-36-103; Del. Code Ann. tit. 11, §§ 841, 841A; Fla. Stat. Ann. § 812.014; Haw. Rev. Stat. Ann. §§ 708-830.5, -831, -832, -833; Iowa Code Ann. § 714.2; Kan. Stat. Ann. § 21-5801; Ky. Rev. Stat. Ann. § 514.030; La. Stat. Ann. § 14:67; Me. Rev. Stat. tit. 17-A, § 353; Md. Code Ann., Crim. Law § 7-104; Mich. Comp. Laws §§ 750.356, .357; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.030; Neb. Rev. Stat. Ann. § 28-518; N.J. Stat. Ann. § 2C:20-2; N.M. Stat. Ann. § 30-16-1; N.Y.

recent study by the Pew Charitable Trusts found that since 2001, at least 35 states have raised the amount of their felony thresholds for theft in order to "prioritize costly prison space for more serious offenders and ensure that value-based penalties take inflation into account.[1973] States "that increased their thresholds reported roughly the same average decrease in crime as the 22 states that did not change their theft laws."[1974] The study further found that raising the felony theft threshold did not affect the "overall" property crime or larceny rates, and that the amount of a state's felony threshold "is not correlated with its property crime and larceny rates."[1975] As a whole, there has been a "long nationwide decline in property crime and larceny rates that began in the early 1990s."[1976]

The gradations in the revised theft offense for theft of a motor vehicle of differing values also reflect national trends. At least 21 of the 50 states[1977] as well as the MPC[1978] and the Proposed Federal Criminal Code[1979] have a gradation of theft specifically for a car, or a separate offense that penalizes theft of car. Fourteen of these states and the MPC grade theft of a motor vehicle without regard to the motor vehicle's value.[1980] The remaining states that do grade theft of a motor vehicle on the basis of its value generally grade theft of motor vehicle more seriously than the theft of other property.[1981]

Fifth, the deletion of the current theft recidivist penalty[1982] would further bring the revised theft offense into conformity with national trends. Most states, the MPC, and the Proposed Federal Criminal Code do not have a theft-specific recidivist penalty, and of those states that do have a theft-specific recidivist penalty, the District's current statute is

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Penal Law §§ 155.25, .30, .35, .40, .42; N.D. Cent. Code Ann. § 12.1-23-05; Or. Rev. Stat. Ann. §§ 164.043, .045, .055, .057; Utah Code Ann. § 76-6-412; Wis. Stat. Ann. § 943.20.

[1973] *The Effects of Changing State Theft Penalties*, PEW CHARITABLE TRUSTS, http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/02/the-effects-of-changing-state-theft-penalties, (last updated February 24, 2017).

[1974] *Id.*

[1975] *Id.*

[1976] *Id.*

[1977] For this survey, statutes that allow either a temporary or permanent intent to interfere with property or a temporary or permanent interference were included. Ala. Code § 13A-8-3(b); Cal. Penal Code § 487 (d)(1); Conn. Gen. Stat. Ann. § 53a-122 through § 53a-124; Del. Code Ann. tit. 11, § 841A; Ind. Code Ann. § 35-43-4-2.5; Iowa Code Ann. § 714.2(2); La. Stat. Ann. § 14:67.26; Minn. Stat. Ann. § 609.52(3)(3)(d); Mo. Ann. Stat. § 570.030(3)(3)(a); Nev. Rev. Stat. Ann. § 205.228; N.J. Stat. Ann. § 2C:20-2(b)(2)(b); N.Y. Penal Law § 155.30(8); N.D. Cent. Code Ann. §12.1-23-05(3)(d); Ohio Rev. Code Ann. § 2913.02(B)(5); Okla. Stat. Ann. tit. 21, § 1720; 18 Pa. Stat. Ann. § 3903(a.1); S.C. Code Ann. § 16.1-21-60(B); Utah Code Ann. § 76-6-412(1)(a)(ii); Fla. Stat. Ann. § 812.014(2)(c)(6); Miss. Code Ann. § 97-17-42; Wash. Rev. Code Ann. § 9A.56.050.

[1978] MPC § 223.1(2)(a).

[1979] Proposed Federal Criminal Code §1735(2)(d).

[1980] Cal. Penal Code § 487 (d)(1); Del. Code Ann. tit. 11, § 841A; Ind. Code Ann. § 35-43-4-2.5; Ohio Rev. Code Ann. § 2913.02(B)(5); S.C. Code Ann. § 16.1-21-60(B); Fla. Stat. Ann. § 812.014(2)(c)(6); N.J. Stat. Ann. § 2C:20-2(b)(2)(b); N.D. Cent. Code Ann. §12.1-23-05(3)(d); 18 Pa. Stat. Ann. § 3903(a.1); Mo. Ann. Stat. § 570.030(3)(3)(a); Ala. Code § 13A-8-3(b); Okla. Stat. Ann. tit. 21, § 1720; Utah Code Ann. § 76-6-412(1)(a)(ii); Wash. Rev. Code Ann. § 9A.56.050.

[1981] Conn. Gen. Stat. Ann. §§ 53a-122, 123, -124, 125, -125a, -125b; Iowa Code Ann. § 714.2; La. Stat. Ann. §§ 14:67:67.26; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. §§205.220, .222, .228, .240; N.Y. Penal Law §§ 155.25, .30, .35, .40, .42.

[1982] D.C. Code § 22-3212(c).

the most severe in the nation. Of the 23 states with theft-specific recidivist penalties,[1983] the highest maximum penalty is ten years, but it only applies when the property has a value of $1,000 or more but less than $20,000.[1984] The next highest maximum possible penalty is seven years,[1985] regardless of the value of the property, which is far lower than the maximum possible sentence of 15 years under current D.C. law. In addition, none of the 23 states appear to require a mandatory minimum sentence like D.C.'s current theft-specific recidivist penalty.

RCC § 22E-2102. UNAUTHORIZED USE OF PROPERTY.

Relation to National Legal Trends. *The UUP offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends. Only a few of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1986] (hereafter "reformed code jurisdictions") have statutes that generally criminalize the temporary unauthorized use or taking of property.[1987]*

First, all of the six reformed code jurisdictions with comparable statutes proscribe a wide range of conduct beyond "takes and carries away" in the current TPWR statute.[1988] None of the comparable statutes in the six reformed code jurisdictions has an asportation element like the current TPWR statute does.[1989]

Second, codifying a "knowingly" mental state to the element "without the effective consent of the owner" also reflects national trends. As of 2015, it appears just one of the 50 states has a statute that criminalizes the temporary taking of particular property with no culpable mental state requirement.[1990] Among the six reformed code

[1983] Alaska Stat. Ann. § 11.46.130; 11.46.140; Cal. Penal Code § 490.2; Fla. Stat. Ann. § 812.014; Ga. Code Ann. § 16-8-12; Haw. Rev. Stat. Ann. § 708-803; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Iowa Code Ann. § 714.2; Kan. Stat. Ann. § 21-5801; La. Stat. Ann. § 14:67; Me. Rev. Stat. tit. 17-A, § 360; Md. Code Ann., Crim. Law § 7-104; Mich. Comp. Laws Ann. § 750.356; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.040; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-518; N.H. Rev. Stat. Ann. § 637:11; N.C. Gen. Stat. Ann. § 14-72; 11 R.I. Gen. Laws Ann. § 11-41-24; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-412; Va. Code Ann. § 18.2-104.

[1984] Mich. Comp. Laws Ann. § 750.736(2)(b)).

[1985] N.H. Rev. Stat. Ann. § 637:11(II)(b.

[1986] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[1987] *See, e.g.*, Ohio Rev. Code Ann. § 2913.04(A), (D), (E), (F); Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3(a), (d); Mont. Code Ann. § 45-6-305; Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803. The MPC declined to extend criminal liability to the temporary deprivation of movable property other than motor vehicles, but recognized that a few states had such statutes. MPC § 223.9 cmt. at 271-72. The Proposed Federal Criminal Code also declined to extend criminal liability to the temporary deprivation of movable property other than motor vehicles.

[1988] *See, e.g.*, Ohio Rev. Code Ann. § 2913.04; Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3; Mont. Code Ann. § 45-6-305; Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803.

[1989] D.C. Code § 22-3216.

[1990] N.C. Gen. Stat. Ann. § 14-72.4 (concerning the unauthorized taking or sale of a dairy milk case or milk crate).

jurisdictions with comparable statutes to UUP,[1991] all of them specify a "knowingly" culpable mental state[1992] or require the defendant to act "with intent to" temporarily deprive the owner of the property.[1993] It is difficult to generalize about the elements to which the culpable mental states apply in these jurisdictions due to the varying rules of construction.

Third, regarding the bar on multiple convictions for the revised unauthorized use of property offense and overlapping property offenses, a generalization to other jurisdictions for all the offenses would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offense similar to the revised unauthorized use of property offense and other overlapping property offenses. For example, where the offense most like the revised unauthorized use of property offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences statute[1994] or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[1995] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[1996]

Fourth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[1997] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication,

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[1991] *See, e.g.*, Ohio Rev. Code Ann. § 2913.04(A), (D), (E), (F); Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3(a), (d); Mont. Code Ann. § 45-6-305; Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803.

[1992] Ohio Rev. Code Ann. § 2913.04(A), (D), (E), (F); Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3(a), (d); Mont. Code Ann. § 45-6-305.

[1992] N.C. Gen. Stat. Ann. § 14-72.4

[1993] Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803.

[1994] D.C. Code § 22-3203.

[1995] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[1996] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[1997] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

actually lacked the requisite [] knowledge."[1998] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[1999]

RCC § 22E-2103. UNAUTHORIZED USE OF A MOTOR VEHICLE.

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

First, expanding the definition of "motor vehicle," and, in turn, the scope of the revised UUV offense to include vehicles such as aircraft and watercraft follows a strong majority of jurisdictions nationwide. Of the 40 states with UUV offenses,[2000] a majority includes aircraft and watercraft,[2001] as do the Model Penal Code (MPC)[2002] and the Proposed Federal Criminal Law Code.[2003]

Second, the RCC's elimination of overlap between theft of a motor vehicle, receiving stolen property (RSP), and UUV brings these offenses in line with national trends. Of the 40 states with UUV offenses,[2004] the majority bar liability for both UUV

[1998] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

[1999] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[2000] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[2001] Ala. Code §§ 13A-8-11 and 13A-8-1; Ariz. Rev. Stat. Ann. §§ 13-1803, 13-1803, and 13-105; Ark. Code Ann. §§ 5-36-108 and 5-36-101; Alaska Stat. Ann. § 11.46.360(a)(1); Colo. Rev. Stat. Ann. § 18-4-409; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 708-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. §§ 514.100 and 514.010; Me. Rev. Stat. tit. 17-A, §360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03(A); Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-406; Tex. Penal Code Ann. §31.07; Minn. Stat Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; N.C. Gen. Stat. Ann. § 14-72.2; Iowa Code Ann. § 714.7; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. §§ 943.23 and 939.22.

[2002] MPC § 223.9

[2003] Proposed Federal Criminal Code § 1736.

[2004] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code §

and theft in regards to the same car involved in a single act or course of conduct.[2005] The MPC and the Proposed Federal Criminal Code do not explicitly prohibit convictions for both theft and UUV for the same act or course of conduct, but the commentary for each[2006] recognizes that UUV is necessary to punish conduct that falls short of theft.

Other jurisdictions' treatment of liability for both UUV and RSP involving the same act or course of conduct is more variable. A few states bar liability for both offenses in regards to the same car involved in a single act or course of conduct,[2007] although at least one state appears to explicitly allow dual liability.[2008] Overall, however, there is a lack of statutory authority that squarely addresses the issue of RSP

13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[2005] A variety of mechanisms prevent the overlap, the most common of which is that the UUV offense requires an intent to temporarily deprive the owner of the motor vehicle, whereas the theft offense requires intent to deprive. Ariz. Rev. Stat. Ann. § 13-1803; Kan. Stat. Ann. § 21-5803; Iowa Code Ann. § 714.7; La. Stat. Ann. § 14:68.4; Mich. Comp. Laws Ann. § 750.414; Nev. Rev. Stat. Ann. § 205.2715; N.J. Stat. Ann. § 2C:30-10; S.C. Code Ann. § 16-21-60(B); S.D. Codified Laws § 22-30A-12; Utah Code Ann. § 41-1a-1314; Va. Code Ann. § 18.2-102; Idaho Code Ann. § 49-227; W. Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102; Tenn. Code. Ann. § 39-14-106; Haw. Rev. Stat. Ann. § 708-836 (specified in commentary). Overlap in other states is prevented by including UUV as a type of theft, Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360, or merger at sentencing, Md. Code Ann., Crim. Law § 7-105(2).

Finally case law in five states views UUV as a lesser included offense, thus preventing convictions for both. *See State v. Willis*, 673 A.2d 1233, 1240 (Del. Super. Ct. 1995); *Jackson v. State*, 270 S.W.3d 649, 652 (Tex. App. 2008); *State v. Shults*, 169 Mont. 33, 35-36 (1976); *Reyna-Abarca v. People*, 2017 WL 745876, 10 (Colo. 2017); *Greer v. State*, 77 Ark. App. 180, 184 (2002).

[2006] MPC § 223.9 cmt. at 271 (discussing the requirements for theft under the MPC and noting that "Nevertheless, there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another."); Proposed Federal Criminal Code § 1736 cmt. at 212 (discussing the requirements for theft under the proposed revised federal criminal code and noting that "In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most 'joyriding' cases may be avoided.").

[2007] Two states prevent overlap by including UUV as a type of theft, Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360. Maryland has a merger at sentencing provision for theft and UUV and includes RSP in the definition of "theft." Md. Code Ann., Crim. Law §§ 7-105(2), 7-104.

Several states prohibit overlap between UUV and RSP by requiring an intent to temporarily deprive the owner of the motor vehicle for UUV, and requiring for RSP an intent to deprive. Kan. Stat. Ann. § 21-5801; Utah Code Ann. § 76-6-408; Nev. Rev. Stat. Ann. § 205.275; Idaho Code Ann. § 18-2403.

[2008] *Commonwealth v. Thompson*, 2015 WL 7722270 (Pa. Super. Ct. Nov. 30, 2015) (affirming convictions for RSP and UUV for the same motor vehicle) (non-precedential).

and UUV convictions for the same act or course of conduct. In addition, a few states appear to not have a specific RSP offense.[2009] In the MPC, liability for both UUV and RSP based on the same act or course of conduct is barred because RSP is a form of theft, and the commentary recognizes that UUV is necessary to punish conduct that falls short of theft.[2010] Similarly, the Proposed Federal Criminal Code includes RSP as a type of theft and the commentary recognizes that UUV is necessary to punish conduct that falls short of theft.[2011]

Third, the RCC's deletion of the UUV-specific recidivist enhancement and the enhancement for committing UUV during a crime of violence or to facilitate a crime of violence reflect national trends. Only 9 of the 40 states with UUV offenses[2012] have UUV-specific recidivist penalties.[2013] The MPC and Proposed Federal Criminal Code do not have UUV-specific penalties. Of the few states with UUV-specific recidivist penalties, the highest maximum penalty is 9 years,[2014] which is significantly less than the 30 year maximum possible penalty in the District's current UUV recidivist penalty. Five years is the most common maximum possible penalty in these 9 states with UUV-specific recidivist penalties,[2015] with the remaining states having lower maximum penalties.[2016]

[2009] Tenn. Code Ann. § 39-14-101; Wyo. Stat. Ann. § 6-3-402.

[2010] MPC § 223.9 cmt. at 271 (discussing the requirements for theft under the MPC and noting that "Nevertheless, there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another.").

[2011] Proposed Federal Criminal Code § 1736 cmt. at 212 (discussing the requirements for theft under the proposed revised federal criminal code and noting that "In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most 'joyriding' cases may be avoided.").

[2012] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[2013] Kan. Stat. Ann. § 21-5803; Neb. Rev. Stat. Ann. § 28-516; Conn. Gen. Stat. Ann. § 53a-119b; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; N.Y. Penal Law §§ 165.05, .06, .08; W. Va. Code Ann. § 17A-8-4; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1.

[2014] N.M. Stat. Ann. § 30-16D-1.

[2015] Conn. Gen. Stat. Ann. § 53a-119b; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mass. Gen. Laws Ann. ch. 90, § 24.

[2016] Kan. Stat. Ann. § 21-5803 (5 to 7 months if the defendant has one prior misdemeanor conviction or no prior convictions); Neb. Rev. Stat. Ann. § 28-516 (2 years); N.Y. Penal Law §§ 165.06 (4 years); W. Va. Code Ann. § 17A-8-4 (3 years).

None of the 40 states with UUV offenses[2017] or the MPC[2018] or the Proposed Federal Criminal Code[2019] enhance UUV if the defendant used the motor vehicle during the course of or to facilitate a crime of violence or a similar type of crime. However, four states generally penalize using the vehicle in the commission of a felony or a crime or with the intent to do so.[2020]

Fourth, establishing multiple gradations for UUV follows national trends. More than half the 40 jurisdictions with a UUV offense[2021] have multiple gradations of UUV.[2022] The MPC only has one grade of UUV,[2023] but the Federal Proposed Criminal

[2017] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[2018] MPC § 223.9.

[2019] Proposed Federal Criminal Code § 1736.

[2020] N.Y. Penal Law § 165.08; Utah Code Ann. § 41-1a-1314; Colo. Rev. Stat. Ann. § 18-4-409; Vt. Stat. Ann. tit. 23, § 1094.

[2021] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[2022] Ala. Code § 13A-8-11 (grading based on whether the defendant used force or threat of force); Alaska Stat. Ann. §§ 11.46.360, .365 (grading based on several factors, including the type of vehicle); Ariz. Rev. Stat. § 13-1803 (grading based on whether the defendant "took unauthorized control" over a vehicle or was "transported or physically located" in the vehicle); Colo. Rev. Stat. Ann. § 18-4-409 (grading based on several factors, including the value of the vehicle); Conn. Gen. Stat. Ann. § 53a-119b (grading based on whether defendant has prior conviction); Kan. Stat. Ann. § 21-5803 (grading based on whether defendant has prior conviction); Ky. Rev. Stat. Ann. § 514.100 (grading based on whether defendant has prior conviction); Me. Rev. Stat. tit. 17-A, § 360 (grading based on whether defendant has prior conviction); N.J.

Code has two.[2024] There is less precedent for grading operating a motor vehicle more seriously than riding as a passenger, in part because only eight states explicitly codify liability for UUV for a passenger.[2025] However, three of these eight states do grade UUV for a passenger less seriously than the general UUV offense,[2026] like the UUV offense in the RCC. The MPC declined to criminalize a passenger's non-operational use of a vehicle without the owner's consent,[2027] as did the Proposed Federal Criminal Code.[2028] The most common method of grading UUV amongst the 40 states with UUV offenses[2029]

Stat. Ann. § (grading based on type of vehicle and whether defendant was passenger); N.Y. Penal Law §§ 165.05, .06, .08 (grading based on whether defendant has prior conviction and whether defendant had the intent to use the vehicle in the course of or the commission of specified offenses, or in the immediate flight therefrom); N.D. Cent. Code Ann. § 12.1-23-06 (grading based on the value of the use of the vehicle and the cost of retrieval and restoration); Ohio Rev. Code Ann. § 2913.03 (grading based on whether the victim was an elderly person or disabled adult); Utah Code Ann. §§ 41-1a-1314 (grading based on several factors, including if the motor vehicle was used to commit a felony); N.C. Gen. Stat. Ann. § 14-72.2 (grading based on type of vehicle); Wash. Rev. Code Ann. §§ 9A.56.070, .075 (grading based on whether defendant was a passenger); Minn. Stat. Ann. § 609.52 (grading based on value of the vehicle); Va. Code Ann. § 18.2-102 (grading based on the value of the vehicle); Wis. Stat. Ann. § 943.23 (grading based on whether defendant was a passenger); Neb. Rev. Stat. Ann. § 28-516 (grading based on whether defendant had a prior conviction); Idaho Code Ann. § 49-227 (grading based on the amount of damage caused to the vehicle and the value of the property taken from the vehicle); Mass. Gen. Laws Ann. ch. 90, § 24 (grading based on whether defendant has prior conviction); N.M. Stat. Ann. § 30-16D-1 (grading based on whether the defendant has prior conviction); Vt. Stat. Ann. tit. 23, § 1094 (grading based on several factors, including whether used the vehicle in the commission of a felony); W.Va. Code Ann. § 17A-8-4 (grading based on whether defendant has a prior conviction).

[2023] MPC § 223.9.

[2024] Proposed Federal Criminal Code §1736(3).

[2025] Ariz. Rev. Stat. Ann. § 13-1803(A)(2); Del. Code Ann. tit. 11, § 853(1); Me. Rev. Stat. tit. 17-A, § 360(1)(A); N.J. Stat. Ann. § 2C:20-10(d); N.Y. Penal Law § 165.03(1); Or. Rev. Stat. Ann. § 164.135(1)(a); Wash. Rev. Code Ann. § 9A.56.075(1); Wis. Stat. Ann. § 943.23(4m).

[2026] Ariz. Rev. Stat. Ann. § 13-1803(A)(2); Wash. Rev. Code Ann. § 9A.56.075(1); Wis. Stat. Ann. § 943.23(4m).

[2027] MPC § 223.9 cmt. at 273.

[2028] Proposed Federal Criminal Code § 1736.

[2029] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

is based upon whether the defendant has prior convictions.[2030] However, many of the remaining states grade UUV on other factors such as the type of vehicle involved[2031] or the value of the vehicle or amount of damage done to the vehicle.[2032]

Fifth, the revised UUV statute prohibits convictions for both UUV and carjacking, RCC § 22E-1XXX, and UUV and the District's unauthorized use of a rented or leased motor vehicle, D.C. Code 22-3215 based on the same act or course of conduct. Neither the MPC nor the Proposed Federal Criminal Code has a carjacking offense. Case law addressing this issue in the 50 states is scant. However, in at least three states, UUV or an equivalent offense to the revised UUV offense in the RCC is a lesser included offense of carjacking.[2033] A few of the states with failing to return rented or leased vehicle statutes appear to avoid multiple convictions with UUV for the same act or course of conduct by making failing to return rented or leased vehicles an alternative means of committing the general UUV offense.[2034] At least one state appears to avoid multiple convictions by making failure to return a rented or leased vehicle a grade of the general UUV offense.[2035] Neither the MPC nor the Proposed Federal Criminal Code have offenses that specifically prohibit failing to return rented or leased motor vehicles.

Sixth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[2036] In practical effect, this means that intoxication may "serve as a defense

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[2030] Conn. Gen. Stat. Ann. § 53a-119b; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; N.Y. Penal Law §§ 165.05, .06, .08; Neb. Rev. Stat. Ann. § 28-516; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; W.Va. Code Ann. § 17A-8-4.

[2031] Alaska Stat. Ann. §§ 11.46.360, .365 (grading based on several factors, including the type of vehicle) N.J. Stat. Ann. § (grading based on type of vehicle and whether defendant was passenger); N.C. Gen. Stat. Ann. § 14-72.2 (grading based on type of vehicle).

[2032] Colo. Rev. Stat. Ann. § 18-4-409 (grading based on several factors, including the value of the vehicle);); N.D. Cent. Code Ann. § 12.1-23-06 (grading based on the value of the use of the vehicle and the cost of retrieval and restoration); Minn. Stat. Ann. § 609.52 (grading based on value of the vehicle); Va. Code Ann. § 18.2-102 (grading based on the value of the vehicle; Idaho Code Ann. § 49-227 (grading based on the amount of damage caused to the vehicle and the value of the property taken from the vehicle).

[2033] *Fryer v. State*, 732 So. 2d 30, 33 (Fla. Dist. Ct. App. 1999) (stating that grand theft auto, which includes as an alternative element that the defendant acted with the intent temporarily deprive, "appears to be a necessarily lesser included offense of carjacking."); *State v. Ector*, 2012 WL 3201985 at 8 (Tenn. Crim. App. 2012) (unpublished) ("Unauthorized use of a motor vehicle is a lesser-included offense of carjacking."); *State v. Talbert*, 2007 WL 466762 at 1 (La. App. 1 Cir. 2007) ("Defendant . . . was charged by bill of information with carjacking, a violation of LSA-R.S. 14:64.2. . . . Defendant was tried by a jury and convicted of the lesser and included offense of unauthorized use of a motor vehicle, a violation of LSA-R.S. 14:68.4.).

[2034] Ala. Code § 13A-8-11; Del. Code Ann. tit. 11, § 853; N.Y. Penal Law §§ 165.05, .06, .08; Or. Rev. Stat. Ann. § 164.135.

[2035] Alaska Stat. Ann. §§ 11.46.360, .365.

[2036] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to

to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[2037] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[2038]

RCC § 22E-2104. SHOPLIFTING.

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

Approximately 28 states have separate shoplifting statutes.[2039] Several other states do not have separate shoplifting statutes, but codify special evidentiary presumptions for their theft statutes that are specific to shoplifting.[2040] Neither the Model Penal Code (MPC) nor the Proposed Federal Criminal Code has a shoplifting offense.

First, regarding the transfer of merchandise between containers, of the 28 states that have separate shoplifting statutes,[2041] at least 17 codify as a means of committing shoplifting conduct substantially similar or identical to subsection (a)(1)(C) in the revised shoplifting statute.[2042] Nine of these 17 states prohibit transferring the property at issue

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this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[2037] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

[2038] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[2039] Alaska Stat. Ann. § 11.46.220; Ariz. Rev. Stat. Ann. § 13-1805; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 840; Haw. Rev. Stat. Ann. § 708-833.5; Ill. Comp. Stat. Ann. 5/16-25; N.H. Rev. Stat. Ann. § 637:3-a; N.J. Stat. Ann. § 2C:20-11; 18 Pa. Stat. Ann. § 3929; Tenn. Code Ann. § 39-14-146; Utah Code Ann. § 76-6-602; Wis. Stat. Ann. § 943.50; Wyo. Stat. Ann. § 6-3-404; S.C. Code Ann. § 16-13-110; Neb. Rev. Stat. Ann. § 28-511.01; Mich. Comp. Laws Ann. § 703.356d; Cal. Penal Code § 459.5; Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577; 11 R.I. Gen. Laws Ann. § 11-41-20; N.M. Stat. Ann. § 30-16-19; Idaho Code Ann. § 18-4624; W. Va. Code Ann. § 61-3A-1; Va. Code Ann. § 18.2-103; Ga. Code Ann. § 16-8-14; Miss. Code Ann. § 97-23-93; Okla. Stat. Ann. tit. 21, § 1731.

[2040] *See, e.g.*, Ark. Code Ann. §5-36-116; Colo. Rev. Stat. Ann § 18-4-406; Mo. Ann. § 570.030.

[2041] Alaska Stat. Ann. § 11.46.220; Ariz. Rev. Stat. Ann. § 13-1805; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 840; Haw. Rev. Stat. Ann. § 708-833.5; Ill. Comp. Stat. Ann. 5/16-25; N.H. Rev. Stat. Ann. § 637:3-a; N.J. Stat. Ann. § 2C:20-11; 18 Pa. Stat. Ann. § 3929; Tenn. Code Ann. § 39-14-146; Utah Code Ann. § 76-6-602; Wis. Stat. Ann. § 943.50; Wyo. Stat. Ann. § 6-3-404; S.C. Code Ann. § 16-13-110; Neb. Rev. Stat. Ann. § 28-511.01; Mich. Comp. Laws Ann. § 703.356d; Cal. Penal Code § 459.5; Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577; 11 R.I. Gen. Laws Ann. § 11-41-20; N.M. Stat. Ann. § 30-16-19; Idaho Code Ann. § 18-4624; W. Va. Code Ann. § 61-3A-1; Va. Code Ann. § 18.2-103; Ga. Code Ann. § 16-8-14; Miss. Code Ann. § 97-23-93; Okla. Stat. Ann. tit. 21, § 1731.

[2042] Ariz. Rev. Stat. Ann. § 13-1805(A)(4); Del. Code Ann. tit. 11, § 840(a)(5); Haw. Rev. Stat. Ann. § 708-833.5(c); Ill. Comp. Stat. Ann. 5/16-25(a)(3); N.H. Rev. Stat. Ann. § 637:3-a(II)(d); N.J. Stat. Ann. § 2C:20-11(b)(4); Tenn. Code Ann. § 39-14-146(a)(4); Utah Code Ann. § 76-6-602(3); S.C. Code Ann. § 16-13-110(A)(3); Neb. Rev. Stat. Ann. § 28-511.01(1)(c); Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577(3); 11 R.I. Gen. Laws Ann. § 11-41-20(b)(3); N.M. Stat. Ann. § 30-16-19(A)(4); W. Va. Code Ann. § 61-3A-1(a)(4); Ga. Code Ann. § 16-8-14(a)(3); Miss. Code Ann. § 97-23-93(2)(d).

from one container or package to another, without additional requirements for the container or package.[2043] These states may, however, have requirements for the property at issue, such that it be displayed for sale, like the RCC does.[2044] In seven of the remaining states, the statute prohibits transferring property that is displayed for sale or intended for sale in a container to any other container.[2045]

Second, regarding the bar on multiple convictions for the revised shoplifting offense and overlapping property offenses, a generalization to other jurisdictions for all the offenses would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offense similar to the revised shoplifting offense and other overlapping property offenses. For example, where the offense most like the revised theft offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences statute[2046] or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2047] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2048]

Specifically for shoplifting, in at least six[2049] of the twenty-eight states with shoplifting statutes, [2050] multiple convictions for these offenses are barred because they are alternative means of committing the same consolidated "theft" offense. All states[2051] that treat shoplifting as an evidentiary presumption for theft also effectively bar multiple punishments for shoplifting and theft because shoplifting is not a separate offense.

[2043] Ariz. Rev. Stat. Ann. § 13-1805(A)(4); Haw. Rev. Stat. Ann. § 708-833.5(c); Tenn. Code Ann. § 39-14-146(a)(4); Neb. Rev. Stat. Ann. § 28-511.01(1)(c); Vt. Stat. Ann. tit. 13, § 2577(3); 11 R.I. Gen. Laws Ann. § 11-41-20(b)(3); W. Va. Code Ann. § 61-3A-1(a)(4); Ga. Code Ann. § 16-8-14(a)(3); Miss. Code Ann. § 97-23-93(2)(d).

[2044] Ariz. Rev. Stat. Ann. § 13-1805(A) ("merchandise displayed for sale."); 11 R.I. Gen. Laws Ann. § 11-41-20(b)(3) ("any merchandise displayed, held, stored of offered for sale in a retail mercantile establishment.").

[2045] Ill. Comp. Stat. Ann. 5/16-25(a)(3); N.H. Rev. Stat. Ann. § 637:3-a(II)(d); N.J. Stat. Ann. § 2C:20-11(b)(4); Utah Code Ann. § 76-6-602(3); S.C. Code Ann. § 16-13-110(A)(3); Mass. Gen. Laws Ann. ch. 266, § 30A; N.M. Stat. Ann. § 30-16-19(A)(4);

[2046] D.C. Code § 22-3203.

[2047] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2048] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2049] Conn. Gen. Stat. Ann. §53a-119; Haw. Rev. Stat. ann. § 708-833.5; N.H. Rev. Stat. Ann. § 637:3-a(II); Tenn. Code Ann. § 39-14-146; Neb. Rev. Stat. Ann. § 28-511.01; Idaho Code Ann. § 18-4624.

[2050] Alaska Stat. Ann. § 11.46.220; Ariz. Rev. Stat. Ann. § 13-1805; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 840; Haw. Rev. Stat. Ann. § 708-833.5; Ill. Comp. Stat. Ann. 5/16-25; N.H. Rev. Stat. Ann. § 637:3-a; N.J. Stat. Ann. § 2C:20-11; 18 Pa. Stat. Ann. § 3929; Tenn. Code Ann. § 39-14-146; Utah Code Ann. § 76-6-602; Wis. Stat. Ann. § 943.50; Wyo. Stat. Ann. § 6-3-404; S.C. Code Ann. § 16-13-110; Neb. Rev. Stat. Ann. § 28-511.01; Mich. Comp. Laws Ann. § 703.356d; Cal. Penal Code § 459.5; Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577; 11 R.I. Gen. Laws Ann. § 11-41-20; N.M. Stat. Ann. § 30-16-19; Idaho Code Ann. § 18-4624; W. Va. Code Ann. § 61-3A-1; Va. Code Ann. § 18.2-103; Ga. Code Ann. § 16-8-14; Miss. Code Ann. § 97-23-93; Okla. Stat. Ann. tit. 21, § 1731.

[2051] *See, e.g.*, Ark. Code Ann. §5-36-116; Colo. Rev. Stat. Ann § 18-4-406; Mo. Ann. § 570.030.

Research was not conducted to determine whether shoplifting statutes in other jurisdictions are lesser included offenses of theft.

RCC § 22E-2105. UNLAWFUL CREATION OR POSSESSION OF A RECORDING.

National Legal Trends. *The revised UCPR's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, removing liability for proprietary information from the revised UCPR offense follows a clear national trend amongst the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[2052](hereafter "reformed code jurisdictions. Nearly all of the 29 reformed code jurisdictions have offenses that prohibit the unlawful creation or possession of specific sound and audiovisual recordings.[2053] None of them include proprietary information or intellectual property in their offenses concerning sound and audiovisual recordings. Neither the Model Penal Code (MPC) nor the Proposed Federal Criminal Code has commercial piracy offenses.

Second, applying a "knowingly" culpable mental state to the element in subsection (a)(3) that the defendant acted "without the effective consent of the owner" is consistent with many of the reformed code jurisdictions' commercial piracy statutes. It is difficult to generalize about the required mental state in other jurisdictions for this element due to the varying rules of construction between states. However, a majority of the reformed code jurisdictions with unlawful creation or possession of a recording statutes appear to apply a "knowingly" mental state to the element of without consent or its substantive equivalent.[2054]

Third, the UCPR statute increases the number and type of gradations for the offense. The current commercial piracy statute is a misdemeanor, regardless of the

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[2052] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[2053] Ala. Code § 13A-8-81; Alaska Stat. Ann. § 45.50.900; Ariz. Rev. Stat. Ann. § 13-3705; Ark. Code Ann. § 5-37-510; Colo. Rev. Stat. Ann. §§ 18-4-602,4-603, 4-604.3, 604.7; Conn. Gen. Stat. Ann. § 53-142b; Del. Code Ann. tit. 11, §§ 921, 921; Haw. Rev. Stat. Ann. § 482C-1, C-2, C-5; 720 Ill. Comp. Stat. Ann. 5/16-7; Kan. Stat. Ann. § 21-5806; Ky. Rev. Stat. Ann. § 434.445; Me. Rev. Stat. tit. 10, § 1261; Minn. Stat. Ann. § 325E.17; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-142, -143; N.H. Rev. Stat. Ann. § 352-A:2, -A:5; N.J. Stat. Ann. § 2C:21-21; N.Y. Penal Law §§ 275.05, .15, .20, .25, .30; N.D. Cent. Code Ann. § 47-21.1-02; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. §§ 164.865, .869; 18 Pa. Stat. Ann. § 4116; S.D. Codified Laws § 43-43A-2; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Utah Code Ann. § 13-10-4; Wash. Rev. Code Ann. §§ 19.25.020, .030; Wis. Stat. Ann. §§ 943.207, .208.

[2054] Ala. Code § 13A-8-81; Alaska Stat. Ann. § 45.50.900; Ariz. Rev. Stat. Ann. § 13-3705; Ark. Code Ann. § 5-37-510; Conn. Gen. Stat. Ann. § 53-142b; Haw. Rev. Stat. Ann. §§ 482C-1; -2; Me. Rev. Stat. tit. 10, § 1261; Minn. Stat. Ann. § 325E.17; N.J. Stat. Ann. § 2C:21-21; N.Y. Penal Law §§ 275.05, .15, .20, .25, .30; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. §§ 164.085; .869; 18 Pa. Stat. Ann. § 4116; S.D. Codified Laws § 43-43A-2; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Utah Code Ann. § 13-10-4; Wash. Rev. Code Ann. §§ 19.25.020, .030; Wis. Stat. Ann. §§ 943.207, .208.

number of the unlawful recordings at issue.[2055] A majority of the reformed code jurisdictions with commercial piracy statutes have more than one grade of the offense,[2056] like the revised UCPR offense. Due to the variety of methods by which the reformed code jurisdictions grade the commercial piracy offense, it is difficult to generalize about the most common number of gradations or the substance of the gradations.[2057] The threshold for the number of unlawful recordings at issue also varies amongst the states with reformed code jurisdictions, and in some states depends on the prohibited conduct.[2058] One hundred unlawful recordings, however, is a threshold in several of the reformed code jurisdictions that do not differentiate between sound recordings and audiovisual recordings, particularly in lower gradations in those jurisdictions.[2059]

Fourth, the addition of the forfeiture provision in subsection (f) of the revised UCPR also reflects national trends. A majority of the reformed jurisdictions with unlawful creation or possession of a recording statutes have similar provisions.[2060]

Fifth, regarding the aggregation of quantities of property in a single scheme or systematic course of conduct, the revised UCPR offense follows many jurisdictions[2061] which have statutes that closely follow the Model Penal Code (MPC)[2062] provision

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[2055] D.C. Code § 22-3214(d).

[2056] Ala. Code § 13A-8-86; Ariz. Rev. Stat. Ann. § 13-3705; Ark. Code Ann. § 5-37-510; Colo. Rev. Stat. Ann. §§ 18-4-602,4-603, 4-604.3, 604.7; Del. Code Ann. tit. 11, §§ 921, 921; 720 Ill. Comp. Stat. Ann. 5/16-7; Kan. Stat. Ann. § 21-5806; Ky. Rev. Stat. Ann. § 434.445; Me. Rev. Stat. tit. 10, § 1261; Minn. Stat. Ann. § 325E.201; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-142, -143; N.H. Rev. Stat. Ann. § 352-A:2, -A:5; N.J. Stat. Ann. § 2C:21-21; N.Y. Penal Law §§ 275.05, .15, .20, .25, .30; N.D. Cent. Code Ann. § 47-21.1-02; Or. Rev. Stat. Ann. §§ 164.865, .869; 18 Pa. Stat. Ann. § 4116; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Wash. Rev. Code Ann. §§ 19.25.020, .030; Wis. Stat. Ann. §§ 943.207, .208.

[2057] For example, several states grade, either in whole or in part, upon the type of prohibited conduct, such as whether the defendant transferred the sounds onto the unlawful recording or merely possessed the unlawful recording. *See, e.g.*, Ala. Code § 13A-8-86; Colo. Rev. Stat. Ann. § 18-4-602, -603, -604; Del. Code Ann. tit. 11, §§ 920, 921; Me. Rev. Stat. tit. 10, § 1261; Mont. Code Ann. §§ 30-13-142, -143; N.H. Rev. Stat. Ann. § 352-A:2. Several states differentiate in the gradations between sound recordings and audiovisual recordings, *e.g.*, Ariz. Rev. Stat. Ann. § 13-3705; 720 Ill. Comp. Stat. Ann. 5/16-7; N.J. Stat. Ann. § 2C:21-21; Wash. Rev. Code Ann. §§ 19.25.020, .030.

[2058] *See, e.g.*, Ala. Code § 13A-8-86 Colo. Rev. Stat. Ann. §§ 18-4-602,4-603, 4-604.3, 604.7; Ark. Code Ann. § 5-37-510; N.H. Rev. Stat. Ann. § 352-A:2, -A:5.

[2059] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3705; Conn. Gen. Stat. Ann. §§ 53-142b, -142f; Mo. Ann. Stat. § 570.225; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Wash. Rev. Code Ann. §§ 19.25.020, .030.

[2060] Ala. Code § 13A-8-4; Ariz. Rev. Stat. Ann. § 13-3705(F); Ark. Code Ann. § 5-37-510(g); Colo. Rev. Stat. Ann. §§ 18-4-606; 720 Ill. Comp. Stat. Ann. 5/16-7(i); Kan. Stat. Ann. § 21-5806(f); Ky. Rev. Stat. Ann. § 434.445(6); Mont. Code Ann. § 30-13-145; N.H. Rev. Stat. Ann. § 352-A:5(III); N.J. Stat. Ann. § 2C:21-21(e); N.D. Cent. Code Ann. § 47-21.1-04; 18 Pa. Stat. Ann. § 4116(f); Tenn. Code Ann. § 39-14-139(g); Tex. Bus. & Com. Code Ann. §§ 641.055; Wash. Rev. Code Ann. §§ 19.25.050.

[2061] Alaska Stat. Ann. § 11.46.980; Ark. Code Ann. § 5-36-102; Conn. Gen. Stat. Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md. Code Ann., Crim. Law § 7-103; Me. Rev. Stat. Ann. tit. 17-A, § 352; Neb. Rev. St. § 28-518; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N. D. Cent. Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; 18 Pa. Stat. Ann., § 3903; S. D. Cod. Laws § 22-30A-18; Tex. Penal Code § 31.09.

[2062] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or

authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[2063] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[2064]

Sixth, regarding the bar on multiple convictions for the revised UCPR offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised UCPR offense and other overlapping property offenses. For example, where the offense most like the revised UCPR is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2065] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2066] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2067]

National legal trends also support other changes to the revised UCPR offense. There is significant support for including audiovisual recordings for live performances in the scope of the revised UCPR offense. At least 18 of the reformed jurisdictions with offenses that prohibit the unlawful creation or possession of specific sound and audiovisual recordings include live performances in their statutes[2068] and a majority of these statutes include audiovisual recordings.[2069]

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course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[2063] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[2064] *See, e.g. Commonwealth v. Young*, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); *People v. Brown*, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[2065] D.C. Code § 22-3203.

[2066] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2067] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2068] Ala. Code § 13A-8-81(2); Ariz. Rev. Stat. Ann. § 13-3705(A)(5); Ark. Code Ann. § 5-37-510(b)(1); Colo. Rev. Stat. Ann. § 18-4-604.3; 720 Ill. Comp. Stat. Ann. 5/16-7(a)(4); Kan. Stat. Ann. § 21-5806(a)(1); Ky. Rev. Stat. Ann. § 434.445(2); Mo. Ann. Stat. § 570.225(1)(2); Mont. Code Ann. § 30-13-142(2); N.H. Rev. Stat. Ann. § 352-A:2(1)(b); N.J. Stat. Ann. § 2C:21-21(c)(3); N.Y. Penal Law §§ 275.15, .20, .25; N.D. Cent. Code Ann. § 47-21.1-02(2); Or. Rev. Stat. Ann. § 164.869; 18 Pa. Stat. Ann. § 4116(d.1); Tenn. Code Ann. § 39-14-139(c)(1); Tex. Bus. & Com. Code Ann. § 641.052; Wash. Rev. Code Ann. §§ 19.25.030; Wis. Stat. Ann. § 943.208.

[2069] Ala. Code § 13A-8-81(2); Ariz. Rev. Stat. Ann. § 13-3705(A)(5), (G)(2); Ark. Code Ann. § 5-37-510(b)(1), (a)(3); Colo. Rev. Stat. Ann. § 18-4-604.3; 720 Ill. Comp. Stat. Ann. 5/16-7(a)(4); Ky. Rev. Stat. Ann. § 434.445(2); Mo. Ann. Stat. § 570.225(1)(2); N.J. Stat. Ann. § 2C:21-21(c)(3); N.D. Cent. Code

Chapter 22. Fraud Offenses

RCC § 22E-2201. FRAUD.

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

A majority of states' criminal codes do not include a general fraud offense similar to the District's current fraud statute. While many states have narrow fraud offenses that cover specific types of frauds[2070], only six states have a separate, general fraud offense that broadly covers obtaining property by deception.[2071] Instead, most states, and the American Law Institute's Model Penal Code (MPC) criminalize general frauds as theft by deception.[2072] The RCC retains a separate fraud offense, but the revised fraud offense is similar to theft by deception offenses in other jurisdictions and the MPC.

Three of the substantive changes discussed above are consistent with the majority national trend of treating deceptive takings as a form of theft. First, limiting fraud to exclude causing a loss is consistent with national trends, as theft requires that the accused actually take, obtain, transfer, or exercise control over property; merely causing loss does not suffice.[2073] Second, eliminating the inchoate version of fraud that is currently codified as second degree fraud is consistent with national trends, as theft requires that the accused actually take, obtain, transfer, or exercise control over property. Unsuccessful attempts to obtain property are not criminalized as completed offenses. Third,

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Ann. § 47-21.1-02(2); Or. Rev. Stat. Ann. §§ 164.865(10), .869; Tenn. Code Ann. § 39-14-139(c)(1), (a)(6); Tex. Bus. & Com. Code Ann. §§ 641.001(4), .052; Wash. Rev. Code Ann. §§ 19.25.010(4), .25.030; Wis. Stat. Ann. § 943.208.

[2070] Many states have fraud offenses that only apply to specific situations. For example, Iowa's fraud statute specifies very specific types of frauds, such as "for the purpose of soliciting assistance, contributions, or other thing of value, falsely represents oneself to be a veteran of the armed forces of the United States, or a member of any fraternal, religious, charitable, or veterans organization, or any pretended organization of a similar nature, or to be acting on behalf of such person or organization." Iowa Code Ann. § 714.8.

[2071] Alaska Stat. Ann. § 11.46.600 ; Ariz. Rev. Stat. Ann. § 13-2310; Fla. Stat. Ann. § 817.034; Mich. Comp. Laws Ann. § 750.218; N.M. Stat. Ann. § 30-16-6 ; N.Y. Penal Law § 190.65. Colorado also has an offense called "Charitable Fraud", though it is defined broadly enough that it could arguably be counted as a general fraud offense. Colo. Rev. Stat. Ann. § 6-16-111.

[2072] MPC § 223.3.

[2073] *E.g.,* Haw. Rev. Stat. Ann. § 708-830 (person commits theft if that person "obtained or exerts control over property;" or "obtains services[.]"; N.Y. Penal Law § 155.05 (person commits theft when that person "wrongfully takes, obtains, or withholds such property from an owner"; Tex. Penal Code Ann. § 31.03 (person commits theft if he "unlawfully appropriates property with intent to deprive the owner of property); MPC § 223.3. Theft by Unlawful Taking or Disposition (requiring that person "takes, or exercise unlawful control over, moveable property of another[.]" *See also,* Lafave, Wayne. 3 SUBST. CRIM. L. § 19.3 (2d ed.) ("Commission of the crime of larceny requires a taking (caption) and carrying away (asportation) of another's property.")

eliminating the "scheme or systematic course of conduct" element is also consistent with national trends, as theft does not require a "scheme or systematic course of conduct."[2074]

Regarding the bar on multiple convictions for the revised fraud offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised fraud offense and other overlapping property offenses. For example, where the offense most like the revised fraud is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2075] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2076] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2077]

Increasing the number of penalty grades for fraud reflects national trends. Nearly all of the 29 states[2078] that have comprehensively reformed criminal codes influenced by the MPC and have a general part[2079] (hereafter "reformed code jurisdictions"), as well as the MPC[2080] and Proposed Federal Criminal Code[2081] have more than two penalty grades for fraud or theft by deception.

The revised fraud statute's use of a new definition of deception, under RCC § 22A-2001 (8), is broadly supported by national legal trends. Of the 29 reformed criminal code jurisdictions, fifteen states,[2082] and the MPC[2083] include a definition of deception. The deception definition in the revised fraud offense is modeled on, and largely consistent with, the definitions adopted in these fifteen states and the MPC. Relying on a statutory deception definition, instead of a vague "intent to defraud" element is also

[2074] *E.g.*, Haw. Rev. Stat. Ann. § 708-830; N.Y. Penal Law § 155.05; Tex. Penal Code Ann. § 31.03; MPC § 223.3.
[2075] D.C. Code § 22-3203.
[2076] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[2077] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[2078] Only two of the 29 reformed code jurisdictions use two or fewer penalty grades for either fraud or theft. Alaska Stat. Ann. § 11.46.600; Ariz. Rev. Stat. Ann. § 13-2310; N.Y. Penal Law § 190.65.
[2079] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[2080] MPC § 223.1(2) (establishing 3 grades of theft).
[2081] Proposed Federal Criminal Code § 1735 (establishing 5 grades of theft).
[2082] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 843; Del. Code Ann. tit. 11, § 844; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401; Wash. Rev. Code Ann. § 9A.56.010.
[2083] MPC § 223.3.

consistent with national legal trends. Of the fifteen states that statutorily define deception, only two also require an intent to defraud.[2084]

Requiring that the defendant knowingly deceive the other is consistent with law in the fifteen reformed code jurisdictions states that have statutorily defined "deception." Eleven of these states require that the defendant acted "knowingly,"[2085] "intentionally,"[2086] or "purposely"[2087]; two states require "intent to defraud"[2088]; and one state requires that the defendant made a representation which he or she "does not believe to be true"[2089] Only one of these states does not specify a mental state as to deception.[2090] However, requiring a knowing mental state for fraud departs from federal courts' interpretation of analogous federal fraud statutes.[2091] Federal courts have held that under the federal mail and wire fraud statutes, a person commits fraud by either "knowingly making false representations" or by making statements "with reckless indifference to their truth or falsity."[2092]

In some respects the RCC's deception definition diverges from the majority approach amongst the fifteen states and the MPC. For instance, unlike the MPC definition, the deception definition requires that the false impression be as to a material fact. Only three of the fifteen states with statutory deception definitions also require materiality, [2093] though traditionally, fraud and false pretenses required a

[2084] Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3. See also, N.Y. Penal Law § 190.65 ("A person is guilty of a scheme to defraud in the first degree when he or she: (a) engages in a scheme or systematic ongoing course of conduct with intent to defraud ten or more persons or to obtain property from ten or more persons by false or fraudulent pretenses, representations or promises, and so obtains property from one or more such persons[.]"); *See also*, 18 U.S.C. 1341("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.").

[2085] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ohio Rev. Code Ann. § 2913.01; Wash. Rev. Code Ann. § 9A.56.010

[2086] Del. Code Ann. tit. 11, § 843; Me. Rev. Stat. tit. 17-A, § 354; 18 Pa. Stat. Ann. § 3922; Utah Code Ann. § 76-6-401

[2087] N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4

[2088] Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.

[2089] Mo. Ann. Stat. § 570.010.

[2090] Tex. Penal Code Ann. § 31.01

[2091] *Williams v. United States*, 979 F.2d 844 (1st Cir. 1992); *United States v. Hannigan*, 27 F.3d 890, 892 n.1 (3d Cir. 1994); *United States v. Wells*, 163 F.3d 889, 898 (4th Cir. 1998); *United States v. Hathaway*, 798 F.2d 902, 909 (6th Cir. 1986); *United States v. Cohen*, 516 F.2d 1358, 1367 (8th Cir. 1975); *United States v. Munoz*, 233 F.3d 1117, 1136 (9th Cir. 2000); *United States v. Welch*, 327 F.3d 1081, 1105 (10th Cir. 2003); *United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986).

[2092] *United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986).

[2093] Mo. Ann. Stat. § 570.010 ; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

misrepresentation as to a material fact.[2094] Although the MPC and most states do not explicitly require materiality, the MPC and six states[2095] require that the false impression must be of "pecuniary significance."[2096] The materiality requirement may be both broader and narrower than the "pecuniary significance" requirement. Materiality may be broader in that it could include false impressions that would affect a reasonable person's decision, even without relating to pecuniary matters. The materiality requirement may be narrower however, by excluding false impressions of pecuniary significance, that are nonetheless so minor they would not affect a reasonable person's decision.

The RCC deception definition also does not include false impressions as to the actor's state of mind (except as it relates to intent to perform a promise). The MPC[2097] and nine[2098] of the fifteen states with deception definitions, by contrast, include false impressions as to the actor's state of mind. A false impression as to the defendant's state of mind can constitute deception under the RCC definition to the extent that the false impression as to the defendant's state of mind is used to create a false impression about some other material fact.[2099]

The RCC deception definition is consistent with the MPC in including a failure to correct a false impression when the defendant has a fiduciary duty or is in any other confidential relationship with the other person from whom the defendant obtains property. However, most states with statutory deception definitions have not followed this approach. Only three states[2100] with statutory deception definitions have criminalize failure to correct a false impression when the actor has a legal duty to do so.

RCC § 22E-2202. PAYMENT CARD FRAUD.

Relation to National Legal Trends. The changes to the payment card fraud statute discussed above are broadly supported by national legal trends.

First, although increasing the number of penalty gradations follows a majority of jurisdictions nationwide, only five jurisdictions use as many as five penalty grades for

[2094] *Neder v. United States*, 527 U.S. 1, 22, (1999) (holing that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes"); *See generally*, Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1 (1998); LaFave, Wayne. 3 Subst. Crim. L. § 19.7.

[2095] Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.

[2096] MPC § 223.3.

[2097] MPC § 223.3.

[2098] Alaska Stat. Ann. § 11.81.900; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4 ; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085 ; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3.

[2099] For example, if a salesman says "in my opinion, this cold coin is worth at least $1,000", when in fact the salesman does not hold that opinion, but lies about his opinion to deceive a buyer into believing the coin is worth that much, he could still be found guilty of fraud.

[2100] Ala. Code § 13A-8-1; N.H. Rev. Stat. Ann. § 637:4; S.D. Codified Laws § 22-30A-3.

payment card fraud.[2101] Of those jurisdictions with fewer than five grades, a majority of jurisdictions use three[2102] or four[2103] penalty grades.

Second, regarding the bar on multiple convictions for the revised payment card fraud offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised payment card fraud offense and other overlapping property offenses. For example, where the offense most like the revised payment card fraud is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.[2104] Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2105] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2106] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2107]

In addition, it should be noted that most jurisdictions retain an intent to defraud clause in their comparable statutes, although several other jurisdictions have eliminated it.[2108]

Requiring knowledge that the card was stolen, forged, revoked, canceled, issued to another and was used without that person's authorization, or that the card was not actually issued, is consistent with payment card fraud statutes in other jurisdictions[2109], as well as the Model Penal Code.[2110]

Also, not explicitly criminalizing the use of a mutilated or altered payment card is broadly supported by law in other jurisdictions. A majority of jurisdictions with

[2101] Colo. Rev. Stat. Ann. § 18-5-702; Minn. Stat. Ann. § 609.821; Minn. Stat. Ann. § 609.821; N.M. Stat. Ann. § 30-16-33; Tenn. Code Ann. § 39-14-118, Tenn. Code Ann. § 39-14-105.

[2102] Alaska Stat. Ann. § 11.46.285; Ariz. Rev. Stat. Ann. § 13-2105; Del. Code Ann. tit. 11, § 903; Iowa Code Ann. § 715A.6; Kan. Stat. Ann. § 21-5828; Ky. Rev. Stat. Ann. § 434.650; N.H. Rev. Stat. Ann. § 638:5; N.D. Cent. Code Ann. § 12.1-23-11.

[2103] Ark. Code Ann. § 5-37-207; Utah Code Ann. § 76-6-506.5; Wis. Stat. Ann. § 943.41.

[2104] *Compare*, *State v. Bozelko*, 987 A.2d 1102, 1116 (Conn. App. Ct. 2010) (holding that convictions for identity theft and illegal use of a credit card based on a single course of conduct are permissible), with *State v. Thompson*, 2014 WL 265491 at 4 (holding that convictions for identity theft and credit card fraud merge when arising from the same act).

[2105] D.C. Code § 22-3203.

[2106] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2107] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2108] Ala. Code § 13A-9-14; Colo. Rev. Stat. Ann. § 18-5-702; Del. Code Ann. tit. 11, § 903; Iowa Code Ann. § 715A.6; Minn. Stat. Ann. § 609.821; Mo. Ann. Stat. § 570.130; N.H. Rev. Stat. Ann. § 638:5.

[2109] E.g., Ala. Code § 13A-9-14; Ariz. Rev. Stat. Ann. § 13-2105; Ark. Code Ann. § 5-37-207; Colo. Rev. Stat. Ann. § 18-5-702; Del. Code Ann. tit. 11, § 903; Ind. Code Ann. § 35-43-5-4; Iowa Code Ann. § 715A.6; Mo. Ann. Stat. § 570.130; Mont. Code Ann. § 45-6-317; N.H. Rev. Stat. Ann. § 638:5; N.M. Stat. Ann. § 30-16-33.

[2110] Model Penal Code § 224.6.

reformed criminal codes,[2111] as well as American Law Institute's Model Penal Code[2112], do not explicitly criminalize use of a mutilated or altered payment card.

Criminalizing use of a payment card issued or provided by an employer or contractor for the person's own purposes is consistent with payment card fraud statutes in other jurisdictions. Many jurisdictions include language that criminalizes any use of a payment card that is unauthorized by the issuer.[2113]

RCC § 22E-2203. CHECK FRAUD.

Relation to National Legal Trends. *Two of the revised check fraud offense's above-mentioned substantive changes to current District law have mixed support in national legal trends.*

First, requiring for check fraud that the accused actually pays for or obtains property of another, appears to be a minority practice in other jurisdictions. Of the 34 states that have adopted a new criminal code influenced by the Model Penal Code (MPC)[2114], only four jurisdictions require that the defendant obtained property of another.[2115] The remaining states, and the MPC[2116] do not require by statute that the defendant actually obtain property. Under the MPC check fraud statute[2117], and many other jurisdictions' statutes[2118], a person need only "issue" or "pass" a check. Issuing or passing a check can involve merely making or delivering a check.[2119] However, case law in many jurisdictions have interpreted analogous check fraud statutes to require that the accused actually obtained property in exchange for the fraudulent check,[2120] complicating an exact analysis of how many jurisdictions require obtaining property by use of the bad check.

[2111] Ala. Code § 13A-9-14; Alaska Stat. Ann. § 11.46.285; Ariz. Rev. Stat. Ann. § 13-2102; Ark. Code Ann. § 5-37-207; Colo. Rev. Stat. Ann. § 18-5-702; Conn. Gen. Stat. Ann. § 53a-128d; Del. Code Ann. tit. 11, § 903; Fla. Stat. Ann. § 817.61; Ga. Code Ann. § 16-9-33; Haw. Rev. Stat. Ann. § 708-8100; Ind. Code Ann. § 35-43-5-4; Iowa Code Ann. § 715A.6; Ky. Rev. Stat. Ann. § 434.650; Minn. Stat. Ann. § 609.821; Mo. Ann. Stat. § 570.130 (explicitly criminalizes use of a forged payment card, but not of a mutilated or altered card); N.H. Rev. Stat. Ann. § 638:5; N.M. Stat. Ann. § 30-16-33.

[2112] MPC § 224.6.

[2113] *E.g.*, Ala. Code § 13A-9-14; Alaska Stat. Ann. § 11.46.285; Ark. Code Ann. § 5-37-207; Del. Code Ann. tit. 11, § 903; Iowa Code Ann. § 715A.6; Mo. Ann. Stat. § 570.130; N.H. Rev. Stat. Ann. § 638:5.

[2114] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2115] ALA. CODE § 13A-9-13.1. KY. REV. STAT. ANN. § 514.040 (check fraud is a form of theft); N.M. STAT. ANN. § 30-36-4, W. VA. CODE ANN. § 61-3-39.

[2116] MPC § 224.5 (requiring that a person "issues or passes a check", but obtaining property not required).

[2117] *Id.*

[2118] *E.g.*, Alaska Stat. Ann. § 11.46.280; Ariz. Rev. Stat. Ann. § 13-1807; Me. Rev. Stat. tit. 17-A, § 708.

[2119] *E.g.*, Colo. Rev. Stat. Ann. § 18-5-205 (1)(e) ("A person issues a check when he makes, draws, delivers, or passes it or causes it to be made, drawn, delivered, or passed.").

[2120] *Com. v. Goren*, 72 Mass. App. Ct. 678, 682–83, 893 N.E.2d 786, 789–90 (2008) (noting that most states' statutes require that property or something of value be obtained in exchange for a fraudulent check, and cases decided under substantially all such statutes have concluded that the statute does not apply to a check tendered in payment of an antecedent debt) (internal citations omitted).

Second, including a permissive inference is consistent with a slight majority of jurisdictions with reformed theft offenses, as well as the MPC.[2121] Almost all states with reformed criminal codes have check fraud statutes allow some form of inference of wrongful knowledge or intent if a defendant fails to make payment after being notified that the check was not honored. Of these states, a slight majority use permissive inference language similar to that in the revised statutes[2122], while a minority refer to "prima facie evidence" [2123], similar to language in the current statute.

Third, the revised statute uses two penalty grades, but changes the value threshold for first degree check fraud from $1,000 to $2,500. Of the 34 states with codes influenced by the MPC, a slight majority use three or more penalty grades.[2124] In most jurisdictions that determine penalty grades based on value[2125], the minimum value threshold for felony check fraud is $1,000 or less,[2126] and the minimum value threshold for the highest penalty grade is $2,000 or more.[2127] However, there is considerable variation in the minimum value threshold required for the highest penalty grade, ranging from $25[2128], to $500,000.[2129]

[2121] MPC § 224.5.

[2122] Ark. Code Ann. § 5-37-307; Colo. Rev. Stat. Ann. § 18-5-205; Conn. Gen. Stat. Ann. § 53a-128; 720 Ill. Comp. Stat. Ann. 5/17-1; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; Neb. Rev. Stat. Ann. § 28-611; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.11; 18 Pa. Stat. Ann. § 4105; Tenn. Code Ann. § 39-14-121; Tex. Penal Code Ann. § 32.41.

[2123] Del. Code Ann. tit. 11, § 901; Fla. Stat. Ann. § 832.07; Ga. Code Ann. § 16-9-20; Haw. Rev. Stat. Ann. § 708-857; Ind. Code Ann. § 35-43-5-5; Iowa Code Ann. § 714.1; Kan. Stat. Ann. § 21-5821; Mont. Code Ann. § 45-6-316; N.M. Stat. Ann. § 30-36-7; N.Y. Penal Law § 190.10; Or. Rev. Stat. Ann. § 165.065; S.D. Codified Laws § 22-30A-27.

[2124] Alaska Stat. Ann. § 11.46.280; Colo. Rev. Stat. Ann. § 18-5-205; Conn. Gen. Stat. Ann. § 53a-128; Ga. Code Ann. § 16-9-20; Iowa Code Ann. § 714.1; Ind. Code Ann. § 35-43-5-12; Kan. Stat. Ann. § 21-5821; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; N.D. Cent. Code Ann. § 6-08-16; Neb. Rev. Stat. Ann. § 28-611; N.H. Rev. Stat. Ann. § 638:4; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.11; 18 Pa. Stat. Ann. § 4105; S.D. Codified Laws § 22-30A-25; Tenn. Code Ann. § 39-14-121; Utah Code Ann. § 76-6-505.

[2125] Two states do not grade their analogous check fraud offenses based on the value of the check. Oregon applies felony liability if the accused has one prior check fraud conviction in the prior 12 months. OR. REV. STAT. ANN. § 165.065. Texas applies felony liability if the fraudulent check was used for child support. TEX. PENAL CODE ANN. § 32.41

[2126] Alaska Stat. Ann. § 11.46.280; Fla. Stat. Ann. § 832.05, Iowa Code Ann. §§ 714.1-714.2, 720 Ill. Comp. Stat. Ann. 5/17-1, Ind. Code Ann. § 35-43-5-12, Kan. Stat. Ann. § 21-5821, Ky. Rev. Stat. Ann. § 514.040, Me. Rev. Stat. tit. 17-A, § 708, Minn. Stat. Ann. § 609.535, Mo. Ann. Stat. § 570.120, N.D. Cent. Code Ann. § 6-08-16, N.H. Rev. Stat. Ann. § 638:4, N.J. Stat. Ann. § 2C:21-5, N.M. Stat. Ann. § 30-36-5, Ohio Rev. Code Ann. § 2913.11, S.D. Codified Laws §§ 22-30A-25, 22-30A-17, Tenn. Code Ann. § 39-14-121, Wash. Rev. Code Ann. § 9A.56.060, W. Va. Code Ann. § 61-3-39, Wyo. Stat. Ann. § 6-3-702.

[2127] Alaska Stat. Ann. § 11.46.280; Ala. Code § 13A-9-13.1; Ark. Code Ann. § 5-37-302; Ariz. Rev. Stat. Ann. § 13-1807; Colo. Rev. Stat. Ann. § 18-5-205; Conn. Gen. Stat. Ann. § 53a-128; Iowa Code Ann. § 714.1; Ind. Code Ann. § 35-43-5-12; Kan. Stat. Ann. § 21-5821; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Neb. Rev. Stat. Ann. § 28-611; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.01; 18 Pa. Stat. Ann. § 4105; S.D. Codified Laws § 22-30A-24; Tenn. Code Ann. § 39-14-121; Utah Code Ann. § 76-6-505.

[2128] N.M. Stat. Ann. § 30-36-5.

[2129] S.D. Codified Laws § 22-30A-24, S.D. Codified Laws § 22-30A-17.

Fourth, regarding the aggregation of values in a single scheme or systematic course of conduct, the revised check fraud offense follows many jurisdictions[2130] which have statutes that closely follow the Model Penal Code (MPC)[2131] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[2132] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[2133]

Fifth, regarding the bar on multiple convictions for the revised check fraud offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised check fraud offense and other overlapping property offenses. For example, where the offense most like the revised check fraud offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2134] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2135] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2136]

In addition, eliminating the intent to defraud element in check fraud follows a strong majority of jurisdictions with reformed criminal codes. Most jurisdictions with reformed criminal codes[2137] and the American Law Institute's Model Penal Code[2138]

[2130] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[2131] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[2132] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[2133] See, e.g. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[2134] D.C. Code § 22-3203.

[2135] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2136] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2137] Ala. Code § 13A-9-13.1; Alaska Stat. Ann. § 11.46.280; Ark. Code Ann. § 5-37-307; Conn. Gen. Stat. Ann. § 53a-128; Del. Code Ann. tit. 11, § 900; Fla. Stat. Ann. § 832.05; Ga. Code Ann. § 16-9-20; Haw. Rev. Stat. Ann. § 708-857; 720 Ill. Comp. Stat. Ann. 5/17-1; Ind. Code Ann. § 35-43-5-12; Ky. Rev. Stat.

(MPC) omit any reference to an "intent to defraud", and instead simply require that the defendant knew that the check would not be honored by the drawee. [2139]

RCC § 22E-2204. FORGERY.

Relation to National Legal Trends. *The revised forgery offense's above-mentioned substantive changes to current District law has mixed support in national legal trends, with the exception of deleting the "intent to defraud" element of forgery.*

First, combining forgery and uttering in a single statute follows a strong majority of jurisdictions nationwide. A majority of the 34 states that have adopted a new criminal code influenced by the Model Penal Code (MPC)[2140] and the MPC[2141] include both forgery and uttering in a single forgery statute. [2142]

Second, replacing the intent to defraud element with an intent to obtain property of another by deception the revised offense does not follow the majority trend,[2143] or the MPC.[2144] However, there are some other jurisdictions with forgery statutes that omit an intent to defraud element.[2145] In addition, the Proposed Federal Criminal Code's forgery statute also omits an intent to defraud element.[2146]

Third, omitting payroll checks, regardless of value, from first degree forgery follows a strong majority of jurisdictions nationwide. Every one of the 34 states that

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Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; Mont. Code Ann. § 45-6-316; Neb. Rev. Stat. Ann. § 28-611; N.J. Stat. Ann. § 2C:21-5; N.Y. Penal Law § 190.05; N.D. Cent. Code Ann. § 6-08-16; Or. Rev. Stat. Ann. § 165.065; 18 Pa. Stat. Ann. § 4105; Tex. Penal Code Ann. § 32.41; Utah Code Ann. § 76-6-505.

[2138] MPC § 224.5.

[2139] Ala. Code § 13A-9-13.1; Alaska Stat. Ann. § 11.46.280; Del. Code Ann. tit. 11, § 900; Ga. Code Ann. § 16-9-20; Haw. Rev. Stat. Ann. § 708-857; 720 Ill. Comp. Stat. Ann. 5/17-1; Ind. Code Ann. § 35-43-5-12; Iowa Code Ann. § 714.1; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; Mo. Ann. Stat. § 570.120; Mont. Code Ann. § 45-6-316; N.H. Rev. Stat. Ann. § 638:4; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.11; Or. Rev. Stat. Ann. § 165.065; 18 Pa. Stat. Ann. § 4105; Utah Code Ann. § 76-6-505.

[2140] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2141] MPC § 224.1.

[2142] Alaska Stat. Ann. § 11.46.510; Ark. Code Ann. § 5-37-201; Ariz. Rev. Stat. Ann. § 13-2002; Colo. Rev. Stat. Ann. § 18-5-102; Conn. Gen. Stat. Ann. § 53a-139; Ga. Code Ann. § 16-9-1; Haw. Rev. Stat. Ann. § 708-851; 720 Ill. Comp. Stat. Ann. 5/17-3; Ind. Code Ann. § 35-43-5-2; Iowa Code Ann. § 715A.2; Kan. Stat. Ann. § 21-5823; Me. Rev. Stat. tit. 17-A, § 703; Mo. Ann. Stat. § 570.090 ; Mont. Code Ann. § 45-6-325; Neb. Rev. Stat. Ann. § 28-602; N.H. Rev. Stat. Ann. § 638:1; N.J. Stat. Ann. § 2C:21-1; N.M. Stat. Ann. § 30-16-10; N.D. Cent. Code Ann. § 12.1-24-01; Ohio Rev. Code Ann. § 2913.31; Or. Rev. Stat. Ann. § 165.007; 18 Pa. Stat. Ann. § 4101; Tex. Penal Code Ann. § 32.21; Utah Code Ann. § 76-6-501; Va. Code Ann. § 18.2-172; Wash. Rev. Code Ann. § 9A.60.020; Wyo. Stat. Ann. § 6-3-602.

[2143] *E.g.* Alaska Stat. Ann. § 11.46.500, Fla. Stat. Ann. § 831.01, Haw. Rev. Stat. Ann. § 708-851.

[2144] MPC § 224.1 (requiring a "purpose to defraud or injure anyone").

[2145] Neb. Rev. Stat. Ann. § 28-602, N.D. Cent. Code Ann. § 12.1-24-01, Va. Code Ann. § 18.2-168.

[2146] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS § 1751 (omitting intent to defraud, but requiring "intent to deceive or harm the government or another person").

have adopted a new criminal code influenced by the MPC[2147], as well as the MPC's forgery offense[2148] does not treat forgery of payroll checks differently from ordinary checks for penalty purposes. The Proposed Federal Criminal Code also does not treat forgeries of payroll checks differently than forgeries of ordinary checks.[2149]

Fourth, regarding the aggregation of values in a single scheme or systematic course of conduct, the revised forgery offense follows many jurisdictions[2150] which have statutes that closely follow the Model Penal Code (MPC)[2151] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[2152] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[2153]

Fifth, regarding the bar on multiple convictions for the revised forgery offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised forgery offense and other

[2147]Ala. Code § 13A-9-2; Alaska Stat. Ann. § 11.46.500; Ark. Code Ann. § 5-37-201; Ariz. Rev. Stat. Ann. § 13-2001; Colo. Rev. Stat. Ann. § 18-5-102; Conn. Gen. Stat. Ann. § 53a-138; Del. Code Ann. tit. 11, § 861; Fla. Stat. Ann. § 831.01; Ga. Code Ann. § 16-9-1; Haw. Rev. Stat. Ann. § 708-853; 720 Ill. Comp. Stat. Ann. 5/17-3; Ind. Code Ann. § 35-43-5-2; Iowa Code Ann. § 715A.2; Kan. Stat. Ann. § 21-5823; Ky. Rev. Stat. Ann. § 516.020; Me. Rev. Stat. tit. 17-A, § 703; Minn. Stat. Ann. § 609.625; Mo. Ann. Stat. § 570.090; Mont. Code Ann. § 45-6-325; Neb. Rev. Stat. Ann. § 28-603; N.H. Rev. Stat. Ann. § 638:1; N.J. Stat. Ann. § 2C:21-1; N.M. Stat. Ann. § 30-16-10; N.Y. Penal Law § 170.10; N.D. Cent. Code Ann. § 12.1-24-01; Ohio Rev. Code Ann. § 2913.31; Or. Rev. Stat. Ann. § 165.013; 18 Pa. Stat. Ann. § 4101; S.D. Codified Laws § 22-39-36; Tex. Penal Code Ann. § 32.21; Utah Code Ann. § 76-6-501; Va. Code Ann. § 18.2-172; Wash. Rev. Code Ann. § 9A.60.020; Wyo. Stat. Ann. § 6-3-602.

[2148] MPC § 224.1. It is worth noting however that the MPC, and many reformed jurisdictions, do grade forgery in part based on whether the instrument was "part of an issue of stock, bonds, or other instruments representing interests in or claims against any property or enterprise." *E.g.*, ALASKA STAT. ANN. § 11.46.500. Arguably, this language could include payroll checks, but not ordinary checks, in that a payroll check is an instrument representing a claim against property. However, the MPC commentary does not indicate that this language would necessarily include payroll checks.

[2149] Proposed Federal Criminal Code § 1751.

[2150] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[2151] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[2152] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[2153] *See, e.g.* Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

overlapping property offenses. For example, where the offense most like the revised forgery is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.[2154] Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2155] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2156] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2157]

In addition, the clarificatory change defining forgery to include altering an instrument without authorization, or making or completing an instrument so that it appears to be the act of another who did not authorize that act follows a strong majority of jurisdictions nationwide. The MPC[2158], and a large majority of jurisdictions' forgery statutes specify that altering, making, or completing instruments must be done without authorization.[2159]

RCC § 22E-2205. IDENTITY THEFT.

Relations to National Legal Trends. *The revised identity theft offenses' above-mentioned substantive changes to current District law are broadly supported by national legal trends, with the exception of criminalizing intent to use another person's identifying information to avoid payment due for any property, fines, or fees by deception, and increasing the number of penalty grades.*

First, revising the identity theft offense to no longer cover possession of identifying information with intent to use identifying information to falsely identify himself or herself at an arrest, to facilitate or conceal his or her commission of a crime, or to avoid detection, apprehension or prosecution for a crime is consistent with national legal norms. Of the 34 states that have adopted a new criminal code influenced by the Model Penal Code (MPC)[2160], only two explicitly criminalize possession of identifying

[2154] *E.g.*, *State v. Baldwin*, 78 P.3d 1005, 1010 (Wash. 2003) (en banc) (holding that convictions for forgery and identity theft do not merge, even when arising from the same act).
[2155] D.C. Code § 22-3203.
[2156] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[2157] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[2158] MPC § 224.1.
[2159] Ala. Code § 13A-9-1; Alaska Stat. Ann. § 11.46.580; Ark. Code Ann. § 5-37-201; Ariz. Rev. Stat. Ann. § 13-2001; Colo. Rev. Stat. Ann. § 18-5-101; Conn. Gen. Stat. Ann. § 53a-137; Del. Code Ann. tit. 11, § 861; Haw. Rev. Stat. Ann. § 708-850; Iowa Code Ann. § 715A.2; Kan. Stat. Ann. § 21-5823; Ky. Rev. Stat. Ann. § 516.010; Me. Rev. Stat. tit. 17-A, § 701; Mont. Code Ann. § 45-6-325; Neb. Rev. Stat. Ann. § 28-601; N.H. Rev. Stat. Ann. § 638:1; N.J. Stat. Ann. § 2C:21-1; N.D. Cent. Code Ann. § 12.1-24-04; Ohio Rev. Code Ann. § 2913.31; Or. Rev. Stat. Ann. § 165.002; Utah Code Ann. § 76-6-501; Wash. Rev. Code Ann. § 9A.60.010; Wyo. Stat. Ann. § 6-3-602.
[2160] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

information for these purposes,[2161] while fourteen others more broadly criminalize possession of identifying information with intent to commit a crime, or for any unlawful purpose.[2162]

Second, broadening identity theft to include use of another person's identifying information to avoid payment, does not follow clear national norms, though it is unclear whether the District would be an outlier in criminalizing this use of identifying information. Of the 34 states that have adopted a new criminal code influenced by the MPC, only two have identity theft statutes that explicitly include intent to avoid payment.[2163] However, many other jurisdictions' identity theft statutes are likely broad enough to criminalize using identifying information to avoid payments. Many jurisdictions criminalize using identifying information either for an "unlawful purpose,"[2164] with intent "to cause loss,"[2165] to "subject [a] person to economic . . . harm";[2166] or to generally "assume another person's identity."[2167]

Third, increasing the number of penalty grades to five also does not follow the majority practice in other jurisdictions. Of the 34 states that have adopted a new criminal code influenced by the MPC, five states' identity theft offenses use five grades[2168], and a slight majority use two or one grade.[2169]

Fourth, regarding the bar on multiple convictions for the revised identity theft offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised identity theft offense and other overlapping property offenses. For example, where the offense most like the revised identity theft offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2170] statute or the proposed RCC § 22A-2003 in other jurisdictions

[2161] Ky. Rev. Stat. Ann. § 514.160, N.J. Stat. Ann. § 2C:21-17.

[2162] Alaska Stat. Ann. § 11.46.570, Ariz. Rev. Stat. Ann. § 13-2008, Del. Code Ann. tit. 11, § 854, Haw. Rev. Stat. Ann. §§ 708-839.6-839.8, 720 Ill. Comp. Stat. Ann. 5/16-30, Minn. Stat. Ann. § 609.527, Mont. Code Ann. § 45-6-332, Neb. Rev. Stat. Ann. § 28-639, N.M. Stat. Ann. § 30-16-24.1, N.D. Cent. Code Ann. § 12.1-23-11, 18 Pa. Stat. Ann. § 4120, Tenn. Code Ann. § 39-14-150, Wash. Rev. Code Ann. § 9.35.020, Wyo. Stat. Ann. § 6-3-901.

[2163] Fla. Stat. Ann. § 817.568; N.J. Stat. Ann. § 2C:21-17.

[2164] Minn. Stat. Ann. § 609.527; Mont. Code Ann. § 45-6-332; Neb. Rev. Stat. Ann. § 28-639; 18 Pa. Stat. Ann. § 4120; Tenn. Code Ann. § 39-14-150; Wyo. Stat. Ann. § 6-3-901.

[2165] Neb. Rev. Stat. Ann. § 28-639.

[2166] Kan. Stat. Ann. § 21-6107.

[2167] Ind. Code Ann. § 35-43-5-3.5; N.H. Rev. Stat. Ann. § 638:26; Ohio Rev. Code Ann. § 2913.49.

[2168] 720 Ill. Comp. Stat. Ann. 5/16-30; Minn. Stat. Ann. § 609.527; Mo. Ann. Stat. § 570.223.

[2169] Alaska Stat. Ann. § 11.46.565 ; Ariz. Rev. Stat. Ann. § 13-2008; Ark. Code Ann. § 5-37-227; Ariz. Rev. Stat. Ann. § 13-2008; Colo. Rev. Stat. Ann. § 18-5-902; Del. Code Ann. tit. 11, § 854; Ga. Code Ann. § 16-9-121, Ga. Code Ann. § 16-9-121.1; Idaho Code Ann. § 18-3126; Ind. Code Ann. § 35-43-5-3.5; Kan. Stat. Ann. § 21-6107; Ky. Rev. Stat. Ann. § 514.160; Me. Rev. Stat. tit. 17-A, § 905-A; N.D. Cent. Code Ann. § 12.1-23-11; N.H. Rev. Stat. Ann. § 638:26; N.M. Stat. Ann. § 30-16-24.1; Or. Rev. Stat. Ann. § 165.800, Or. Rev. Stat. Ann. § 165.803; S.D. Codified Laws § 22-40-8; Tenn. Code Ann. § 39-14-150; Utah Code Ann. § 76-6-1102; Wash. Rev. Code Ann. § 9.35.020; Wyo. Stat. Ann. § 6-3-901.

[2170] D.C. Code § 22-3203.

that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2171] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2172]

In addition, deleting the requirement that property be obtained "fraudulently" is also consistent with the majority approach across reform jurisdictions. A majority of reform jurisdictions' identity theft offenses, when predicated on using identifying information to obtain property, do not require that the defendant acted "fraudulently."[2173]

RCC § 22E-2206. IDENTITY THEFT CIVIL PROVISIONS.

[No National Legal Trends Section.]

RCC § 22E-2207. UNLAWFUL LABELING OF A RECORDING.

Relation to National Legal Trends. *The revised unlawful labeling statute's above-mentioned substantive changes to current District law are broadly supported by national legal trends, with the exception of the addition of the permissive inference.*

First, of the 29 states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[2174](hereafter "reformed code jurisdictions"), a majority have statutes that only criminalize possession of recordings with intent to sell or rent, and do not more broadly criminalize possessing recordings for "commercial advantage or private financial gain."[2175]

Second, the District would be an outlier in including a permissive inference that allows fact finders to infer intent to rent or sell when the defendant possessed five or more copies of the same recording. Amongst reformed code jurisdictions, only one state includes a similar presumption of intent to sell or rent in their analogous offenses.[2176]

[2171] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2172] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2173] Ariz. Rev. Stat. Ann. § 13-2008; Ark. Code Ann. § 5-37-227; Colo. Rev. Stat. Ann. § 18-5-902; Conn. Gen. Stat. Ann. § 53a-129a; Del. Code Ann. tit. 11, § 854; Haw. Rev. Stat. Ann. § 708-839.8; Idaho Code Ann. § 18-3126; Ky. Rev. Stat. Ann. § 514.160; Me. Rev. Stat. tit. 17-A, § 905-A; Minn. Stat. Ann. § 609.527; Mont. Code Ann. § 45-6-332; Neb. Rev. Stat. Ann. § 28-639; N.J. Stat. Ann. § 2C:21-17; N.D. Cent. Code Ann. § 12.1-23-11; Ohio Rev. Code Ann. § 2913.49; 18 Pa. Stat. Ann. § 4120; Tenn. Code Ann. § 39-14-150; Wash. Rev. Code Ann. § 9.35.020; Wyo. Stat. Ann. § 6-3-901.

[2174] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[2175] Ariz. Rev. Stat. Ann. § 13-3705; Alaska Stat. Ann. § 45.50.900; Conn. Gen. Stat. Ann. § 53-142c; 720 Ill. Comp. Stat. Ann. 5/16-7; Ky. Rev. Stat. Ann. § 434.445; Minn. Stat. Ann. § 325E.18; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-144; N.H. Rev. Stat. § 352-A:3; N.D. Cent. Code Ann. § 47-21.1-03; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. § 164.868; 18 Pa. Stat. Ann. § 4116; S.D. Codified Laws § 43-43A-3; Utah Code Ann. § 13-10-8; Wash. Rev. Code Ann. § 19.25.040.

[2176] Or. Rev. Stat. Ann. § 164.868. *Cf.*, N.H. Rev. Stat. Ann. § 352-A:2 (A related offense criminalizing possession of copyrighted materials with intent to sell provides that "Possession of 5 or more duplicate copies or 20 or more individual copies of such recorded articles, produced without the consent of the owner

Third, changing the penalty gradations to treat sound and audiovisual recordings the same is consistent with national trends. A large majority of reformed code jurisdictions' analogous unlawful labeling statutes do not differentiate between sound and audiovisual recordings for penalty purposes.[2177]

Fourth, removing the 180 day aggregation time period is also supported by national legal trends. Amongst reformed code jurisdictions only six states allow aggregating the number of recordings across a 180 day period for sentencing purposes.[2178]

Fifth, regarding the aggregation of the number of recordings possessed in a single scheme or systematic course of conduct, the revised ULR offense follows many jurisdictions[2179] which have statutes that closely follow the Model Penal Code (MPC)[2180] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[2181] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[2182]

Sixth, regarding the bar on multiple convictions for the revised ULR offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised ULR offense and other overlapping property offenses. For example, where the offense most like the revised

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or performer, shall create a rebuttable presumption that such articles are intended for sale or distribution in violation of this section.").

[2177] Alaska Stat. Ann. § 45.50.900; Conn. Gen. Stat. Ann. § 53-142c; Ind. Code Ann. § 24-4-10-4; Ky. Rev. Stat. Ann. § 434.445; Md. Code Ann., Crim. Law § 7-309; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-144; N.H. Rev. Stat. Ann. § 352-A:3; N.D. Cent. Code Ann. § 47-21.1-03;N.Y. Penal Law § 275.35; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. § 164.868; S.D. Codified Laws § 43-43A-3; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. § 641.054; Utah Code Ann. § 13-10-8; Wash. Rev. Code Ann. § 19.25.040; Wis. Stat. Ann. § 943.209.

[2178] 720 Ill. Comp. Stat. Ann. 5/16-7; 18 Pa. Stat. Ann. § 4116; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. § 641.054; Utah Code Ann. § 13-10-8; Wash. Rev. Code Ann. § 19.25.040; Wis. Stat. Ann. § 943.209.

[2179] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[2180] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[2181] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[2182] *See, e.g. Commonwealth v. Young*, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); *People v. Brown*, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

ULR offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2183] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2184] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2185]

RCC § 22E-2208. FINANCIAL EXPLOITATION OF A VULNERABLE ADULT.

Relation to National Legal Trends. *Two of the main changes to the FEVA statute discussed above are broadly supported by national legal trends, but remaining four changes are not consistent with national legal trends.*

First, a majority of states do not specify the mental state as to whether the victim is a vulnerable adult or elderly person. At least four states require a culpable mental state less demanding than "knowingly." Two states require that the accused either "knows or reasonably should know" that the victim is an "elder or dependent adult,"[2186] or that the victim is "at least 68 years old."[2187] In addition, two states expressly state that it is not a defense if the "accused reasonably believed that the endangered adult or dependent was less than sixty (60) years of age at the time of the offense,"[2188] or did not know the age of the victim.[2189]

a majority jurisdictions with analogous FEVA offenses do not criminalize causing a vulnerable adult or elderly person to assume a legal obligation. Analogous FEVA offenses in other jurisdictions require that the defendant expend, diminish, or use the property;[2190] commit another property offense[2191], or more generally requires that the defendant "exploits" the elderly person.[2192] One exception, Minnesota, also criminalizes causing a vulnerable adult to establish a fiduciary relationship by use of undue influence, harassment, duress, force, compulsion, coercion, or other enticement.[2193]

Second, increasing the number of penalty gradations is not supported by national legal trends. Of the jurisdictions with analogous FEVA offenses, a majority use either

[2183] D.C. Code § 22-3203.
[2184] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[2185] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[2186] Cal. Penal Code § 368.
[2187] Md. Code Ann., Crim. Law § 8-801.
[2188] Ind. Code Ann. § 35-46-1-12.
[2189] N.D. Cent. Code Ann. § 12.1-31-07.1.
[2190] Ala. Code § 38-9-2; Ark. Code Ann. § 5-28-101; Del. Code Ann. tit. 31, § 3902; Fla. Stat. Ann. § 825.103; 720 Ill. Comp. Stat. Ann. 5/17-56; Ind. Code Ann. § 35-46-1-12; Kan. Crim. Code Ann. § 21-5417; La. Stat. Ann. § 14:67.21; Md. Code Ann., Crim. Law § 8-801; Mich. Comp. Laws Ann. § 750.174a.
[2191] Cal. Penal Code § 368
[2192] Idaho Code Ann. § 18-1505; Miss. Code. Ann. § 43-47-19;
[2193] Minn. Stat. Ann. § 609.2335.

two, or one penalty grades.[2194] Only four jurisdictions' analogous FEVA offenses include five or more penalty grades.[2195]

Third, deleting the recidivist penalty provision is consistent with national trends. A majority of jurisdictions with analogous FEVA offenses do not include a recidivist penalty provision. Only seven states include such a provision.[2196]

Fourth, regarding the aggregation of values in a single scheme or systematic course of conduct, the revised FEVA offense follows many jurisdictions[2197] which have statutes that closely follow the Model Penal Code (MPC)[2198] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[2199] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[2200]

Fifth, regarding the bar on multiple convictions for the revised FEVA offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised FEVA offense and other overlapping property offenses. For example, where the offense most like the revised FEVA is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive

[2194] Ala. Code § 38-9-7; Ala. Code § 38-9-2; Cal. Penal Code § 368; Colo. Rev. Stat. Ann. § 18-6.5-103; Idaho Code Ann. § 18-1505; Ind. Code Ann. § 35-46-1-12; Minn. Stat. Ann. § 609.2335; Miss. Code. Ann. § 43-47-19; Neb. Rev. Stat. Ann. § 28-358; Okla. Stat. Ann. tit. 21, § 843.4; Or. Rev. Stat. Ann. § 163.205; S.C. Code Ann. § 43-35-10; S.D. Codified Laws § 22-46-3; Tex. Penal Code Ann. § 32.53; Vt. Stat. Ann. tit. 13, § 1380; Wyo. Stat. Ann. § 35-20-102.

[2195] Del. Code Ann. tit. 31, § 3902, Del. Code Ann. tit. 31, § 3913 ; Kan. Crim. Code Ann. § 21-5417; Mich. Comp. Laws Ann. § 750.174a; Mo. Ann. Stat. § 570.145.

[2196] Del. Code Ann. tit. 31, § 3902, Del. Code Ann. tit. 31, § 3913; Fla. Stat. Ann. § 825.103; Kan. Crim. Code Ann. § 21-5417; Ky. Rev. Stat. Ann. § 209.990; La. Stat. Ann. § 14:67.21, La. Stat. Ann. § 14:93.4; Mich. Comp. Laws Ann. § 750.174a. Miss. Code. Ann. § 43-47-19.

[2197] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[2198] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[2199] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[2200] See, e.g. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

sentences[2201] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2202] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2203]

RCC § 22E-2209. FINANCIAL EXPLOITATION OF A VULNERABLE ADULT CIVIL PROVISIONS.

[No National Legal Trends Section.]

Chapter 23. Extortion

RCC § 22E-2301. EXTORTION.

[Now RCC § 22E-2501. Extortion.]

Relation to National Legal Trends. *The above-mentioned substantive changes to current District burglary law are broadly supported by national legal trends.*

As a general matter, states take two approaches to extortion. Either states incorporate coercion and extortion into the structure of their theft offenses, or they codify extortion as a standalone offense that shares few, if any, elements with their theft offenses. Those states that adopt a theft-like approach to extortion tend to have similar elements to the elements of RCC extortion, while those that adopt a *sui generis* version of extortion are less likely to have similar elements.[2204]

First, of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"), only one state punishes attempted extortion and completed extortion the same.[2205]

Second, the types of coercion that are predicates for extortion vary widely. The relationship between the factors the Revised Criminal Code uses in the definition of "coercion" and the practice of reformed jurisdictions is discussed in more detail in the RCC Commentary to "coercion." However, the three new types of threats that may provide the basis for an extortion conviction (threats to report a person's immigration

[2201] D.C. Code § 22-3203.
[2202] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[2203] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[2204] The states that include extortion as a means or a type of theft include Ark. Code Ann. § 5-36-103; Conn. Gen. Stat. Ann. § 53a-119; Kan. Stat. Ann. § 21-5801; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; N.Y. Penal Law § 155.05; S.D. Codified Laws § 22-30A-4. Additionally, as with the current blackmail offense, many states codify a "coercion" offense that punishes using coercive threats to induce a person to act or refrain from acting. Such offenses seemingly overlap with extortion. The statutes of reform jurisdictions that staff examined, however, were limited to those offenses involving the taking or obtaining of property.
[2205] Wash. Rev. Code Ann. § 9A.04.110. However, one other jurisdiction punishes attempted extortion the same as completed extortion if the property taken (or the property the defendant attempted to take) was anhydrous ammonia or liquid nitrogen. Mo. Ann. Stat. § 570.030.

status, threats to commit any offense, and threats to cause material harm to a person's interests) are supported by national legal trends.[2206]

Third, the inclusion of the "intent to deprive" element in extortion is also common to reform code jurisdictions. Twelve states require it,[2207] while thirteen do not.[2208]

Fourth, grading on the basis of value is also common to jurisdictions. Eleven states include value as a basis for grading extortion.[2209] Of the states that do not, three states grade on the basis of the seriousness of the coercive threat.[2210] One state grades on the basis of the victim, punishing those who extort money from the elderly more seriously.[2211] Last, eight states do not grade the offense at all.[2212]

Fifth, regarding the aggregation of values of property in a single scheme or systematic course of conduct, the revised extortion offense follows many jurisdictions[2213] which have statutes that closely follow the Model Penal Code (MPC)[2214] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen

[2206] *See* RCC § 22A-2001(4), Commentary.

[2207] Ala. Code § 13A-8-13; Ark. Code Ann. § 5-36-103; Kan. Stat. Ann. § 21-5801; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; N.D. Cent. Code Ann. § 12.1-23-02; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406; Wis. Stat. Ann. § 943.30.

[2208] Alaska Stat. Ann. § 11.41.520; Ariz. Rev. Stat. Ann. § 13-1804; Conn. Gen. Stat. Ann. § 53a-119; Haw. Rev. Stat. Ann. § 707-764; Kan. Stat. Ann. § 21-6501; Ky. Rev. Stat. Ann. § 514.080; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11; Or. Rev. Stat. Ann. § 164.075; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Tenn. Code Ann. § 39-11-106; Wash. Rev. Code Ann. § 9A.04.110.

[2209] Ark. Code Ann. § 5-36-103; Conn. Gen. Stat. Ann. § 53a-119; Kan. Stat. Ann. § 21-5801; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; N.D. Cent. Code Ann. § 12.1-23-02; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Tex. Penal Code Ann. § 1.07. Some of these states include other, additional bases for grading extortion.

[2210] Ark. Code Ann. § 5-36-103; Ala. Code § 13A-8-13; Ariz. Rev. Stat. Ann. § 13-1804; Wash. Rev. Code Ann. § 9A.04.110. Note that Arkansas grades on both the value of the property taken and the type of threat issued against the victim.

[2211] Del. Code Ann. tit. 11, § 846.

[2212] Alaska Stat. Ann. § 11.41.520; Kan. Stat. Ann. § 21-6501; Me. Rev. Stat. tit. 17-A, § 355; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11; Or. Rev. Stat. Ann. § 164.075; Tenn. Code Ann. § 39-11-106; Wis. Stat. Ann. § 943.30.

[2213] Alaska Stat. Ann. § 11.46.980; Ark. Code Ann. § 5-36-102; Conn. Gen. Stat. Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md. Code Ann. Crim. Law § 7-103; Me. Rev. Stat. Ann. tit. 17-A, § 352; Neb. Rev. St. § 28-518; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D. Cent. Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa. Cons. Stat. Ann. tit. 18, § 3903; S.D. Cod. Laws § 22-30A-18; Tex. Penal Code § 31.09.

[2214] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

property.[2215] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[2216]

Sixth, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised extortion offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct. However, extortion is not among those offenses and, as described in the commentary to RCC § 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised extortion offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

In addition, it is notable that states typically apply either knowledge or a default mental state to extortion. Eight states require proof of the defendant's knowledge.[2217] Sixteen use the default mental state, typically recklessness.[2218] Interestingly, however, of the states that rely on default rules of construction, seven then require proof that the defendant "intend" to deprive the victim of the property.[2219] This suggests that the mental state in practice is actually more like knowledge than recklessness in these jurisdictions. One state makes use of the mental state of malice.[2220]

[2215] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[2216] *See, e.g*. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[2217] Ala. Code § 13A-8-13; Ariz. Rev. Stat. Ann. § 13-1804; Kan. Stat. Ann. § 21-6501; Ky. Rev. Stat. Ann. § 514.080; Mont. Code Ann. § 45-6-301; N.J. Stat. Ann. § 2C:20-5; N.D. Cent. Code Ann. § 12.1-23-02; 18 Pa. Stat. and Cons. Stat. Ann. § 3923.

[2218] Alaska Stat. Ann. § 11.41.520; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Kan. Stat. Ann. § 21-5801; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.030; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; Ohio Rev. Code Ann. § 2905.11; Or. Rev. Stat. Ann. § 164.075; S.D. Codified Laws § 22-30A-4; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406; Wash. Rev. Code Ann. § 9A.04.110.

[2219] Kan. Stat. Ann. § 21-5801; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.030; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406.

[2220] Wis. Stat. Ann. § 943.30.

Chapter 24. Stolen Property Offenses

RCC § 22E-2401. POSSESSION OF STOLEN PROPERTY.

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

First, a majority of jurisdictions, including nearly all jurisdictions with reformed criminal codes, and the Proposed Revised Federal Criminal Code[2221] have analogous PSP offenses that require intent to deprive.[2222] Of the minority of jurisdictions with PSP offenses that do not require intent to deprive[2223], a slight majority have explicit statutory language providing for a defense if the defendant intended to return the property to its rightful owner, or law enforcement authorities;[2224] and three others require proof of a "dishonest" or "criminal" purpose or intent.[2225] The Model Penal Code's PSP statute also specifically excludes cases in which the property is possessed "with purpose to restore it to the owner."[2226] Only six jurisdictions' PSP statutes do not require intent to deprive, other wrongful purpose, or do not provide explicit language excluding cases in which the defendant possessed stolen property with intent to return it to its rightful owner.[2227]

Second, increasing the number of penalty gradations is also consistent with the national norms. A strong majority of jurisdictions use more than two penalty gradations.[2228] Only nine states use just two grades[2229], and one state, Oklahoma, uses just one grade.

[2221] Proposed Federal Criminal Code § 1732(c). Note however that the Proposed Federal Criminal Code treats PSP as a version of theft, rather than a separate offense.

[2222] Alaska Stat. Ann. § 11.46.190; Ala. Code § 13A-8-16; Ark. Code Ann. § 5-36-106; Ariz. Rev. Stat. Ann. § 13-1802; Colo. Rev. Stat. Ann. § 18-4-401; Del. Code Ann. tit. 11, § 851; Fla. Stat. Ann. § 812.014; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Kan. Stat. Ann. § 21-5801; Mass. Gen. Laws Ann. ch. 266, § 60; Md. Code Ann., Crim. Law § 7-104; Me. Rev. Stat. tit. 17-A, § 359; Minn. Stat. Ann. § 609.53; Mo. Ann. Stat. § 570.080; Mont. Code Ann. § 45-6-301; N.D. Cent. Code Ann. § 12.1-23-02; N.H. Rev. Stat. Ann. § 637:7; Nev. Rev. Stat. Ann. § 205.275; N.Y. Penal Law § 165.40; Ohio Rev. Code Ann. § 2913.51; Okla. Stat. Ann. tit. 21, § 1713; Or. Rev. Stat. Ann. § 164.095; 18 Pa. Stat. Ann. § 3925; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-408; Wash. Rev. Code Ann. § 9A.56.140.

[2223] Cal. Penal Code § 496 (but statute requires intent to temporarily deprive); Conn. Gen. Stat. Ann. § 53a-119; Ga. Code Ann. § 16-8-7; Ky. Rev. Stat. Ann. § 514.110; La. Stat. Ann. § 14:69; Mich. Comp. Laws Ann. § 750.535; Miss. Code. Ann. § 97-17-70; Neb. Rev. Stat. Ann. § 28-517; N.J. Stat. Ann. § 2C:20-7; N.M. Stat. Ann. § 30-16-11; N.C. Gen. Stat. Ann. § 14-71; 11 R.I. Gen. Laws Ann. § 11-41-2; S.C. Code Ann. § 16-13-180; S.D. Codified Laws § 22-30A-7; Va Code Ann. § 18.2-108; Vt. Stat. Ann. tit. 13, § 2561; Wisconsin, Wis. Stat. Ann. § 943.34; W. Va. Code Ann. § 61-3-18; Wyo. Stat. Ann. § 6-3-403.

[2224] Connecticut, Georgia, Kentucky, Louisiana, Mississippi, Nebraska, New Jersey, New Mexico, South Dakota, and Vermont.

[2225] North Carolina, Virginia, and West Virginia.

[2226] MPC § 223.6.

[2227] California, Michigan, Rhode Island, South Carolina, Wisconsin, and Wyoming.

[2228] Ten states use 3 grades; eleven states use 4 grades; nine states use 5 grades; four states use 6 grades; three states use 7 grades, and one state each uses 9 and 10 grades. On average, these forty states use 4.675 gradations.

Third, regarding the bar on multiple convictions for the revised PSP offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised PSP offense and other overlapping property offenses. For example, where the offense most like the revised PSP offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2230] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2231] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2232]

Although it is difficult to generalize as to whether multiple convictions for PSP and other property offenses would be permitted in other jurisdictions, barring convictions for both PSP and theft based on possession of the same property follows a strong national legal trend. Only one other jurisdiction, Oklahoma, allows convictions for both theft and PSP for a single piece of property.[2233] The law is somewhat unclear in three other jurisdictions: Michigan, Missouri, and Pennsylvania. In all other jurisdictions, there is either case law barring convictions for both theft and RSP of the same property,[2234] statutory language barring convictions for both theft and PSP of the same property,[2235] or PSP and other theft-type offenses have been consolidated into a single theft offense.[2236]

[2229] Cal. Penal Code § 496; Del. Code Ann. tit. 11, § 851 (West); Idaho Code Ann. § 18-2403; Mass. Gen. Laws Ann. ch. 266, § 60; N.C. Gen. Stat. Ann. § 14-71; Okla. Stat. Ann. tit. 21, § 1713; Vt. Stat. Ann. tit. 13, § 2561; Va. Code Ann. §18.2-108; W. Va. Code Ann. § 61-3-18; Wyo. Stat. Ann. § 6-3-403.

[2230] D.C. Code § 22-3203.

[2231] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2232] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2233] *Nowlin v. State*, 34 P.3d 654, 655-56 (Okla. Crim. App. 2012).

[2234] Alabama, *George v. State*, 410 So. 2d 476, 478 (Ala. Crim. App. 1982); Colorado, *People v. Griffie*, 610 P.2d 1079, 1080-81 (Colo. App. 1980); Georgia, *Redding v. State*, 384 S.E.2d 910, 912 (Ga. Ct. App. 1989); Illinois, *People v. Miller*, 146 N.E. 501, 503 (Ill. 1925); Indiana, *Gibson v. State*, 643 N.E.2d 885, 892 (Ind. 1994); Kentucky *Phillips v. Com.*, 679 S.W.2d 235, 236-37 (Ky. 1984); Louisiana, *State v. Franklin*, 142 So. 3d 295, 305 (La. Ct. App. 2014); Massachusetts, *Com. v. Obshatkin*, 307 N.E.2d 341, 343-44 (Mass. App. Ct. 1974); Minnesota, *State v. Banks*, 358 N.W.2d 133, 135 (Minn.App.1984); Mississippi, *Young v. State*, 908 So. 2d 819, 829 (Miss. Ct. App. 2005); Montana, *State v. Hernandez* 689 P.2d 1261, 1262 (Mont. 1984); Nevada, *Stowe v. State*, 857 P.2d 15, 17 (Nev. 1993); New Hampshire, *State v. Chaisson*, 458 A.2d 95, 98 (N.H. 1983), New Mexico, *Territory v. Graves*, 125 P. 604, 604 (N.M. 1912); New York, *People v. Colon*, 267 N.E.2d 577, 582 (N.Y. 1971); Ohio, *City of Maumee v. Geiger*, 344 N.E.2d 133, 137 (Ohio 1976); Rhode Island, *State v. Grant*, 840 A.2d 541, 549 (R.I. 2004); South Carolina, *State v. Tindall*, 50 S.E.2d 188, 189 (S.C. 1948); South Dakota, *State v. Howell*, 354 N.W.2d 196, 198 (S.D. 1984); Tennessee, *State v. Kennedy*, 7 S.W.3d 58, 70 (Tenn. Crim. App. 1999); Vermont, *State v. Bleau*, 428 A.2d 1097, 1099 (Vt. 1981); Washington, *State v. Hancock*, 721 P.2d 1006, 1007-08 (Wash. Ct. App. 1986); West Virginia, *State v. Koton*, 202 S.E.2d 823, 828 (W. Va. 1974); Wisconsin, *State v. Godsey*, 75 N.W.2d 572, 573 (Wis. 1956); Wyoming, *Garcia v. State*, 777 P.2d 1091, 1094 (Wyo. 1989).

[2235] California, Cal. Penal Code § 496 (West); Delaware, Del. Code Ann. tit. 11, § 856 (West).

[2236] Alaska, Arizona, Arkansas, Connecticut, Florida, Hawaii, Iowa, Idaho, Kansas, Maryland, Maine, North Carolina, Nebraska, New Jersey, North Dakota, Oregon, Texas, Utah, Virginia.

RCC § 22E-2402. TRAFFICKING OF STOLEN PROPERTY.

Relation to National Legal Trends*. The major changes the revised statutes makes to current District law are not consistent with national legal trends.* The District is one of just six jurisdictions that codify an offense like TSP.[2237]

First, among the handful of jurisdictions with TSP offenses, none use five penalty grades. One state uses a single grade[2238], with value being irrelevant, four states use two grades[2239], and one state uses four grades.[2240] Using five penalty grades will make the revised TSP offense consistent with other revised property offenses, but this change will not follow a majority practice in other jurisdictions. Nationally, the District is an outlier in penalizing all trafficking with a possible ten year sentence. Only five states have TSP-type offenses, and only two of those authorize sentences of 10 years or greater for trafficking in low value property.[2241] In each of the states that have comprehensively reformed criminal codes influenced by the MPC and have a general part,[2242] and that do not have a separate TSP offense, trafficking in low value property on two separate occasions would only constitute two counts of misdemeanor possession of stolen property.[2243]

Second, regarding the bar on multiple convictions for the revised TSP offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised TSP offense and other

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[2237] Only five other jurisdictions specifically criminalize trafficking or dealing in stolen property. Ariz. Rev. Stat. Ann. § 13-2307; N.J. Stat. Ann. § 2C:20-7.1; N.D. Cent. Code Ann. § 12.1-23-08.3; Va. Code Ann. § 18.2-108.01; Wash. Rev. Code Ann. § 9A.82.050. The Model Penal Code does not have a specific TSP statute, but its receiving stolen property statute includes a presumption of knowledge that the property was stolen if it was possessed by a dealer who is found in possession of stolen property on two or more occasions; has received stolen property in another transaction within the preceding year; or acquires the property for consideration which he knows is far below its reasonable value. In addition, the Brown Commission's Final Report of the National Commission on Reform of Federal Criminal Laws did not include a TSP offense.

[2238] Va. Code Ann. § 18.2-108.01.

[2239] Del. Code Ann. tit. 11, § 852A; Fla. Stat. Ann. § 812.019 ; N.D. Cent. Code Ann. § 12.1-23-08.3; Wash. Rev. Code Ann. § 9A.82.050.

[2240] N.J. Stat. Ann. § 2C:20-7.1; *State v. Portuondo*, 649 A.2d 892, 896 (N.J. Super. Ct. App. Div. 1994) (holding that § 2C:20-7.1 uses same penalty structure as theft offense).

[2241] Ariz. Rev. Stat. Ann. § 13-2307; Fla. Stat. Ann. § 812.019.

[2242] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part).

[2243] Alaska Stat. Ann. § 11.46.190 (West); Ala. Code § 13A-8-16; Ark. Code Ann. § 5-36-106; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119 ; Del. Code Ann. tit. 11, § 851; Haw. Rev. Stat. Ann. § 708-830; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Kan. Stat. Ann. § 21-5801; Ky. Rev. Stat. Ann. § 514.110; Me. Rev. Stat. tit. 17-A, § 359; Minn. Stat. Ann. § 609.53; Mo. Ann. Stat. § 570.080; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:7; N.J. Stat. Ann. § 2C:20-7; N.Y. Penal Law § 165.40; N.D. Cent. Code Ann. § 12.1-23-02; Ohio Rev. Code Ann. § 2913.51; Or. Rev. Stat. Ann. § 164.095; 18 Pa. Stat. Ann. § 3925; S.D. Codified Laws § 22-30A-7; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-408; Wash. Rev. Code Ann. § 9A.56.140; Wis. Stat. Ann. § 943.34.

overlapping property offenses. For example, where the offense most like the revised TSP is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2244] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2245] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2246]

RCC § 22E-2403. ALTERATION OF MOTOR VEHICLE IDENTIFICATION NUMBER.

Relation to National Legal Trends. *The revised AVIN offense's above mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, a majority of jurisdictions only criminalize alteration of a VIN when there is an additional evidence of wrongful intent. Of the 29 states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[2247] (hereafter "reformed code jurisdictions") that have analogous AVIN statutes, a majority require some wrongful intent[2248], lack of authorization from a government agency[2249], or recognize a defense that the defendant was the owner of the vehicle, or had consent of the vehicle.[2250] However, three of the states that require intent to conceal or misrepresent the identity of the vehicle or part only require this intent for the felony grade of the offense.[2251]

Second, regarding the aggregation of value in a single scheme or systematic course of conduct, the revised AVIN offense follows many jurisdictions[2252] which have

[2244] D.C. Code § 22-3203.
[2245] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[2246] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[2247] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[2248] Ala. Code § 32-8-86; Alaska Stat. Ann. § 11.46.260; Ariz. Rev. Stat. Ann. § 28-4593; Ark. Code Ann. § 27-14-2211; Colo. Rev. Stat. Ann. § 18-4-420; Del. Code Ann. tit. 21, § 6705; Ky. Rev. Stat. Ann. § 514.120; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; N.D. Cent. Code Ann. § 39-05-28; N.J. Stat. Ann. § 2C:17-6; Ohio Rev. Code Ann. § 4549.62; Tenn. Code Ann. § 55-5-112; Wash. Rev. Code Ann. § 9A.56.180.
[2249] S.D. Codified Laws § 32-4-9.
[2250] Tex. Penal Code Ann. § 31.11.
[2251] Ala. Code § 32-8-86; Ariz. Rev. Stat. Ann. § 28-4593; Del. Code Ann. tit. 21, § 6705.
[2252] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

statutes that closely follow the Model Penal Code (MPC)[2253] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[2254] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[2255] Notably, of reformed code jurisdictions with analogous AVIN offenses, a majority use only a single penalty grade, and the value of the motor vehicle or motor vehicle part is irrelevant.[2256]

Third, regarding the bar on multiple convictions for the revised AVIN offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised AVIN offense and other overlapping property offenses. For example, where the offense most like the revised AVIN offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.[2257] Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2258] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2259] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2260]

RCC § 22E-2404. ALTERATION OF BICYCLE IDENTIFICATION NUMBER.

[2253] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[2254] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[2255] See, e.g. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[2256] Ark. Code Ann. § 27-14-2211; Colo. Rev. Stat. Ann. § 18-4-420; Conn. Gen. Stat. Ann. § 14-149; 625 Ill. Comp. Stat. Ann. 5/4-103; Kan. Stat. Ann. § 8-113; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 301.400; Mont. Code Ann. § 45-6-326; N.D. Cent. Code Ann. § 39-05-28; N.H. Rev. Stat. Ann. § 262:9; N.J. Stat. Ann. § 2C:17-6; N.Y. Penal Law § 170.65; 18 Pa. Stat. Ann. § 7703; S.D. Codified Laws § 32-4-9; Tenn. Code Ann. § 55-5-112; Tex. Penal Code Ann. § 31.11; Wash. Rev. Code Ann. § 9A.56.180; Wis. Stat. Ann. § 342.30.

[2257] *Rogers v. State*, 656 So. 2d 245, 247 (Fla. Dist. Ct. App. 1995) (holding that theft and alteration of vehicle identification numbers do not merge);

[2258] D.C. Code § 22-3203.

[2259] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2260] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

Relation to National Legal Trends. *The revised ABIN offense's above mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, adding an element that the accused had intent to conceal or misrepresent the identity of the bicycle is supported by national legal trends. Of the 29 states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[2261] (hereafter "reformed code jurisdictions"), nineteen have analogous offenses.[2262] Of these nineteen states, a majority require some wrongful intent.[2263]

Second, regarding the bar on multiple convictions for the revised ABIN offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised ABIN offense and other overlapping property offenses. For example, where the offense most like the revised ABIN is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2264] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2265] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2266]

Chapter 25. Property Damage Offenses

[2261] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[2262] Ala. Code § 13A-8-22; Alaska Stat. Ann. § 11.46.260 ; Colo. Rev. Stat. Ann. § 18-5-305; Conn. Gen. Stat. Ann. § 53-132a; Del. Code Ann. tit. 21, § 6705; Haw. Rev. Stat. Ann. § 293-1; 720 Ill. Comp. Stat. Ann. 5/17-30; Ky. Rev. Stat. Ann. § 514.120; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.085; Mont. Code Ann. § 45-6-326; N.Y. Penal Law § 170.65; N.D. Cent. Code Ann. § 12.1-23-08.1; Ohio Rev. Code Ann. § 4549.62; S.D. Codified Laws § 22-30A-39; Tenn. Code Ann. § 39-14-134; Wash. Rev. Code Ann. § 9A.56.180; Wis. Stat. Ann. § 943.37. Note however, that only Hawaii's statute is specific to bicycles. The other statutes apply more broadly to alteration of identification numbers on any machine, vehicle, or product. For example, Connecticut's statute applies to a "number or other mark which identifies any product, other than a motor vehicle, and distinguishes it from other products of like model and kind produced by the same manufacturer[.]". Conn. Gen. Stat. Ann. § 53-132a.

[2263] Ala. Code § 13A-8-22; Alaska Stat. Ann. § 11.46.260; Colo. Rev. Stat. Ann. § 18-5-305; Conn. Gen. Stat. Ann. § 53-132a; Ky. Rev. Stat. Ann. § 514.120; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.085; N.D. Cent. Code Ann. § 12.1-23-08.1; Ohio Rev. Code Ann. § 4549.62; 18 Pa. Stat. Ann. § 7703; Tenn. Code Ann. § 39-14-134; Wash. Rev. Code Ann. § 9A.56.180; Wis. Stat. Ann. § 943.37.

[2264] D.C. Code § 22-3203.

[2265] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2266] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

RCC § 22E-2501. ARSON.

Relation to National Legal Trends. *The revised arson offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[2267]

The first substantive change to District law in the revised arson statute is that the revised offense no longer uses the "malice" mental state that is in the current arson statute. Only 15 of the 50 states use malice in one of their arson statutes.[2268] Even where malice is used, the recognition of a mitigation defense to arson is rare and disapproved by experts.[2269] The majority of the 35 states that do not have a "malice" culpable mental state requirement instead specify "knowingly," "purposely," or "intentionally" in some or all of their arson statutes.[2270] The MPC arson statute requires that the defendant "starts a

[2267] There is significant variation in the 50 states as to what conduct constitutes "arson," and some states do not name their offenses in this manner. Research for this commentary section considered the following as arson, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "arson"; 2) Any statutes that pertain to burning property, or starting a fire, etc., including those that require an intent to defraud or injure another; and 3) Any statutes that name offenses codified therein as "reckless burning" or burning with a higher mental state, or substantively similar statutes. The following were excluded: 1) Felony arson offenses; 2) Statutes that name the offenses codified therein "negligent burning" or substantively similar statutes; and 3) Offenses or gradations that pertain to burning, starting a fire, etc., and the production of drugs.

[2268] Md. Code Ann., Crim. Law §§ 6-102, -103, -104, -105; Va. Code Ann. § 18.2-77, -79, -80, -81; Cal. Penal Code §§ 451, 451.5, 454; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77, .78; Miss. Code Ann. §§ 97-17-1, -3, -5, -7, -9; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025; N.M. Stat. Ann. §§ 30-17-5 and 30-17-6; N.C. Stat. Ann. § 14-58.2; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; S.C. Code Ann. § 16-11-110; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504; Wash. Rev. Code Ann. §§ 9A.48.020 and .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4; Wyo. Stat. Ann. § 6-3-101.

[2269] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 10.4 (2d ed.) ("Outside of homicide law, the concept of [mitigation] doesn't [really] exist."); John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 404 n. 573 (1986) (rejecting the argument of R. Perkins & R. Boyce that a mitigated burning should not be arson and stating that "why should the rule of provocation be applied outside the law of homicide? I find neither history nor policy which supports the application of the rule of provocation to arson."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1041 (2011) (categorically stating that "[p]rovocation is available as a partial defense only to murder" and that it is not "a defense, partial or otherwise" to non-homicide offenses, which is incorrect in light of District law.

[2270] For the purposes of this specific survey, state statutes for "reckless burning," "knowingly burning," and substantively similar offenses, which this commentary otherwise considers "arson," were excluded. *See, e.g.*, N.Y. Penal Law §§ 150.01, .05, .10, .15, .20; Tex. Penal Code § 28.02; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253, -8254; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Ark. Code Ann. § 5-38-301; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Ga. Code Ann. §§ 16-7-60, -61; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040, .060; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1; Minn. Stat. Ann. §§ 609.561, .562, .563, .5631; Mo. Ann. Stat. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Code Ann. § 12.1-21-02; Ohio Rev. Code Ann. §§ 2909..02, .03; Or. Rev. Stat. Ann. § 164.325, .3315; 18 Pa. Stat. Ann. § 3301; S.D. Codified Laws §§ 22-33-9.1, 9.2, 9.3, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-102, -103; Wis. Stat. Ann. §§ 943.02, .03, .04.

fire or causes an explosion with the purpose" of destroying or damaging certain property[2271] and the Proposed Federal Criminal Code arson statute does not specify a mental state specified for prohibited conduct.[2272] Due to the varying rules of statutory interpretation or lack thereof in these states and models, however, it is unclear whether these mental states apply to the prohibited conduct, such as starts a fire or causes an explosion.

The mental state "reckless" as to "the fact that a person who is not a participant in the crime is present in the dwelling or building" in the revised arson statute also generally reflects national trends. Arson statutes in the 50 states overwhelmingly protect arson that endangers human life more seriously than arson that endangers or damages property,[2273] but they do so in different ways, making generalization difficult. For example, some states include in their higher levels of arson damaging or endangering an occupied dwelling or building, with varying mental state requirements as to that fact.[2274] Other states, like the revised arson statute, use "reckless" as to the fact that human life is endangered in their highest grade of arson, although the precise language varies.[2275]

[2271] For the purposes of this specific survey, the MPC statute for "reckless burning," which this commentary otherwise considers "arson," was excluded. MPC § 220.1(1).

[2272] For the purposes of this specific survey, the Proposed Federal Criminal Code offense for "endangering by fire or explosion," which this commentary otherwise considers "arson," was excluded. Proposed Federal Criminal Code § 1701.

[2273] *See, e.g.*, Md. Code Ann., Crim. Law §§ 6-102, 6-103; 6-106; Va. Code Ann. § 18.2-77, -79, -80, -81; N.Y. Penal Law §§ 150.01, .05, .10, .15. 20; Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.01; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.2, .3, .4; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14:53; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77; Minn. Stat. Ann. §§ 609.561, .562; Mo. Stat. Ann. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504, -505; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025, .030; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Codified Laws §§ 12.1-21-01, -02; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403; Or. Rev. Stat. Ann. §§ 164.325, .315; 18 Pa. Stat. Ann. § 3301; S.C. Code Ann. §§ 16-11-110, -130; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4-, -6; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, 102; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504, 505, 506; Wash. Rev. Code Ann. §§ 9A.48.020, .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4, -5, -7; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104.

[2274] *See, e.g.*, Md. Code Ann., Crim. Law § 6-102; Va. Code Ann. §18.2-127(A); N.Y. Penal Law §§ 150.15, .20; Ala. Code § 13A-7-41; Ariz. Rev. Stat. Ann. § 13-1704; Cal. Penal Code § 451; Colo. Rev. Stat. Ann. § 18-4-102; Conn. Gen. Stat. Ann. § 53a-111; Del. Code Ann. tit. 11, § 803; Fla. Stat. Ann. § 806.01; Idaho Code Ann. § 18-802; 720 Ill. Comp. Stat. Ann. 5/20-1.1; Iowa Code Ann. § 712.2; Ky. Rev. Stat. Ann. § 513.020; Minn. Stat. Ann. § 609.5632(2); Neb. Rev. Stat. Ann. § 28-502; N.H. Rev. Stat. Ann. § 634:1; Tenn. Code Ann. § 39-14-302; Utah Code Ann. § 76-6-103; Wash. Rev. Code Ann. § 9A.48.020.

[2275] Tex. Penal Code § 28.02(a)(2)(F) ("when the person is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another."); Alaska Stat. Ann. § 11.46.400(a) ("recklessly places another person in danger of serious physical injury."); Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2) ("recklessly endangers any person or the property of another."); Mo. Ann. Stat. § 569.040(1)(1) "recklessly places such person in danger of death or serious physical injury."); N.D. Cent. Code Ann. § 12.1-21-02(12)(1)(a) ("recklessly places another person in danger of death or bodily injury."); Or. Rev. Stat. Ann. § 164.325(1)(a) ("recklessly places another person in danger of physical injury or

Unlike the revised arson statute, these states do not exclude a participant in the crime from the scope of the offense. However, such an exclusion is more common in other states' arson statutes that require damage to or threatening an occupied dwelling or a building.[2276] The MPC and the Proposed Federal Criminal Code use "recklessly places another person in danger of death or bodily injury" in the closely-related offenses of reckless burning[2277] and endangering by fire or explosion,[2278] which essentially function as a second grade of arson in these models. The arson offenses in these models require, in part, starting a fire or causing an explosion with the purpose of destroying a building or occupied structure of another.[2279]

The second substantive change is that subsection (a)(1) requires, in part, that the defendant "cause an explosion." There is a clear national trend towards including explosions in arson statutes. A large majority of the 50 states include "causes an explosion" in some or all of their arson statutes or damaging or destroying "by explosives," or similar language.[2280] The MPC arson offense also includes "causes an explosion,"[2281] as does the Proposed Federal Criminal Code.[2282]

A third substantive change to current District law is that the revised arson statute applies to motor vehicles. Aggravated arson and first degree arson include motor vehicles that qualify as "dwellings" as defined in RCC § 22E-2001, and any motor vehicle will suffice for second degree arson that satisfies the definition of "motor vehicle" in RCC § 22E-2001. At least 37 of the 50 states' arson statutes,[2283] as well as

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protected property of another in danger of damage."); 18 Pa. Stat. Ann. § 3301(a.1) "thereby attempts to cause, or intentionally, knowingly, or recklessly causes bodily injury to another person, including, but not limited to a firefighter, police officer, or other person actively engaged in fighting the fire.").

[2276] Md. Code Ann., Crim. Law § 6-102; N.Y. Penal Law §§ 150.15, .20; Del. Code Ann. tit. 11, § 803; Minn. Stat. Ann. § 609.5632(2); Utah Code Ann. § 76-6-103; Wash. Rev. Code Ann. § 9A.48.020.

[2277] MPC § 220.1(2) ("recklessly places another person in danger of death or bodily injury.").

[2278] Proposed Federal Criminal Code § 1702 ("recklessly places another person in danger of death or bodily injury.").

[2279] MPC § 220.1(1); Proposed Federal Criminal Code § 1701.

[2280] N.Y. Penal Law §§ 150.01, .05, .10, .15 Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705, -1702; Ark. Code Ann. § 5-38-301, -302; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen Stat. Ann. §§ 53a-111, -112, -113, -114; Del. Code Ann. tit. 11, §§ 801, 802, 803, -804; Fla. Stat. Ann. § 806.01; Ky. Rev. Stat. Ann. §§ 513.020, .030, 040; Me. Rev. Stat. Ann. tit. 17-A, § 802; Mo. Ann. Stat. §§ 569.040, .05, .055, .060; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§, 28-502, -503, -504; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.M. Stat. Ann. §§ 30-17-5, -6; N.D. Cent. Code Ann. §§ 12.1-21-01, -02; Ohio Rev. Code Ann. § 2909.02, .03, .06; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; Or. Rev. Stat. Ann. §§ 164.325, .315, .335; 18 Pa. Stat. Ann. § 3301; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4, -6; S.C. Code Ann. § 16-11-110; S.D. Codified Laws §§ 22-33-9.1, 9.2, 9.3; Tenn. Code Ann. §§ 39-14-301, -302, -303, -304; Utah Code Ann. §§ 76-6-103, -102, -104; Wash. Rev. Code Ann. §§ 9A.48.020, .030, .040, .050; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104; Va. Code Ann. §§ 18.2-77, -79, -80, -81; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.1, .5; Kan. Stat. Ann. § 21-5182; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77, -.78; Minn. Stat. Ann. §§ 609.561, .562.

[2281] MPC § 220.1(1).

[2282] Proposed Federal Criminal Code § 1701.

[2283] For this survey, offenses of "reckless burning," "negligent burning," and substantively similar offenses, which this commentary otherwise considers arson, were excluded, as were lower grades of arson.

the Proposed Federal Criminal Code[2284] and the MPC,[2285] include motor vehicles in the grades of arson that prohibit endangering human life, either specifically including "motor vehicles" in the arson statute or in the definition of "building" or similar term. Half of the states include vehicles in their grades of arson that protect property, without any explicit requirement that the arson endanger human life, like the revised second degree arson offense.[2286] The MPC includes vehicles adapted for overnight accommodation of

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Many of these states have requirements for the motor vehicle or building, such as it must be used for or adapted for the lodging of persons. These requirements exist in the revised aggravated arson and revised first degree arson grades because they only include motor vehicles that satisfy the definition of "dwelling" in 22E-2001.

Md. Code Ann., Crim. Law §§ 6-101 (defining "structure" to include "a vehicle"), 6-102; N.Y. Penal Law §§ 150.20, .15; Tex. Penal Code Ann. § 28.01(a), (d); Ala. Code §§ 13A-7-40 (defining "building" to include vehicles that meet certain requirements), -41; Ariz. Rev. Stat. Ann. §§ 13-1701 (defining "occupied structure" to include vehicles that meet certain requirements), -1704; Ark. Code Ann. § 5-38-301; Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building" to include vehicles that meet certain requirements), -102; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building" to include "vehicle"), -111, -112; Del. Code Ann. tit. 11, §§ 222 (defining "building" to include "vehicle"), 803; Fla. Stat. Ann. § 806.01(1), (3); Ga. Code Ann. § 16-7-60; Idaho Code Ann. §§ 18-801 (defining "structure" to include "vehicle"), -802, -803; 720 Ill. Comp. Stat. Ann. 5/20-1.1; Kan. Stat. Ann. §§ 21-5111 (defining "dwelling" to include vehicles that meet certain requirements), -5812; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building" to include "vehicle"), .020; Mich. Comp. Laws Ann. §§ 750.71 (defining "dwelling" to include vehicles that meet certain requirements), -.72, -73; Minn. Stat. Ann. §§ 609.556 (defining "building" to include "vehicle" that meets certain requirements), -.561; Mo. Ann. Stat. §§ 569.010 (defining "inhabitable structure" to include vehicles that meet certain requirements), -.040; Neb. Rev. Stat. Ann. §§ 28-501 (defining "building" to include vehicles), -502; N.H. Rev. Stat. Ann. § 634:1 (through definition of "occupied structure"); N.M. Stat. Ann. §§ 30-17-5 (through definition of "occupied structure"), -6; N.D. Cent. Code Ann. §§ 12.1-21-08 (defining "inhabited structure" to include vehicles that meet certain requirements), -01, -02; Ohio Rev. Code Ann. §§ 2909.01 (defining "occupied structure" to include vehicles that meet certain requirements), .02; S.D. Codified Laws §§ 22-33-9.5 (defining "occupied structure" to include vehicles that meet certain requirements), -9.1; Utah Code Ann. §§ 76-6-101 (defining "habitable structure" to include vehicles that meet certain requirements), -103; Wyo. Stat. Ann. §§ 6-1-104 (defining "occupied structure" to include vehicles that meet certain requirements), -101.

Several other states include motor vehicles because their arson statutes apply to any property if there is danger to human life. Haw. Rev. Stat. Ann. §§ 708-8251(1)(a), -8252(1)(a), -8253(1)(a); Alaska Stat. Ann. § 11.46.400; Ind. Code Ann. § 35-43-1-1(a)(2); Iowa Code Ann. § 712.1, .2; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); Mont. Code Ann. §§ 45-6-103(1)(c); Or. Rev. Stat. Ann. § 164.325(1)(a)(B), (C); S.C. Code Ann. § 16-11-110; Tenn. Code Ann. § 39-14-302; N.J. Stat. Ann. § 2C:17-1(a)(1), (b)(1); Wash. Rev. Code Ann. § 9A.48.020(1)(a); 18 Pa. Stat. Ann. § 3301(a.1)(1)(i).

[2284] Proposed Federal Criminal Code §§ 1701, 1706 (defining "inhabited structure" to include vehicles that meet certain requirements).

[2285] MPC §220.1(1)(a), (4).

[2286] Md. Code Ann., Crim. Law §§ 6-101 (defining "structure" to include "a vehicle"), 6-103; N.Y. Penal Law §§ 150.10, .05, .01; Tex. Penal Code Ann. § 28.02(a-1); Haw. Rev. Stat. Ann. §§ 708-8251(1)(B), -8252(1)(b), -8253(1)(B), -8254; Colo. Rev. Stat. Ann. §§ 18-4-103; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building" to include "vehicle"), -113; Del. Code Ann. tit. 11, §§ 222 (defining "building" to include "vehicle"), -801, -802; Fla. Stat. Ann. § 806.01(2), (4) (through the definition of "structure"); Ga. Code Ann. § 16-7-61; Idaho Code Ann. §§ 18-801 (defining "structure" to include "vehicle"), -803; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building" to include "vehicle"), .030, .040; La. Stat. Ann. §§ 14:52(A)(1); Mo. Ann. Stat. §§ 569.055;

Mont. Code Ann. § 45-6-103(1)(a); N.J. Stat. Ann. § 2C:17-1(a)(2), (b)(2), (f) (through definition of "structure"); N.M. Stat. Ann. § 30-17-5; Ohio Rev. Code Ann. § 2909.03(A)(1); 18 Pa. Stat. Ann. § 3301(d); Tenn. Code Ann. § 39-14-303; Utah Code Ann. § 76-6-102(1)(b);Wash. Rev. Code Ann. §

persons, or for carrying on business therein, in the closely-related offense of reckless burning,[2287] which is essentially a second grade of arson in this model. An additional 14 states have arson statutes that include vehicles because they apply to any property, but have a monetary limit to the value of the property or the amount of damage done.[2288] The Proposed Federal Criminal Code's closely-related offense endangering by fire or explosion,[2289] which essentially functions as a second grade of arson in this model, prohibits damage to property of another constituting pecuniary loss in excess of $5,000.

The fourth substantive change to District law is that the revised arson statute does not require that the dwelling, building, or business yard be another person's property. The 50 states overwhelmingly include all property, without distinguishing as to ownership, in their grades of arson that protect human life[2290] with few exceptions.[2291] The Proposed Federal Criminal Code arson offense requires "a building or inhabited structure of another,"[2292] but the closely-related offense of endangering by fire or explosion, which essentially functions as a second grade of arson in this model, does not have any ownership requirement for the property when the fire or explosion "place[]

9A.48.030; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); Mont. Code Ann. §§ 45-6-103(1)(a), -103; Neb. Rev. Stat. Ann. § 28-504; Kan. Stat. Ann. § 21-5812(a)(1)(C).

[2287] MPC § 220.1(2)(b), (4).

[2288] 720 Ill. Comp. Stat. Ann. 5/20-1(a)(1) (any property or any personal property with a value of $150 or more); Ind. Code Ann. § 35-43-1-1(a)(3) (property of another if the pecuniary loss is at least $5,000); Iowa Code Ann. § 712.3(personal property with a value that exceeds $500); Mich. Comp. Laws Ann. §§ 750.74 (personal property with a value of $20,000 or more), .75 (personal property with a value of $1,000 or more, but less than $20,000) , .77 (personal property having a value of $1,000 or less and defendant has one or more specified prior convictions), .78 (personal property of varying values, including $200 or more, but less than $1,000, and less than $200); Minn. Stat. Ann. § 609.562 (real or personal property with a value of more than $1,000); Miss. Code Ann. § 97-17-7 (personal property of the value of $25); Nev. Rev. Stat. Ann. § 205.020 (any unoccupied personal property with a value of $25 or more); N.H. Rev. Stat. Ann. § 634:1(III)(d) (pecuniary loss in excess of $1,000); N.D. Cent. Code Ann. § 12.1-21-02(1)(c) (pecuniary loss in excess of $2,000); Okla. Stat. Ann. tit. 21, § 1403(A) (property worth not less than $50); Or. Rev. Stat. Ann. § 164.315(1)(a)(B) (damage to property exceeds $750); Vt. Stat. Ann. tit. 13, § 504 (personal property with a value of not less than $25.00); W. Va. Code Ann. § 61-3-3 (personal property with a value of not less than $500); Wyo. Stat. Ann. § 6-3-103(a)(ii) (property which has a value of $200 or more).

[2289] Proposed Federal Criminal Code § 1702(1)(c).

[2290] Md. Code Ann., Crim. Law § 6-102; Va. Code Ann. § 18.2-77; N.Y. Penal Law §§ 150.15, .20; Tex. Penal Code Ann. § 28.02; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253; Alaska Stat. Ann. § 11.46.400; Ala. Code § 13A-7-41; Ariz. Rev. Stat. Ann. § 13-1704; Ark. Code Ann. § 5-38-301(a)(1)(C); Cal. Penal Code §§ 451, 451.5; Conn. Gen. Stat. Ann. §§ 53a-111, -112; Del. Code Ann. tit. 11, § 803; Fla. Stat. Ann. § 806.01(1); Idaho Code Ann. §18-802; 720 Ill. Comp. Stat. Ann. 5/20-1(b), 5/20-1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. § 712.2; Ky. Rev. Stat. Ann. § 513.020; La. Stat. Ann. § 14:51.1; Me. Rev. Stat. tit. 17-A, § 802; Mass. Gen. Laws Ann. ch. 266, § 1; Mich. Comp. Laws Ann. §§ 750.72, .73 Minn. Stat. Ann. § 609.561; Miss. Code Ann. § 97-17-1; Mo. Ann. Stat. § 569.040; Mont. Code Ann. § 45-6-102; Neb. Rev. Stat. Ann. §28-502; Nev. Rev. Stat. Ann. § 205.010; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.C. Gen. Stat. Ann. §§ 14-58, -58.2; N.D. Cent. Code Ann. §§ 12.1-21-01, -02; Ohio Rev. Code Ann. §§ 2909.02, .03; Okla. Stat. Ann. tit. 21, 1401; Or. Rev. Stat. Ann. § 164.325; 18 Pa. Stat. Ann. § 3301; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1; S.C. Code Ann. § 16-11-110; Tenn. Code Ann. § 39-14-302; Utah Code Ann. § 76-6-103; Vt. Stat. Ann. tit. 13, § 502; Wash. Rev. Code Ann. § 9A.48.020; W. Va. Code Ann. § 61-3-1; Wyo. Stat. Ann. § 6-3-101.

[2291] Ga. Code Ann. §16-7-60; Kan. Stat. Ann. § 21-5812(a); N.M. § 30-17-5; S.D. Codified Laws § 22-33-9.1; Colo. Rev. Stat. Ann. § 18-4-102; La. Stat. Ann. § 14:51.1.

[2292] Proposed Federal Criminal Code § 1701.

another person in danger of death or bodily injury."[2293] The MPC maintains a requirement that the property at issue be "of another," but defines "of another" broadly, applicable "if anyone other than the actor has a possessory or proprietary interest therein."[2294] Similar to the Proposed Federal Criminal Code, the MPC does not require that the property be "of another" in the closely-related offense reckless burning when the defendant "recklessly places another person in danger of death or bodily injury."[2295]

The fifth substantive change in the revised arson offense is the affirmative defense in subsection (d), which applies only to second degree arson when there is no danger to human life. The affirmative defense reflects a minority position amongst the 50 states. At least ten states have an affirmative defense or exception to liability when only property is at risk and not human life.[2296] However, the Proposed Federal Criminal Code has a consent defense when the property is of another,[2297] which would apply to arson[2298] and the closely-related offense of endangering by fire or explosion,[2299] and the MPC has a narrow affirmative defense to arson for insurance fraud purposes that the defendant's conduct "did not recklessly endanger any building or occupied structure of another or place any person in danger of death or bodily injury."[2300]

The sixth substantive change to District law is that the revised arson statute no longer includes "attempt to burn" that is in the current arson statute. A small minority of the 50 states include attempt to burn or similar attempt language in their arson statutes,[2301] but they are all non-reformed jurisdictions and generally punish attempt lower than completed arson, although there is some overlap with the lower grades of arson. Neither the Proposed Federal Criminal Code[2302] nor the MPC[2303] include attempt to burn or similar language in their arson statutes.

The seventh substantive change that the revised arson statute makes to current District law is to create three gradations of arson. There does not appear to be any other state with one grade of arson as there is in the District's current arson statute.[2304] If the closely-related offense of burning one's own property with intent to injure or defraud another person[2305] is considered a grade of arson, the current District law has two grades of arson. Even then, however, the District is in the minority of the 50 states. There

[2293] Proposed Federal Criminal Code § 1702.
[2294] MPC § 220.1(4).
[2295] MPC § 220.1(2).
[2296] N.Y. Penal Law §§ 150.05, .10; Tex. Penal Code Ann. § 28.02(c); Alaska Stat. Ann. § 11.46.410; Ala. Code §§ 13A-7-42, -43; Del. Code Ann. tit. 11, §§ 801, 802; Ky. Rev. Stat. Ann. §§ 513.030, .040; Me. Rev. Stat. tit. 17-A, § 802; Mo. Ann. Stat. § 569.050; Neb. Rev. Stat. Ann. § 28-504; Iowa Code Ann. § 712.1(1)
[2297] Proposed Federal Criminal Code § 1708.
[2298] Proposed Federal Criminal Code § 1701.
[2299] Proposed Federal Criminal Code § 1702.
[2300] MPC § 220.1(1)(b).
[2301] Cal. Penal Code § 455; Miss. Code Ann. §97-17-9; Nev. Rev. Stat. § 205.025; Okla. Stat. Ann. tit. 21, § 1404; 11 R.I. Gen. Laws Ann. § 11-4-6; S.C. Code Ann. § 16-11-190; Vt. Stat. Ann. tit. 13, § 505; W. Va. Code Ann. § 61-3-4; Mass. Gen. Laws Ann. ch. 266, § 5A.
[2302] Proposed Federal Criminal Code § 1701.
[2303] MPC § 220.1(1).
[2304] D.C. Code § 22-301.
[2305] D.C. Code § 22-302.

appear to be only five states that are limited to two arson gradations.[2306] Although it is difficult to compare gradations amongst states given the variety in arson offenses, the vast majority of states have more than two arson gradations, with three and four gradations being the most common.[2307] The Proposed Federal Criminal Code has one arson grade,[2308] but essentially two additional grades in the closely-related endangering by fire or explosion offense.[2309] Similarly, the MPC[2310] has a single arson offense, but the closely related offense of reckless burning essentially operates as a second grade of arson.

The substance of the revised arson gradations also reflects national trends. The higher grades of the revised arson offense, aggravated arson and first degree arson, are reserved for arson that endangers human life. The majority of jurisdictions, the MPC,[2311] and the Proposed Federal Criminal Code[2312] grade arson that protects human life more seriously than arson that protects property.[2313] At least 35 states, like the revised second

[2306] N.J. Stat. Ann. § 2C:17-1(a), (b); Or. Rev. Stat. Ann. §§ 164.325, 164.315; Wash. Rev. Code Ann. § 9A.48.020; Wis. Stat. Ann. §§ 943.02, 04; N.D. Cent. Code Ann. §§ 12.1-21-01, 02; Mo. Ann. Stat. §§ 569.040, .0505.

[2307] Md. Code Ann., Crim. Law §§ 6-102, -103, 6-1-06; Va. Code Ann. §§ 18.2-77, -79, -80, -81; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Conn. Gen. Stat. Ann. §§ 53a-111,-112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; Iowa Code Ann. §§ 712.2, .3, .4; 720 Ill. Comp. Stat. Ann. 5/20-1; -1.1; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mont. Code Ann. §§ 45-6-102, -103; Minn. Stat. Ann. §§ 609.561, .562; N.H. Stat. Ann. § 634:1; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Kan. Stat. Ann. §§ 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, 030, 040, .060; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14.53; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, -102; Tex. Penal Code Ann. § 28.02; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253, -8254; Ind. Code Ann. § 35-43-1-1.

[2308] Proposed Federal Criminal Code §§ 1701, 1702.

[2309] Proposed Federal Criminal Code § 1702.

[2310] MPC § 220.1.

[2311] MPC § 220.1. Although the MPC has just one "arson" offense in subsection (1), the closely-related offense of reckless burning in subsection (2) essentially operates as a second grade of arson. The MPC commentary notes that the intent of the "arson" offense in subsection (1) is "to confine the arson offense to specially cherished property whose burning or endangering by explosion would typically endanger life." *Id.* cmt. at 18.

[2312] The arson offense in the Proposed Federal Criminal Code is limited to "a building or inhabited structure of another or a vital public facility." Proposed Federal Criminal Code § 1701. Although the Proposed Federal Criminal Code has just one "arson" offense in § 1701, the closely-related offense of endangering by fire or explsion in § 1702 essentially operates as a second grade of arson. The commentary states that "human endangerment is the principle concern" in the arson offense, but notes that the arson offense does not distinguish based upon the awareness of, or consequences of actual human occupation, and some kinds of property are included at which humans may rarely be present. *Id.* cmt. at 194. "The policy thus expressed is that the difference between arson accompanied and arson unaccompanied by the awareness, or consequences, of actual human occupation of the property is insufficient to warrant requiring proof as to the awareness of consequences in order to distinguish between the availability of Class B and Class C felony penalties." *Id.*

[2313] *See, e.g.*, Md. Code Ann., Crim. Law §§ 6-102, 6-103; 6-106; Va. Code Ann. § 18.2-77, -79, -80, -81; N.Y. Penal Law §§ 150.01, .05, .10, .15. 20; Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.01; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho

degree arson offense, have a grade of arson that prohibits damaging specific types of property like dwellings or buildings, without regard to whether they are occupied.[2314] These states' definitions of "dwelling," "building," and similar terms frequently include motor vehicles and watercraft and could include "business yard" as defined in RCC § 22E-2001. In addition, as discussed earlier in this section, half the states include vehicles in their grades of arson that protect property, without any explicit requirement that the arson endanger human life.[2315]

Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.2, .3, .4; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14:53; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77; Minn. Stat. Ann. §§ 609.561, .562; Mo. Stat. Ann. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504, -505; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025, .030; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Codified Laws §§ 12.1-21-01, -02; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403; Or. Rev. Stat. Ann. §§ 164.325, .315; 18 Pa. Stat. Ann. § 3301; S.C. Code Ann. §§ 16-11-110, -130; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4-, -6; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, 102; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504, 505, 506; Wash. Rev. Code Ann. §§ 9A.48.020, .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4, -5, -7; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104.

[2314] Md. Code Ann., Crim. Law §§ 6-101 (defining "structure"), -103; N.Y. Penal Law §§ 150.00 (defining "building") .05, .10; Tex. Penal Code Ann. § 28.02(a)(2)(A), (C), (D), (E), (a-2); Alaska Stat. Ann. § 11.46.410; Ala. Code §§ 13A-7-40 (defining "building"), -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1701 (defining structure), -1703; Ark. Code Ann. §§ 5-38-101 (defining "occupiable structure"), (a)(1)(A); Cal Penal Code §§ 450 (defining "structure"), 451(c), (d); Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building"), -102; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building"), 53a-113; Del. Code Ann. tit. 11, §§ 222 (defining "building"), 801, -802; Fla. Stat. Ann. § 806.01(1)(a), (b), (2), (3) (definition of "structure"); Ga. Code Ann. § 16-7-61(a); Idaho Code Ann. §§ 18-801 (defining "structure"), -802(1), (2), -803; Iowa Code Ann. § 712.3; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building"), .030(1)(a), .040; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2; Mich. Comp. Laws Ann. §§ 750.73, .74; Minn. Stat. Ann. §§ 609.556 (defining "building"), .561, .562; Miss. Code Ann. §§ 97-17-1, -5; Mo. Ann. Stat. § 569.010 (defining "inhabitable structure"), .050(1)(1); Mont. Code Ann. § 45-6-103(1)(a); Neb. Rev. Stat. Ann. §§ 28-501 (defining "building"), -503; Nev. Rev. Stat. Ann. §§ 205.010(1), .014 (defining "building"), .015; N.M. Stat. Ann. § 30-17-5(A)(1), (I) (defining "occupied structure"); Or. Rev. Stat. Ann. §§ 154.305 (defining "protected property"), .325(1)(a)(A), .315(1)(a)(A); 18 Pa. Stat. Ann. § 3301(c)(1), (2); 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3; S.D. Codified Laws § 22-33-9.2(1); Tenn. Code Ann. §39-14-301(a)(1); Utah Code Ann. §§ 76-6-101 (defining "habitable structure"), -103(1)(a); Vt. Stat. Ann. tit. 13, §§ 502, 503; Wash. Rev. Code Ann. § 9A.48.010 (defining "building"), .030; W. Va. Code Ann. §§ 61-3-1, -2; Wis. Stat. Ann. § 943.020(1)(a); Wyo. Stat. Ann. §§ 6-3-104 (defining "occupied structure"), -101.

[2315] Md. Code Ann., Crim. Law §§ 6-101 (defining "structure" to include "a vehicle"), 6-103; N.Y. Penal Law §§ 150.10, .05, .01; Tex. Penal Code Ann. § 28.02(a-1); Haw. Rev. Stat. Ann. §§ 708-8251(1)(B), -8252(1)(b), -8253(1)(B), -8254; Colo. Rev. Stat. Ann. §§ 18-4-103; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building" to include "vehicle"), -113; Del. Code Ann. tit. 11, §§ 222 (defining "building" to include "vehicle"), -801, -802; Fla. Stat. Ann. § 806.01(2), (4) (through the definition of "structure"); Ga. Code Ann. § 16-7-61; Idaho Code Ann. §§ 18-801 (defining "structure" to include "vehicle"), -803; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building" to include "vehicle"), .030, .040; La. Stat. Ann. §§ 14:52(A)(1); Mo. Ann. Stat. §§ 569.055;
Mont. Code Ann. § 45-6-103(1)(a); N.J. Stat. Ann. § 2C:17-1(a)(2), (b)(2), (f) (through definition of "structure"); N.M. Stat. Ann. § 30-17-5; Ohio Rev. Code Ann. § 2909.03(A)(1); 18 Pa. Stat. Ann. § 3301(d); Tenn. Code Ann. § 39-14-303; Utah Code Ann. § 76-6-102(1)(b);Wash. Rev. Code Ann. § 9A.48.030; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); Mont. Code Ann. §§ 45-6-103(1)(a), -103; Neb. Rev. Stat. Ann. § 28-504; Kan. Stat. Ann. § 21-5812(a)(1)(C).

There is limited support in the 50 states for including, with strict liability, that a person other than a participant was killed or suffered serious bodily injury as does the revised aggravated arson gradation. At least 15 states specifically include death, bodily injury, or both as a gradation of arson,[2316] with most of these states reserving it for the most serious gradation.[2317] It is uncommon in these states to explicitly exclude a participant in the crime.[2318] However, excluding a participant in a crime is a more common requirement in other states' arson statutes that require the presence of a person in a building.[2319] One state specifies strict liability for the fact that a person suffered death bodily injury.[2320] Due to the varying rules of statutory interpretation or lack thereof in the states, it is unclear whether the other states apply a culpable mental state or strict liability. As stated in the earlier discussion of "Relation to Current District Law," the aggravated arson gradation is intended to bring within the scope of the revised offense firefighters and first responders who may be injured or killed in responding to the fire or explosion. At least fourteen states specifically include injury or risk to firefighters or other first responders in their arson statutes.[2321]

The eighth substantive change to current District law is that the RCC deletes two statutes that are closely related to the current arson statute, burning one's own property with intent to injure or defraud another person[2322] and placing explosives with intent to destroy or injure property.[2323] It is difficult to assess national trends for this change because there is significant variation in the 50 states as to what conduct constitutes "arson," and some states do not name their offenses. However, in the 50 states' arson statutes, placing explosives near property with a certain intent is specifically an attempt to commit arson, and it is not a separate offense.[2324] There is no equivalent offense in the MPC or the Proposed Federal Criminal Code.

[2316] N.Y. Penal Law § 150.20; Tex. Penal Code § 28.02(d); Conn. Gen. Stat. Ann. § 53a-111(a)(2); 720 Ill. Comp. Stat. Ann. 5/20-1.1(a)(2); Ky. Rev. Stat. Ann. § 513.020(1)(b); Mich. Comp. Laws Ann. § 750.72(1)(b); Okla. Stat. Ann. tit. 21, § 1401(A); 18 Pa. Stat. Ann. § 3301(a.1); Tenn. Code Ann. § 39-14-302(a)(2); Wyo. Stat. Ann. § 6-3-101(c); Cal. Penal Code §§ 451(a); Fla. Stat. Ann. § 806.031(1); N.M. Stat. Ann. §§ 30-17-5, -6; S.C. Code Ann. § 16-11-110; Utah Code Ann. § 76-6-102(3).

[2317] N.Y. Penal Law § 150.20; Tex. Penal Code § 28.02(d); Conn. Gen. Stat. Ann. § 53a-111(a)(2); 720 Ill. Comp. Stat. Ann. 5/20-1.1(a)(2); Ky. Rev. Stat. Ann. § 513.020(1)(b); Mich. Comp. Laws Ann. § 750.72(1)(b); Okla. Stat. Ann. tit. 21, § 1401(A); 18 Pa. Stat. Ann. § 3301(a.1); Tenn. Code Ann. § 39-14-302(a)(2); Wyo. Stat. Ann. § 6-3-101(c).

[2318] N.Y. Penal Law § 150.20; Utah Code Ann. § 76-6-102(3).

[2319] Md. Code Ann., Crim. Law § 6-102; N.Y. Penal Law §§ 150.15, .20; Del. Code Ann. tit. 11, § 803; Minn. Stat. Ann. § 609.5632(2); Utah Code Ann. § 76-6-103; Wash. Rev. Code Ann. § 9A.48.020.

[2320] Fla. Stat. Ann. § 806.031.

[2321] 720 Ill. Comp. Stat. Ann. 5/20-1.1(a)(2); 18 Pa. Stat. Ann. § 3301(a.1); Tenn. Code Ann. § 39-14-302(a)(2); Wyo. Stat. Ann. § 6-3-101(c); Cal. Penal Code §§ 451.1(a)(2); Fla. Stat. Ann. § 806.031; Conn. Gen. Stat. Ann. § 53a-111(4); 720 Ill. Comp. Stat. Ann. 5/20-1.1(3); Iowa code Ann. § 712.2; Kan. Stat. Ann. § 21-5812(b)(2); La. Stat. Ann. § 14:51.1; Or. Rev. Stat. Ann. § 164.325(1)(a)(C); Miss. Code Ann. § 97-17-14; N.C. Gen. Stat. Ann. § 14-69.3.

[2322] D.C. Code § 22-302.

[2323] D.C. Code § 22-3305.

[2324] *See, e.g.*, Md. Code Ann., Crim. Law § 6-109; Cal. Penal Code §455(b); Miss. Code Ann. § 97-17-9(2); Nev. Rev. Stat. Ann. § 205.025(2); Okla. Stat. Ann. tit. 21, § 1404(B); Vt. Stat. Ann. tit. 13, § 509; W. Va. Code Ann. § 61-3-4(b); Wis. Stat. Ann. § 943.05.

Similarly, for burning one's own property with intent to injure or defraud another person, very few states' arson statutes use "intent to injure any other person,"[2325] nor does the MPC or the Proposed Federal Criminal Code. As already noted, a majority of states,[2326] the MPC,[2327] and the Proposed Federal Criminal Code[2328] grade arson more seriously where there is danger to human life, but the language used varies. Another change to current District law is deleting "with intent to defraud . . . any other person" that is in the current statute for burning one's own property with intent to injure or defraud another person. Although at least ten states, mostly jurisdictions with reformed criminal codes, do not include intent to defraud in their arson statutes,[2329] a majority of states do.

Ninth, regarding the bar on multiple convictions for the revised arson offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised arson offense and other overlapping property offenses. For example, where the offense most like the revised arson is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2330] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just

[2325] *See, e.g.*, Cal. Penal Code § 451.5.

[2326] *See, e.g.*, Md. Code Ann., Crim. Law §§ 6-102, 6-103; 6-106; Va. Code Ann. § 18.2-77, -79, -80, -81; N.Y. Penal Law §§ 150.01, .05, .10, .15. 20; Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.01; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.2, .3, .4; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14:53; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77; Minn. Stat. Ann. §§ 609.561, .562; Mo. Stat. Ann. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504, -505; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025, .030; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Codified Laws §§ 12.1-21-01, -02; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403; Or. Rev. Stat. Ann. §§ 164.325, .315; 18 Pa. Stat. Ann. § 3301; S.C. Code Ann. §§ 16-11-110, -130; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4-, -6; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, 102; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504, 505, 506; Wash. Rev. Code Ann. §§ 9A.48.020, .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4, -5, -7; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104.

[2327] MPC § 220.1(1), (2).

[2328] Proposed Federal Criminal Code §§ 1701, 1702.

[2329] N.Y. Penal Law §§ 150.01, .05, .10, .15, .20; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253, -8254; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code § 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§13-1703, -1704, -1705; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.031; Iowa Code Ann. §§ 712.2, .3, .4; Minn. Stat. Ann. § § 609.561, .562; Mo. Ann. Stat. § § 569.040, .050.

[2330] D.C. Code § 22-3203.

property) crimes,[2331] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2332]

Specifically for arson, at least two states define their general property damage offenses to exclude damage caused by fire,[2333] prohibiting convictions for both arson and property damage for the same act or course of conduct.

Tenth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[2334] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[2335] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[2336]

RCC § 22E-2502. RECKLESS BURNING.

Relation to National Legal Trends. *The RCC reckless burning offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

The first substantive change to District law is that the RCC reckless burning offense no longer uses the "malice" mental state that is in the current arson statute. Only 15 of the 50 states use malice in one of their arson statutes.[2337] Even where malice is

[2331] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2332] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2333] Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823, -823.5 ("other than fire"); La. Stat. Ann. §§ 14:55 ("other than fire or explosion"), 14:56 ("other than fire or explosion.").

[2334] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[2335] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

[2336] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[2337] Md. Code Ann., Crim. Law §§ 6-102, -103, -104, -105; Va. Code Ann. § 18.2-77, -79, -80, -81; Cal. Penal Code §§ 451, 451.5, 454; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77, .78; Miss. Code Ann. §§ 97-17-1, -3, -5, -7, -9; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025; N.M. Stat. Ann. §§ 30-17-5 and 30-17-6; N.C. Stat. Ann. § 14-58.2; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; S.C. Code Ann. § 16-11-110; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504; Wash. Rev. Code Ann. §§ 9A.48.020 and .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4; Wyo. Stat. Ann. § 6-3-101.

used, the recognition of a mitigation defense to arson is rare and disapproved by experts.[2338] At least 20 states have reckless burning offenses,[2339] as well as the MPC[2340] and the Proposed Federal Criminal Code.[2341] None of the states, the MPC, or the Proposed Federal Criminal Code use "malice" in their reckless burning statutes.

Instead, 11 of the 20 states[2342] with reckless burning statutes instead specify "knowingly," "purposely," or "intentionally" in some or all of their reckless burning statutes. The varying rules of construction amongst states make it difficult to generalize whether these culpable mental states apply to the prohibited conduct in these states, such as start a fire or cause an explosion. However, the MPC reckless burning offense requires that the defendant "purposely" start a fire or cause an explosion[2343] and the Proposed Federal Criminal Code requires that the defendant "intentionally" start or maintain a fire or causes an explosion.[2344] The vast majority of the states with reckless burning statutes require "recklessly" as to the damage or destruction of the property or endangering of the property,[2345] as do the MPC[2346] and the Proposed Federal Criminal

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[2338] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 10.4 (2d ed.) ("Outside of homicide law, the concept of [mitigation] doesn't [really] exist."); John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 404 n. 573 (1986) (rejecting the argument of R. Perkins & R. Boyce that a mitigated burning should not be arson and stating that "why should the rule of provocation be applied outside the law of homicide? I find neither history nor policy which supports the application of the rule of provocation to arson."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1041 (2011) (categorically stating that "[p]rovocation is available as a partial defense only to murder" and that it is not "a defense, partial or otherwise" to non-homicide offenses, which is incorrect in light of District law.

[2339] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.

Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[2340] MPC § 220.1(2).

[2341] Proposed Federal Criminal Code § 1702.

[2342] Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; 18 Pa. Stat. Ann. § 3301(d); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; Wash. Rev. Code Ann. §§ 9A.48.040, .050; S.D. Codified Laws § 22-33-9.3.

[2343] MPC § 220.1(2).

[2344] Proposed Federal Criminal Code § 1702.

[2345] Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, §

Code.[2347] The RCC reckless burning offense reflects national trends with its culpable mental states of "knowingly" starts a fire or causes an explosion and "recklessly damages or destroys."

The second substantive change is that subsection (a)(1) requires, in part, that the defendant "cause[] an explosion." There is a clear national trend towards including explosions in reckless burning statutes. All of the 20 states with reckless burning statutes,[2348] except one,[2349] include "causes an explosion" or damaging or destroying "by explosives" or similar language in the offenses, as do the MPC[2350] and the Proposed Federal Criminal Code.[2351]

A third substantive change to current District law is that the RCC reckless burning statute applies to motor vehicles. Of the 20 states that have reckless burning statutes,[2352] nine include motor vehicles in their reckless burning statutes.[2353] A few of these states have requirements for the motor vehicle, such as it must be used for or adapted for the lodging of persons,[2354] but the majority do not, and an additional nine states include any

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802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[2346] MPC § 220.1(2).

[2347] Proposed Federal Criminal Code § 1702.

[2348] Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[2349] Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b).

[2350] MPC § 220.1(2).

[2351] Proposed Federal Criminal Code § 1702.

[2352] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.

Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[2353] Ark. Code Ann. §§ 5-38-101 (defining occupiable structure" to include vehicles that meet certain requirements), -302; Conn. Gen. Stat. Ann. §§ 53a-101 (defining "building" to include vehicles), -114; Mo. Ann. Stat. §§ 569.010 (defining "habitable structure" to include vehicles that meet certain requirements); 18 Pa. Stat. Ann. § 3301(d)(2); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; N.Y. Penal Law § 150.05; Ala. Code §§ 13A-7-40 (defining "building" to include vehicles that meet certain requirements); Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building" to include vehicles), -105; N.D. Cent. Code Ann. §§ 12.1-21-08 (defining "inhabited structure" to include vehicles that meet certain requirements).

[2354] Ark. Code Ann. §§ 5-38-101 (defining occupiable structure" to include vehicles that meet certain requirements), -302; Conn. Gen. Stat. Ann. §§ 53a-101 (defining "building" to include vehicles), -114; Mo. Ann. Stat. §§ 569.010 (defining "habitable structure" to include vehicles that meet certain requirements);

property in their reckless burning statutes.[2355] The MPC reckless burning offense is limited to a building or occupied structure, which includes vehicles that meet certain requirements.[2356] The Proposed Federal Criminal Code endangering by fire or explosion offense is similarly limited to a building or inhabited structure, which includes vehicles that meet certain requirements, and also includes damage to property of another constituting pecuniary loss in excess of $5,000.[2357]

The fourth substantive change to District law is that the RCC reckless burning statute does not require that the dwelling, building, business yard, watercraft, or motor vehicle be another person's property. This is a minority position. Of the 20 states with reckless burning statutes,[2358] all but four require that the property be of another person when the reckless burning endangers or damages property.[2359]

The fifth substantive change in the RCC reckless burning statute is the affirmative defense in subsection (d). The affirmative defense reflects a minority position amongst the states. As already noted, of the 20 states with reckless burning statutes,[2360] all but

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18 Pa. Stat. Ann. § 3301(d)(2); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; N.Y. Penal Law § 150.05; Ala. Code §§ 13A-7-40 (defining "building" to include vehicles that meet certain requirements); Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building" to include vehicles), -105; N.D. Cent. Code Ann. §§ 12.1-21-08 (defining "inhabited structure" to include vehicles that meet certain requirements).

[2355] Del. Code Ann. tit. 11, § 804; Or. Rev. Stat. Ann. § 164.335; Utah Code Ann. § 76-6-104(1)(c); Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2);

[2356] MPC § 220.1(2), (4).

[2357] Proposed Federal Criminal Code §§ 1702, 1709.

[2358] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.

Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[2359] Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; N.Y. Penal Law § 150.05; Ala. Code § 13A-7-43.

[2360] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.

Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-

four require that the property be of another person when the reckless burning endangers or damages property.[2361] Two of these four states have an affirmative defense or exception to liability that requires the defendant to establish that no one person other than the defendant had a possessory interest in the property.[2362]

The sixth substantive change to District law is that the RCC reckless burning statute does not include "attempt to burn" that is in the current arson statute.[2363] None of the states with reckless burning statutes include "attempt" or similar language in the offense, nor do the MPC[2364] or the Proposed Federal Criminal Code.[2365]

The seventh substantive change to current District law is that the RCC deletes a statute that is closely related to the current arson statute and RCC reckless burning statute: placing explosives with intent to destroy or injure property.[2366] It is difficult to assess national trends for this change because there is significant variation in the 50 states as to what conduct constitutes "reckless burning," and some states do not name their offenses. However, in the 50 states' arson statutes, placing explosives near property with a certain intent is specifically an attempt to commit arson, and it is not a separate offense.[2367] There is no equivalent offense in the MPC or the Proposed Federal Criminal Code.

Finally, regarding the bar on multiple convictions for the reckless burning offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the reckless burning offense and other overlapping property offenses. For example, where the offense most like the reckless burning is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2368] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just

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43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[2361] Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; N.Y. Penal Law § 150.05; Ala. Code § 13A-7-43.

[2362] N.Y. Penal Law § 150.05; Ala. Code § 13A-7-43.

[2363] D.C. Code § 22-301.

[2364] MPC § 220.1.

[2365] Proposed Federal Criminal Code § 1702.

[2366] 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.").

[2367] *See, e.g.*, Md. Code Ann., Crim. Law § 6-109; Cal. Penal Code §455(b); Miss. Code Ann. § 97-17-9(2); Nev. Rev. Stat. Ann. § 205.025(2); Okla. Stat. Ann. tit. 21, § 1404(B); Vt. Stat. Ann. tit. 13, § 509; W. Va. Code Ann. § 61-3-4(b); Wis. Stat. Ann. § 943.05.

[2368] D.C. Code § 22-3203.

property) crimes,[2369] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2370]

RCC § 22E-2503. CRIMINAL DAMAGE TO PROPERTY.

Relation to National Legal Trends. *The revised CDP offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends in equivalent property damage offenses.*[2371]

First, the revised CDP offense replaces "malice" as the culpable mental state in the current MDP statute with requirements of knowledge, recklessness, and strict liability with respect to various elements. Deleting "malice" reflects national trends. Only 12 states, mostly with unreformed criminal codes, use "malice" in their damage to property statutes.[2372] Neither the MPC[2373] nor the Proposed Federal Criminal Code[2374] criminal mischief statutes require "malice." Three states require "recklessly" in all grades of their damage to property offenses.[2375] An additional 10 states differentiate gradations, at least in part, based on the defendant's culpable mental state and include "recklessly" in the lowest or lower grades of the offense.[2376] The MPC's criminal mischief offense uses this grading scheme, requiring either "purposely" or "recklessly," with reckless damage limited to the lower grades of the offense.[2377] Similarly, the Proposed Federal Criminal Code's criminal mischief offense requires "willfully," with reckless damage limited to the lower grades of the offense.[2378] Most of the remaining states, at least 19, require "knowingly" or a higher mental state, such as intentionally or purposely, for all grades of their property damage statutes.[2379]

[2369] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2370] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2371] Unless otherwise specifically noted, this survey of national legal trends is limited to states' most general property damage or destruction statute. More specific statutes, such as those pertaining to the damage or destruction of specific types of property, tampering offenses, interfering with public utilities or services, especially dangerous means of damage or destruction, and graffiti were excluded.

[2372] Md. Code Ann., Crim. Law § 6-301; Fla. Stat. Ann. § 806.13; Idaho Code Ann. § 18-7001; Mass. Gen. Laws Ann. ch. 266, § 127; Mich. Comp. Laws Ann. § 750.377a; Miss. Code Ann. § 97-17-67; Okla. Stat. Ann. tit. 21, § 1760; S.C. Code Ann. § 16-11-510; Wash. Rev. Code Ann. § 9A.48.090; Cal. Penal Code § 594; Nev. Rev. Stat. Ann. § 206.310; 11 R.I. Gen. Laws Ann. § 11-44-1.

[2373] MPC § 220.3.

[2374] Proposed Federal Criminal Code § 1705.

[2375] Ariz. Rev. Stat. Ann. § 13-1602(A)(1)-(5); Ind. Code Ann. § 35-43-1-2(a), (a)(1), (a)(2)(A); Me. Rev. Stat. Ann. tit. 17-A, §§ 805, 806.

[2376] N.Y. Penal Law §§ 145.00(1), (3), .05(2), .10; Tex. Penal Coe Ann. §§ 28.03(a)(1), (b), .04; Ark. Code Ann. §§ 5-38-203(a)(1), (b), -204(a)(1); Conn. Gen. Stat. Ann. §§ 53a-115(a)(1), -116(a)(1), -117(a)(1); Del. Code Ann. tit. 11, § 811(a)(1), (b); Neb. Rev. Stat. Ann. § 28-519(1)(a), (2)-(5); N.H. Rev. Stat. Ann. § 634:2; Or. Rev. Stat. Ann. §§ 164.365(1)(a)(A); 18 Pa. Stat. Ann. § 3304(a)(1), (a)(6), (b); N.D. Cent. Code Ann. § 12.1-21-05(1)(b), (2).

[2377] MPC § 220.3.

[2378] Proposed Federal Criminal Code § 1705.

[2379] Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ala. Code §§ 13A-7-21(a)(1), -22(a), -23; Colo. Rev. Stat. Ann. § 18-4-501; Ga. Code Ann. §§ 16-7-23(a)(1), -21(a); Ill. Comp. Stat. Ann. 5/21-1(a)(1), (d); Iowa Code Ann. §§ 716.1, .3(1)(a), .4, .5(1)(a), .6(1)(a)(1), (b), Kans. Stat. Ann. § 21-5813(a)(1), (c); Ky. Rev. Stat. Ann. §§ 512.020, .030, .040; La. Stat. ann. § 14:56; Minn. Stat. Ann. § 609.595(1)(3), (2)(a), (3); Mont. Code Ann. § 45-6-

Second, using the amount of damage to the property as the basis for measuring the damage or destruction reflects a clear national trend. The majority of the 50 states use the amount of damage or destruction as the gradation for the equivalent property damage offense.[2380] Four states use the costs of repairs or replacement.[2381] Six states grade based on the value of the property, and two of these states also partially grade based on the amount of damage.[2382] The MPC criminal mischief offense grades, in part, based on the amount of "pecuniary loss" that results,[2383] with the commentary suggesting that "pecuniary loss" is limited to the amount of physical harm or damage done.[2384] The Proposed Federal Criminal Code criminal mischief offense also grades, in part, based on the amount of "pecuniary loss."[2385]

Third, it appears that only one state treats attempts the same as the completed property damage offense.[2386] The MPC[2387] and the Proposed Federal Criminal Code[2388] do not include attempt in their criminal mischief offenses.

Fourth, regarding increasing the number and type of gradations, it appears that the District's current two gradations and $1,000 value cutoff in its MDP statute make it an outlier, with its 10 year penalty for the higher grade being one of the harshest, if not the harshest, in the country. One state appears to not have any gradations in its property damage offense, but the offense is a misdemeanor.[2389] Of the remaining 49 states, only two permit 10 year maximum penalties for gradations that are equal to or less than D.C.'s

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101(1)(a); N.J. Stat. Ann. § 2C:17-3(a)(1); N.M. Stat. Ann. § 30-15-1; Tenn. Code Ann. § 39-14-408(b)(1); Utah Code Ann. § 76-6-106(1)(c); Vt. Stat. Ann. tit. 13, § 3701; Wis. Stat. Ann. § 943.01(1), (2)(d); Wyo. Stat. Ann. § 6-3-201.

[2380] Md. Code Ann., Crim. Law § 6-301; Alaska Code Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(1); N.Y. Penal Law §§ 145.00(1), (6), .05(2), .10; Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ala. Code § 13A-7-21(a)(1), -22(a), -23; Ariz. Rev. Stat. § 13-1602; Ark. Code Ann. Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823 ("without the other's consent."); Colo. Rev. Stat. Ann. § 18-4-501; Conn. Gen. Stat. Ann. §§ 53a-115, -116, -117; Fla. Stat. Ann. § 806.13; Ga. Code Ann. § 16-7-23(a)(1); Idaho Code Ann. § 18-7001; 720 Ill. Comp. Stat. Ann. 5-21-1; Me. Rev. Stat. tit. 17-A, §§ 806(1)(A), 805(A)(1); Mich. Comp. Laws Ann. § 750.377a; N.M. Stat. Ann. § 30-15-1; Or. Rev. Stat. Ann. §§ 164.365, .364; Tenn. Code Ann. § 39-14-408; Wash. Rev. Code Ann. §§ 9A.48.070(1)(A), .080(1)(A), .090(1)(A); Cal. Penal Code § 594; Mo. Ann. Stat. §§ 569.100, .120.

[2381] Wis. Stat. Ann. § 943.01; Iowa Code Ann. §§ 716.3, .4, .5, .6; Minn. Stat. Ann. § 609.595; W. Va. Code Ann. § 61-3-30.

[2382] Nev. Rev. Stat. Ann. § 206.310 ("value of the property affected or the loss resulting."); Va. Code Ann. § 18.2-137(B) ("value of or damage to the property."); Tenn. Code Ann. § 39-14-408(c)(1) ("value"); Vt. Stat. Ann. tit. 13, § 3701 ("valued at" or "valued."); Miss. Code Ann. § 97-17-67 ("value of the property."); Mass. Gen. Laws Ann. ch. 266, § 127 ("value of the property.").

[2383] MPC § 220.3.

[2384] MPC § 220.3 cmt. at 47, 53 (stating that "damages" in the MPC criminal mischief offense is meant to "refer to actual physical destruction or harm to the tangible property" and discussing the grading of the offense as based on "a mixture of culpability and amount of harm done."). The MPC commentary also characterizes states' property damage statutes that require "pecuniary loss" as requiring damage. *Id.* at 55-56.

[2385] Proposed Federal Criminal Code § 1705.

[2386] N.H. Rev. Stat. Ann. § 634:2.

[2387] MPC § 220.3.

[2388] Proposed Federal Criminal Code § 1705.

[2389] 11 R.I. Gen. Laws Ann. § 11-44-1.

$1,000 threshold.[2390] However, one of these states requires a mental state of "knowingly,"[2391] which is a higher mental state than the "malice" culpable mental state in the current District MDP statute. Other states generally have far higher dollar value requirements for gradations with 10 year maximum penalties.[2392] The District's current MDP statute is similarly an outlier when compared to the criminal mischief offenses in the MPC and the Proposed Federal Criminal Code. The MPC punishes purposely causing pecuniary loss in excess of $5,000 with a maximum penalty of 5 years imprisonment.[2393] The Proposed Federal Criminal Code punishes intentionally causing pecuniary loss in excess of $5,000 with a maximum penalty of 7 years imprisonment.[2394]

A majority of the 50 states have more than two gradations, with three and four[2395] being the most common number. The MPC[2396] and the Proposed Federal Criminal Code[2397] criminal mischief offense each have three gradations. As noted earlier, ten states, [2398] the MPC,[2399] and the Proposed Federal Criminal Code[2400] grade their property damage offenses partially based on the defendant's mental state. While a minority approach, this appears to reflect the fact that damage done with a lower culpable mental state, such as malice in the current MDP statute, or reckless in the criminal damage to property statute, can still create significant harm.

There is significant support for treating the special types of property specified in second degree CDP differently amongst the 50 states. At least 17 states have special gradations in their damage to property offenses or separate offenses for damage to cemeteries and similar places for the internment of human remains.[2401] At least nine

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[2390] Wyo. Stat. Ann. § 6-3-201; Mass. Gen. Laws. Ann. ch. 266, § 127.
[2391] Wyo. Stat. Ann. § 6-3-201.
[2392] *See, e.g.*, Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823; Ala. Code §§ 13A-7-22, -23; La. Stat. Ann. § 14:56; S.C. Code Ann. § 16-11-510; S.D. Codified Laws § 22-34-1; Wash. Rev. Code Ann. §§ 9A.48.070, .080, .090; Iowa Code Ann. §§ 716.4, .5, .6; Ark. Code Ann. §§ 5-3-203, -204.
[2393] MPC §§ 220.3, 6.06.
[2394] Proposed Federal Criminal Code §§ 1705, 3201.
[2395] Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); Ala. Code §§ 13A-7-21, -22, -23; Fla. Stat. Ann. § 806.13; La. Stat. Ann. § 14:55; Me. Rev. Stat. tit. 17-A, §§ 805, 807; S.C. Code Ann. § 16-11-510; Wash. Rev. Code Ann. §§ 9A.48.070, .080, .090; Cal. Penal Code § 594; Ind. Code Ann. § 35-43-1-2; Ky. Rev. Stat. Ann. §§ 512.020, .030, .040; N.J. Stat. Ann. § 2C:17-3; Minn. Stat. Ann. § 609.595; Conn. Gen. Stat. Ann. §§ 53a-115, -116, -117; Del. Code Ann. tit. 11, § 811; Or. Rev. Stat. Ann. §§ 164.365, .354; N.H. Rev. Stat. Ann. § 634:2; Va. Code Ann. § 18.2-137; Vt. Stat. Ann. tit. 13, § 3701; Mass. Gen. Laws Ann. ch. 266, § 127; Ohio Rev. Code § 2909.07; Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823; 720 Ill. Comp. Stat. Ann. 5/21-1; Mich. Comp. Laws Ann. § 750.377a; Nev. Rev. Stat. Ann. § 206.310; Kan. Stat. Ann. § 28-5813; 18 Pa. Stat. Ann. § 3304; N.D. Cent. Code Ann. § 12.1-21-05; N.Y. Penal Law §§ 145.00, .05, .10; Neb. Rev. Stat. Ann. § 28-519; Miss. Code Ann. § 97-17-67.
[2396] MPC § 220.3.
[2397] Proposed Federal Criminal Code § 1705.
[2398] Proposed Federal Criminal Code § 1705.
[2399] MPC § 220.3.
[2400] Proposed Federal Criminal Code § 1705.
[2401] Wis. Stat. Ann. § 943.012(2); Mont Code Ann. § 45-6-104(2); Ind. Code Ann. § 35-43-1-2.1; Ala. Code § 13A-7-23.1; N.Y. Penal Law §§145.22, .23; Ark. Code Ann. § 5-38-207; N.H. Rev. Stat. Ann. § 635:6(I)(a); Ohio Rev. Code Ann. § 2909.05(C); 18 Pa. Stat. Ann. § 3307(a)(2); Alaska Stat. Ann. § 11.46.482(a)(3)(A); N.J. Stat. Ann. § 2C:17-4(b)(6); Ariz. Rev. Stat. Ann. § 13-1604(A)(3); Tex. Penal Code Ann. § 28.03(f); Kan. Stat. Ann. § 21-5813(b)(4); Idaho Code Ann. § 18-7027; Nev. Rev. Stat. Ann. § 206.125(1)(b); N.C. Gen. Stat. Ann. § 14-148.

states have gradations in their damage to property statutes or separate offenses that are specific to damage places of worship.[2402] A small number of states, possibly as few as four,[2403] have separate gradations for damaging public monuments. However, neither the MPC nor the Proposed Federal Criminal Code select places such as cemeteries, places of worship, and public monuments for different grading.

Fifth, regarding the deletion of several statutes that are closely related to the current MDP statute, the 50 states take different approaches to reducing overlap between the main criminal damage to property offense and separate offenses for damaging certain kinds of property. Some states have a main criminal damage to property offense with separate offenses that pertain to specific property, although the number of separate offenses varies greatly.[2404] Other states, however, appear to have only one property damage statute.[2405] The RCC has one main property damage property statute with gradations for specific types of property to prevent defendants from receiving multiple convictions for the same act or course of conduct. In doing so, the RCC follows several states and the MPC[2406] and the Proposed Federal Criminal Code[2407] which have criminal mischief offenses that were meant to consolidate the numerous specific property damage offenses that existed at the time the model legislation was proposed. Neither the MPC nor the Proposed Federal Criminal Code has property damage statutes for specific types of property.

Sixth, regarding the bar on multiple convictions for the CDP offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the CDP offense and other overlapping property offenses. For example, where the offense most like the CDP offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent

[2402] Wis. Stat. Ann. § 943.012(1); Mont Code Ann. § 45-6-104(2); 18 Pa. Stat. Ann. § 3307(a)(1); Kan. Stat. Ann. § 21-5813(b)(1); Ariz. Rev. Stat. Ann. § 13-1604(A)(1); 720 Ill. Comp. Stat. Ann. 5/21-1(d); N.M. Stat. Ann. § 30-15-1.1; Nev. Rev. Stat. Ann. § 206.125 (1)(a); S.C. Code Ann. § 16-11-535.

[2403] Mont Code Ann. § 45-6-104(2); Tex. Penal Code Ann. § 28.03(f); 720 Ill. Comp. Stat. Ann. 5/21-1(d); Idaho Code Ann. § 18-7021.

[2404] *See, e.g.*, Ala. Code §§ 13A-21, -22, -23, -23.1; Va. Code Ann. §§ 18.2-137, -138, -139.1, -140; 18 Pa. Stat. Ann. §§ 3304, 3305, 3307, 3309, 3310, 3312; Ky. Rev. Stat. Ann. §§ 512.020, .030, .040, .090; Conn. Gen. Stat. Ann. §§ 53a-115 through -117m; S.C. Code Ann. §§ 16-11-510, -520, -535, -560, -570, -580, -590.

[2405] Me. Rev. Stat. tit. 17-A, §§ 805, 806 (two degrees of criminal mischief); Alaska Stat. Ann. §§ 11.46.475, .480, .482, .484, .486 (five degrees of criminal mischief); Md. Code Ann., Crim. Law § 6-301; Neb. Rev. Stat. Ann. § 28-519.

[2406] MPC § 220.3 cmt. at 41 ("Typical legislation at the time the Model Penal Code was drafted consisted of numerous specifically prohibited types of harm to particular property, often supplemented by a catch-all offense dealing with injury or destruction to real or personal property in cases not specifically covered by other provisions. . . . Section 220.3 consolidates all forms of malicious mischief into a single generic offense.").

[2407] Proposed Federal Criminal Code § 1705 cmt. at 197 ("This section is intended to provide a rational grading structure for the numerous property-damage and property-tampering provisions in existing law which are consolidated in it.").

statutory provision to either the current Consecutive sentences[2408] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2409] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2410]

Specifically for CDP, at least two states define their general property damage offenses to exclude damage caused by fire,[2411] prohibiting convictions for both arson and property damage for the same act or course of conduct.

Seventh, regarding the aggregation of amounts of damage in a single scheme or systematic course of conduct, the revised CDP offense follows many jurisdictions[2412] which have statutes that closely follow the Model Penal Code (MPC)[2413] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[2414] However, these other jurisdictions' aggregation statutes are silent as to damage to property offenses, nor does the MPC's Criminal Mischief[2415] offense explicitly provide for aggregation.

Eighth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[2416] In practical effect, this means that intoxication may "serve as a

[2408] D.C. Code § 22-3203.

[2409] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2410] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2411] Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823, -823.5 ("other than fire"); La. Stat. Ann. §§ 14:55 ("other than fire or explosion"), 14:56 ("other than fire or explosion.").

[2412] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[2413] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[2414] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[2415] Model Penal Code § 220.3

[2416] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to

defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[2417] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[2418]

National legal trends also support other changes to the revised CDP offense.

For example, regarding the replacement of "injures or breaks" in the current MDP statute with "damages," a majority of the 50 states use "damage" or similar language in the equivalent property damage offenses,[2419] as do the MPC[2420] and the Proposed Federal Criminal Code.[2421] Fifteen states include "injures,"[2422] at least three of which also include "damage."[2423] None of the 50 states appear to use "breaks" in their equivalent property damage offenses.

Also, regarding the replacement of "not his or her own" in the current MDP statute with "property of another," the majority of the 50 states' criminal damage to property statutes require that the property be "of another" or use similar language.[2424]

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this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[2417] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

[2418] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[2419] Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); N.Y. Penal Law §§ 145.00(1), (3), .05(2), .10; Tex. Penal Code Ann. §§ 28.03(a)(1), .04; Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ala. Code §§ 13A-7-21, -22, -23; Ark. Code Ann. §§ 5-38-203(a)(1), -204(a)(1); Colo. Rev. Stat. Ann. § 18-4-501; Conn. Gen. Stat. Ann. §§ 53a-115(1), -116(1), -117(1); Del. Code Ann. tit. 11, § 811(a)(1); Ga. Code Ann. § 16-7-23(a)(1); 720 Ill. Comp. Stat. Ann. 5/21-1(a)(1); La. Stat. Ann. §§ 14:55, 14:56; Me. Rev. Stat. tit. 17-A, §§ 805(1)(A), 806(1)(A); Minn. Stat. Ann. § 609.595; Neb. Rev. Stat. Ann. § 28-519(1)(a); N.H. Rev. Stat. Ann. § 634:2; N.J. Stat. Ann. § 2C:17-3(a)(1); N.M. Stat. Ann. § 30-15-1; N.D. Cent. Code Ann. § 12.1-21-05(1)(b); Or. Rev. Stat. Ann. §§ 164.365, .354; 18 Pa. Stat. Ann. § 3304(a)(1), (6); Tenn. Code Ann. § 39-14-408(b)(1); Vt. Stat. Ann. tit. 13, § 3701; Wash. Rev. Code Ann. § 9A.48.070(1)(a), .080(1)(a), .090(1)(a); Wis. Stat. Ann. § 943.01(1); Cal. Penal Code § 594(a)(2), (3); Mo. Ann. Stat. §§ 569.100(1)(1), .120(1)(2).

[2420] MPC § 220.3.

[2421] Proposed Federal Criminal Code § 1705.

[2422] Md. Code Ann., Crim Law. § 6-301; Fla. Stat. Ann. § 806.13; Idaho Code Ann. § 18-7001; Mass. Gen. Laws ch. 266, § 127; Mich. Comp. Laws Ann. § 750.377a; Miss. Code Ann. § 97-17-67; Mont. Code Ann. § 45-6-101; N.C. Gen. Stat. Ann. §§ 14-127, -160; Okla. Stat. Ann. tit. 21, § 1760; S.C. Code § 16-11-510; S.D. Codified Laws § 22-34-1; W. Va. Code Ann. § 61-3-30; Wyo. Stat. Ann. § 6-3-201; Nev. Rev. Stat. Ann. § 206.310; 11 R.I. Gen. Laws Ann. § 11-44-1.

[2423] Fla. Stat. Ann. § 806.13; Mont. Code Ann. § 45-6-101; S.D. Codified Laws § 22-34-1.

[2424] *See, e.g.*, Md. Code Ann., Crim Law. § 6-301; Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); N.Y. Penal Law §§ 145.00(1), (3), .05(2), .10; Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ariz. Rev. Stat. Ann. § 13-1602(A)(1); Ark. Code Ann. §§ 5-38-203(a)(1), -204(a)(1); Colo. Rev. Stat. Ann. § 18-4-501; Conn. Gen. Stat. Ann. §§ 53a-115(1), -116(1), -117(1); Del. Code Ann. tit. 11, § 811(a)(1); Fla. Stat. Ann. § 806.13; Ga. Code Ann. § 16-7-23(a)(1); 720 Ill. Comp. Stat. Ann. 5/21-1(a)(1); Ind. Code Ann. § 35-43-1-2(a); Kan. Stat. Ann. § 21-5813(a)(1); Me. Rev. Stat. tit. 17-A, §§ 805(1)(A), 806(1)(A); Mich. Comp. Laws Ann. § 750.377a; Me. Rev. Stat. tit. 17-A, §§ 805(1)(A), 806(1)(A); Minn. Stat. Ann. § 609.595; Mont. Code Ann. § 45-6-101(1)(a); Neb. Rev. Stat. Ann. § 28-519(1)(a); N.H. Rev. Stat. Ann. § 634:2; N.J. Stat. Ann. § 2C:17-3(a)(1); N.M. Sat. Ann. § 30-

Both the MPC[2425] and the Proposed Federal Criminal Code[2426] require that the property at issue be "property of another." Only four states use "not his own" or "not his or her own" in their damage to property statutes.[2427] However, it is difficult to generalize about whether other jurisdictions' language is directly comparable to the definition of "property of another" used in the revised CDP statute because not all jurisdictions define that term or adopt an MPC-based definition of that term. At least some states specifically exclude security interests from their property damage statutes through the definition of "property of another."[2428] However, the majority of states and the Proposed Federal Criminal Code appear to include such property with security interests in their equivalent property damage statutes, even though many of these states and the Proposed Federal Criminal Code adopt the MPC definition of "property of another" and exclude these interests from theft and related offenses. The MPC applies the same definition of "property of another," and the exclusion of certain security interests to both the criminal mischief offense and theft offenses.[2429]

RCC § 22E-2504. CRIMINAL GRAFFITI.

Relation to National Legal Trends. *The revised criminal graffiti offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, the revised criminal graffiti offense replaces the current possessing graffiti materials offense. At least 17 states have separate offenses for placing graffiti on property, or have a specific gradation to that effect in their broader property damage statutes.[2430] Neither the Model Penal Code (MPC) nor the Proposed Federal Criminal

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15-1; N.D. Cent. Code Ann. § 12.1-21-05(1)(b); Or. Rev. Stat. Ann. §§ 164.365, .354; 18 Pa. Stat. Ann. § 3304(a)(1), (6); Tenn. Code Ann. § 39-14-408(b)(1); Utah Code Ann. § 76-6-106(2)(c); Wash. Rev. Code Ann. § 9A.48.070(1)(a), .080(1)(a), .090(1)(a); Wis. Stat. Ann. § 943.01(1); Wyo. Stat. Ann. § 6-3-201; Mo. Ann. Stat. §§ 569.100(1)(1), .120(1)(2); Ohio Rev. Code Ann. § 2909.07(A)(1).

[2425] MPC § 220.3.

[2426] Proposed Federal Criminal Code § 1705.

[2427] Va. Code Ann. § 18.2-137; Idaho Code Ann. § 18-7001; Okla. Stat. Ann. tit. 21, § 1760; Cal. Penal Code § 594.

[2428] Haw. Rev. Stat. Ann. § 708-800; N.H. Rev. Stat. Ann. §§ 637:2, 634:2.

[2429] MPC § 220.3 cmt. at 45 ("With respect to the element 'of another' in the Model Code, there would seem to be no reason not to apply the term 'property of another' as defined in Section 223.0(7)."). The MPC has a separate offense that prohibits destroying or "otherwise deal[ing] with" property subject to a security interest with purpose to hinder enforcement of that interest. MPC § 224.10 ("A person commits a misdemeanor if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with purpose to hinder enforcement of that interest.").

[2430] For the purposes of this survey, states with statutes that described the penalties for damage to property when caused by graffiti, without specifying elements of a graffiti offense, were excluded. States with statutes that did not use the term "graffiti," but had elements that substantively established a graffiti offense were included. Or. Rev. Stat. Ann. §§ 164.381, .383, .388; Wis. Stat. Ann. § 943.017; Idaho Code Ann. § 18-7036; Neb. Rev. Stat. Ann. § 28-524; N.M. Stat. Ann. § 30-15-1.1; La. Rev. Stat. Ann. § 14:56.4; 11 R.I. Gen. Laws Ann. § 11-44-21.1; N.Y. Penal Law §§ 145.60, .65; Tex. Penal Code § 28.08; Ariz. Rev. Stat. Ann. § 13-1602(A)(5); Utah Code Ann. §§ 76-6-107, -107.1; 18 Pa. Stat. Ann. § 3304; Del. Code Ann. tit. 11, § 812; Md. Code, Crim. Law § 6-301; Nev. Rev. Stat. Ann. §§ 206.335, .330; S.C. Code Ann. § 16-11-770; N.C. Gen. Stat. Ann. § 14-127.1.

Code has graffiti offenses or provisions in their criminal mischief statutes. It appears only four[2431] of the 17 states with graffiti offenses have similar offenses that prohibit possessing graffiti materials.

Second, the revised criminal graffiti offense replaces the "willfully" mental state in the current graffiti offense[2432] with a "knowingly" culpable mental state and applies the "knowingly" culpable mental state to each element of the offense. Of the 17 states with graffiti offenses,[2433] six states require an "intentionally"[2434] culpable mental state, two require "knowingly,"[2435] and two require "recklessly."[2436] Several states do not specify a mental state in the statute[2437] or use old, common law mental states.[2438] Varying rules of construction amongst the states or lack thereof make it difficult to determine whether the states apply the culpable mental states to each element as the revised criminal graffiti offense does.

Third, regarding the bar on multiple convictions for the revised criminal graffiti offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the criminal graffiti offense and other overlapping property offenses. For example, where the offense most like the revised criminal graffiti offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2439] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2440] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2441]

[2431] Or. Rev. Stat. Ann. § 164.388; N.Y. Penal Law §§ 145.65; Del. Code Ann. tit. 11, § 812; Nev. Rev. Stat. Ann. § 206.335.

[2432] D.C. Code § 22-3312.04(e).

[2433] For the purposes of this survey, states with statutes that described the penalties for damage to property when caused by graffiti, without specifying elements of a graffiti offense, were excluded. States with statutes that did not use the term "graffiti," but had elements that substantively established a graffiti offense were included. Or. Rev. Stat. Ann. §§ 164.381, .383, .388; Wis. Stat. Ann. § 943.017; Idaho Code Ann. § 18-7036; Neb. Rev. Stat. Ann. § 28-524; N.M. Stat. Ann. § 30-15-1.1; La. Rev. Stat. Ann. § 14:56.4; 11 R.I. Gen. Laws Ann. § 11-44-21.1; N.Y. Penal Law §§ 145.60, .65; Tex. Penal Code § 28.08; Ariz. Rev. Stat. Ann. § 13-1602(A)(5); Utah Code Ann. §§ 76-6-107, -107.1; 18 Pa. Stat. Ann. § 3304; Del. Code Ann. tit. 11, § 812; Md. Code, Crim. Law § 6-301; Nev. Rev. Stat. Ann. §§ 206.335, .330; S.C. Code Ann. § 16-11-770; N.C. Gen. Stat. Ann. § 14-127.1.

[2434] Or. Rev. Stat. Ann. §§ 164.383, .388; Wis. Stat. Ann. § 943.017; Neb. Rev. Stat. Ann. § 28-524; N.M. Stat. Ann. § 30-15-1.1; La. Rev. Stat. Ann. § 14:56.4; 18 Pa. Stat. Ann. § 3304.

[2435] Idaho Code Ann. § 18-7036; Tex. Penal Coded Ann. § 28.08.

[2436] Ariz. Rev. Stat. Ann. § 13-1602(A)(5); Del. Code Ann. tit. 11, § 812

[2437] N.Y. Penal Law §§ 145.60, .65; Utah Code Ann. §§ 76-6-107, -107.1; Md. Code, Crim. Law § 6-301; Nev. Rev. Stat. Ann. §§ 206.335, .330; S.C. Code Ann. § 16-11-770; N.C. Gen. Stat. Ann. § 14-127.1.

[2438] 11 R.I. Gen. Laws Ann. § 11-44-21.1.

[2439] D.C. Code § 22-3203.

[2440] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2441] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

Specifically, for graffiti, one state avoids overlap with the broader property damage statute by making graffiti a gradation of the broader property damage offense[2442] and another state applies the graffiti statute "unless a greater penalty is provided by a specific statute."[2443] At least four states avoid overlap between graffiti and the broader property damage statute by codifying a special penalty when damage to property is done by graffiti.[2444] These states do not have graffiti offenses and were not otherwise analyzed in this commentary, but they prevent overlap between graffiti and the broader property damage offense.

Chapter 26. Trespass Offenses

RCC § 22E-2601. TRESPASS.

Relation to National Legal Trends. *The above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, nearly all of the twenty-nines states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions")[2445] require that the defendant have at least knowledge of the owner's wishes;[2446] only four states permit conviction based on recklessness.[2447] And not a single reformed jurisdiction permits conviction based on the defendant's negligence or based on strict liability. One commentator flatly states that it is "exceedingly rare" for a state to adopt "an express utilization of either of the lesser mental states . . . ."[2448] Both the Model Penal Code and the Brown Commission recommended a mental state of recklessness. Also, as one commentator has noted, not requiring a culpable mental state would make the crime of trespass equivalent to the tort of trespass.[2449] This fact has significance because it is generally known that "as to civil

[2442] Ariz. Rev. Stat. Ann. § 13-1602(A)(5).
[2443] Nev. Rev. Stat. Ann. § 206.330(1).
[2444] Haw. Rev. Stat. Ann. § 708-823.6; N.J. Stat. Ann. § 2C:17-3(c), (d); Fla. Stat. Ann. § 806.13; Ind. Code Ann. § 35-43-1-2(c).
[2445] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[2446] Ala. Code § 13A-7-2; Ark. Code Ann. § 5-39-203; Ariz. Rev. Stat. Ann. § 13-1504; Colo. Rev. Stat. Ann. § 18-4-502; Conn. Gen. Stat. Ann. § 53a-107; Del. Code Ann. tit. 11, § 823; Haw. Rev. Stat. § 708-813; 720 Ill. Comp. Stat. Ann. 5/21-3; Ind. Code Ann. § 35-43-2-2; Kan. Stat. Ann. § 21-5808; Ky. Rev. Stat. Ann. § 511.060; Me. Rev. Stat. tit. 17-A, § 402; Minn. Stat. Ann. § 609.605; Mo. Ann. Stat. § 569.140; Mont. Code Ann. § 45-6-203; N.H. Rev. Stat. Ann. § 635:2; N.J. Stat. Ann. § 2C:18-3; N.Y. Penal Law § 140.05; N.D. Cent. Code Ann. § 12.1-22-03; Ohio Rev. Code Ann. § 2911.21; Or. Rev. Stat. Ann. § 164.255; 18 Pa. Cons. Stat. Ann. § 3503; S.D. Codified Laws § 22-35-5; Utah Code Ann. § 76-6-206; Wash. Rev. Code Ann. § 9A.52.070.
[2447] Alaska Stat. Ann. § 11.46.320; Tenn. Code Ann. § 39-14-405; Tex. Penal Code Ann. § 30.05; Wis. Stat. Ann. § 943.13.
[2448] LAFAVE, CRIMINAL LAW 1087 (5th ed. 2010).
[2449] *See* LAFAVE, CRIMINAL LAW 1081 (5th ed. 2010).

trespass . . . the interest of the landowner is protected at the expense of those who would make mistakes," while "more is required in the criminal arena."[2450]

Second, no reformed code jurisdiction treats attempted trespass and completed trespass the same.

Third, Third, the provision in RCC § 22E-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised trespass offense and other offenses in Chapters 26 and 27 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct. However, the current unlawful entry offense is not among those offenses and, as described in the commentary to section 22E-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised trespass offense and other closely-related offenses, 22E-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Fourth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[2451] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[2452] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[2453]

Fifth, nearly all reformed code jurisdictions use the phrase "enter or remains in."[2454] "Enter or remain" is the language used by the Model Penal Code,[2455] and was

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[2450] *Id*.

[2451] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[2452] LAFAVE, *supra* note__, AT 2 SUBST. CRIM. L. § 9.5.

[2453] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[2454] Ala. Code § 13A-7-2; Alaska Stat. Ann. § 11.46.320; Ariz. Rev. Stat. Ann. § 13-1504; Ark. Code Ann. § 5-39-203; Colo. Rev. Stat. Ann. § 18-4-502; Conn. Gen. Stat. Ann. § 53a-107; Del. Code Ann. tit. 11, § 823; Haw. Rev. Stat. Ann. § 708-813; 720 Ill. Comp. Stat. Ann. 5/21-3; Kan. Stat. Ann. § 21-5808; Ky. Rev. Stat. Ann. § 511.060; Me. Rev. Stat. tit. 17-A, § 402; Mo. Ann. Stat. § 569.140; Mont. Code Ann. §

also the language recommended by the Brown Commission in its review of the federal criminal code.[2456] Only Indiana varies, and its statute uses the phrase, "enters or refuses to leave," which is substantially similar to "enter or remains."[2457]

Sixth, the revised trespass is largely in line with respect to the types of property that are protected, and the words used to describe them. Although there is no true uniformity in the reformed code jurisdictions, "real property" is used by a plurality of the states. This is roughly equivalent to "land." Five states use the term "real property" in their trespass statutes; none of these states provide a definition of the term in their definition sections.[2458] The word "premises" is used by eight states;[2459] however, six of these states simply define "premises" to include "real property," which brings the total of "real property" states to eleven.[2460] Four states simply use the word "land,"[2461] and four others use the very broad term, "any place."[2462] "Dwelling" is often defined as "a building which is used or usually used by a person for lodging."[2463] The word "lodging" is frequently used across all states, though some states also use a mixture of terms including "residence,"[2464] and reference to "overnight accommodation."[2465]

Seventh, the revised trespass offense uses the phrase "effective consent," which is not commonly found in other reformed code jurisdictions. "[W]ithout license or privilege to do so" is used by eight of the reformed code jurisdictions,[2466] as well as the

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45-6-203; N.H. Rev. Stat. Ann. § 635:2; N.J. Stat. Ann. § 2C:18-3; N.Y. Penal Law § 140.17; N.D. Cent. Code Ann. § 12.1-22-03; Ohio Rev. Code Ann. § 2911.21; Or. Rev. Stat. Ann. § 164.255; 18 Pa. Stat. and Cons. Stat. Ann. § 3503; Tenn. Code Ann. § 39-14-405; Tex. Penal Code Ann. § 30.05; S.D. Codified Laws § 22-35-5; Utah Code Ann. § 76-6-206; Wash. Rev. Code Ann. § 9A.52.070; Wis. Stat. Ann. § 943.14. One state uses only "enters." Minn. Stat. Ann. § 609.605.

[2455] Model Penal Code § 221.2 ("A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof.").

[2456] Proposed Federal Criminal Code § 1712 ("A person is guilty [of an offense] if, knowing that he is not licensed or privileged to do so, he (a) enters or remains in any building, occupied structure or storage structure, or separately secured or occupied portion thereof . . . .").

[2457] Ind. Code Ann. § 35-43-2-2 (West).

[2458] Ariz. Rev. Stat. Ann. § 13-1502; Del. Code Ann. tit. 11, § 821; Ind. Code Ann. § 35-43-2-2; Mo. Ann. Stat. § 569.140; N.Y. Penal Law § 140.10.

[2459] Ala. Code § 13A-7-4; Ark. Code Ann. § 5-39-203; Colo. Rev. Stat. Ann. § 18-4-504; Conn. Gen. Stat. Ann. § 53a-109; Haw. Rev. Stat. § 708-815; Ky. Rev. Stat. Ann. § 511.080; Mont. Code Ann. § 45-6-203; Or. Rev. Stat. Ann. § 164.245.

[2460] Ala. Code § 13A-7-1; Ark. Code Ann. § 5-39-101; Colo. Rev. Stat. Ann. § 18-4-504.5; Haw. Rev. Stat. § 708-800; Ky. Rev. Stat. Ann. § 511.010; Or. Rev. Stat. Ann. § 164.205.

[2461] Alaska Stat. Ann. § 11.46.320; 720 Ill. Comp. Stat. Ann. 5/21-3; Ohio Rev. Code Ann. § 2911.21.

[2462] Me. Rev. Stat. tit. 17-A, § 402; N.H. Rev. Stat. Ann. § 635:2; N.D. Cent. Code Ann. § 12.1-22-03; 18 Pa. Cons. Stat. Ann. § 3503.

[2463] Haw. Rev. Stat. § 708-813; see also Ala. Code § 13A-7-1 ("Dwelling. A building which is used or normally used by a person for sleeping, living or lodging therein."); Del. Code Ann. tit. 11, § 829 (""Dwelling" means a building which is usually occupied by a person lodging therein at night."); Ky. Rev. Stat. Ann. § 511.010; N.Y. Penal Law § 140.00; N.D. Cent. Code Ann. § 12.1-05-12; Or. Rev. Stat. Ann. § 164.205; Utah Code Ann. § 76-6-201.

[2464] Ariz. Rev. Stat. Ann. § 13-1501.

[2465] Ark. Code Ann. § 5-39-101(4)(A); N.J. Stat. Ann. § 2C:18-1; 18 Pa. Cons. Stat. Ann. § 3501; Tenn. Code Ann. § 39-14-401; Tex. Penal Code Ann. § 30.01.

[2466] Conn. Gen. Stat. Ann. § 53a-107; Kan. Stat. Ann. § 21-5808; Me. Rev. Stat. tit. 17-A, § 402; Mont. Code Ann. § 45-6-203 (another statute defines "entering or remaining unlawfully" as "not licensed, invited,

language used by the Model Penal Code.[2467] Additionally, thirteen states use the phrase "unlawfully" in the criminal trespass statute itself, which is then separately defined as entering or remaining without "license[], invit[ation] or privilege[] to do so."[2468] Thus, the total number of reformed jurisdictions using some variant of "license or privilege" is twenty-four states. [2469] However, four states do use the term "consent" or the phrase "effective consent."[2470]

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or otherwise privileged to do so"); N.H. Rev. Stat. Ann. § 635:2; N.J. Stat. Ann. § 2C:18-3; N.D. Cent. Code Ann. § 12.1-22-03 ; 18 Pa. Stat. and Cons. Stat. Ann. § 3503.

[2467] Model Penal Code § 221.2.

[2468] Ala. Code § 13A-7-1. See also, Alaska Stat. Ann. § 11.46.350 ("enter or remain in or upon premises or in a propelled vehicle when the premises or propelled vehicle, at the time of the entry or remaining, is not open to the public and when the defendant is not otherwise privileged to do so"); Ariz. Rev. Stat. Ann. § 13-1501 ("an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged"); Ark. Code Ann. § 5-39-101 ("enter or remain in or upon premises when not licensed or privileged to enter or remain in or upon the premises"); Colo. Rev. Stat. Ann. § 18-4-201 ("A person 'enters unlawfully' or 'remains unlawfully' in or upon premises when the person is not licensed, invited, or otherwise privileged to do so."); Conn. Gen. Stat. Ann. § 53a-107 ("A person is guilty of criminal trespass in the first degree when: (1) Knowing that such person is not licensed or privileged to do so . . . ."); Del. Code Ann. tit. 11, § 829 ("A person 'enters or remains unlawfully' in or upon premises when the person is not licensed or privileged to do so."); Haw. Rev. Stat. Ann. § 708-800 ('Enter or remain unlawfully' means to enter or remain in or upon premises when the person is not licensed, invited, or otherwise privileged to do so."); Kan. Stat. Ann. § 21-5808 ("Criminal trespass is entering or remaining upon or in any . . .[l]and . . . by a person who knows such person is not authorized or privileged to do so,"); Ky. Rev. Stat. Ann. § 511.090 ("A person 'enters or remains unlawfully' in or upon premises when he is not privileged or licensed to do so."); Me. Rev. Stat. tit. 17-A, § 402 ("A person is guilty of criminal trespass if, knowing that that person is not licensed or privileged to do so, that person . . . enters any dwelling place."); Mo. Ann. Stat. § 569.010 ("a person 'enters unlawfully or remains unlawfully' in or upon premises when he is not licensed or privileged to do so."); Mont. Code Ann. § 45-6-201 ("A person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises when the person is not licensed, invited, or otherwise privileged to do so."); N.Y. Penal Law § 140.00 ("A person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so."); Or. Rev. Stat. Ann. § 164.205 ("'Enter or remain unlawfully' means: (a) To enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the entrant is not otherwise licensed or privileged to do so; (b) To fail to leave premises that are open to the public after being lawfully directed to do so by the person in charge; (c) To enter premises that are open to the public after being lawfully directed not to enter the premises; or (d) To enter or remain in a motor vehicle when the entrant is not authorized to do so."); Utah Code Ann. § 76-6-201 ("'Enter or remain unlawfully' means a person enters or remains in or on any premises when: (a) at the time of the entry or remaining, the premises or any portion of the premises are not open to the public; and (b) the actor is not otherwise licensed or privileged to enter or remain on the premises or any portion of the premises."); Wash. Rev. Code Ann. § 9A.52.010 ("A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."). One state uses "without lawful authority." 720 Ill. Comp. Stat. Ann. 5/21-3. Minnesota uses a variety of terms, including "without claim of right" and "without consent." Minn. Stat. Ann. § 609.605.

[2469] Given its widespread use, this language was considered for the revised trespass offense, but ultimately rejected because it appeared to be practically identical to "consent," but unnecessarily legalistic. Compare LICENSE, Black's Law Dictionary (10th ed. 2014) ("A permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an agreement [not amounting to a lease or profit à prendre] that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game."), with CONSENT, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, esp. given voluntarily by a competent person; legally effective assent. • Consent is an affirmative defense to

The precise meaning of "license" and "privilege" is not clear from other jurisdictions' statutory text. Some courts in states adopting the language have drawn a distinction between the two. For example, the Supreme Court of Vermont observed that "[w]hile the decisions are not entirely consistent, they generally support the interpretation that 'licensed' refers to a consensual entry while 'privileged' refers to a nonconsensual entry."[2471] It would seem that a person does not commit trespass when that person is invited into a friend's home because the person is "licensed" to enter. On the other hand, a police officer who searches a home pursuant to a warrant does not commit trespass because the officer is "privileged" to enter the home – the officer is in the home lawfully due to his or her status as a peace officer, but most likely does not have the consent of the home's owner.[2472]

In other jurisdictions, trespass is commonly considered a lesser-included offense (LIO) of burglary; generally, a determination of the LIO relationship is matter of case law, and most states appear to determine the LIO relationship on the basis of examining statutory elements.[2473] Although it appears to be more common than not that trespass is an LIO of burglary, some reformed code jurisdiction takes the opposite view.[2474]

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assault, battery, and related torts, as well as such torts as defamation, invasion of privacy, conversion, and trespass. Consent may be a defense to a crime if the victim has the capacity to consent and if the consent negates an element of the crime or thwarts the harm that the law seeks to prevent.").

[2470] Ind. Code Ann. § 35-43-2-2 (trespass occurs when a person "knowingly or intentionally interferes with the possession or use of the property of another person without the person's consent;"); Minn. Stat. Ann. § 609.605; Tenn. Code Ann. § 39-14-405 ("A person commits criminal trespass if the person enters or remains on property, or any portion of property, without the consent of the owner."); Tex. Penal Code Ann. § 30.05 ("A person commits an offense if the person enters or remains on or in property of another . . . without effective consent . . . ."); Wis. Stat. Ann. § 943.14 "Whoever intentionally enters or remains in the dwelling of another without the consent of some person lawfully upon the premises . . . .").

[2471] *State v. Kreth*, 553 A.2d 554, 556 (Vt. 1988).

[2472] *See* WAYNE R. LAFAVE, CRIMINAL LAW 1083-84 (5th ed. 2010).

[2473] *E.g.*, *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) ("Criminal trespass can be a lesser included offense of burglary of a building."); State v. Terry, 118 S.W.3d 355, 359 (Tenn. 2003) ("we conclude that aggravated criminal trespass is a lesser-included offense of aggravated burglary. Thus, we also conclude that attempted aggravated criminal trespass is a lesser-included offense of attempted aggravated burglary."); People v. Devonish, 843 N.E.2d 1120, 1120 (2005) ("It was error to refuse defendant's request that the jury be charged with the lesser included offense of criminal trespass in the second degree."); *State v. Singleton*, 675 A.2d 1143, 1146 (N.J. App. Div. 1996) (trespass is a lesser-included offense of burglary, and therefore, judge erred when failing to instruct jury on trespass in burglary case); *State v. Williams*, 708 P.2d 834, 835 (Haw. 1985) ("Criminal trespass in the first degree is a lesser included offense of burglary in the first degree."); *State v. Harvey*, 713 P.2d 517, 520 (Mont. 1986) ("A reading of the criminal trespass and burglary statutes clearly shows that criminal trespass is a lesser included offense of burglary."); *State v. Smith*, No. SC 95461, 2017 WL 2952325, at *3 (Mo. July 11, 2017).

[2474] *E,g.*, *Commonwealth v. Quintua*, 56 A.3d 399, 402 (Penn. Super. Ct. 2012) (trespass is not a lesser-included offense of burglary, because trespass requires proof the defendant knew he or she was not permitted to enter, while burglary does not). *People v. Satre*, 950 P.2d 667, 668 (Colo. App. 1997) ("we conclude that first degree criminal trespass is not a lesser included offense of first degree burglary."); *State v. Malloy*, 639 P.2d 315, 320–21 (Ariz. 1981) ("Since in [burglary] the phrase "entering or remaining unlawfully" is not modified by the term "knowingly", in order to convict a defendant of burglary in the third degree, the prosecution need not prove that the defendant was aware of the unlawfulness of his entry. There need only be shown that the entry was knowingly or voluntarily made. Criminal trespass is not necessarily a lesser included offense of burglary.").

RCC § 22E-2602. TRESPASS OF A MOTOR VEHICLE.
[Now RCC § 22E-2601. Trespass.]

Relation to National Legal Trends. *The above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

Regarding the bar on multiple convictions for the revised TMV offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised TMV offense and other overlapping property offenses. For example, where the offense most like revised TMV is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2475] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2476] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2477]

RCC § 22E-2603. CRIMINAL OBSTRUCTION OF A PUBLIC WAY.
[Now RCC § 22E-4203. Blocking a Public Way.]

Relation to National Legal Trends. *The above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[2478] twenty-three have some type of obstruction of public ways statute.[2479] Of these twenty-three jurisdictions, at least twenty-one appear to statutorily require some subjective awareness on the part of the defendant as to the results

[2475] D.C. Code § 22-3203.
[2476] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[2477] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[2478] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[2479] Alaska Stat. Ann. § 11.61.150; Ala. Code § 13A-11-7; Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Colo. Rev. Stat. Ann. § 18-9-107; Conn. Gen. Stat. Ann. § 53a-182; Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; 720 Ill. Comp. Stat. Ann. 5/47-5; Ind. Code Ann. § 35-44.1-2-13; Ky. Rev. Stat. Ann. § 525.140; Minn. Stat. Ann. § 609.74; Mont. Code Ann. § 45-8-101; N.J. Stat. Ann. § 2C:33-7; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Or. Rev. Stat. Ann. § 166.025; N.Y. Penal Law § 240.20; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03; Utah Code Ann. § 76-9-102; Wash. Rev. Code Ann. § 9A.84.030.

of his or her actions.[2480] Fourteen reform jurisdictions statutorily require a mental state of recklessness.[2481] The commonality of this culpable mental state may be due to the MPC's adoption of recklessness.[2482] Three states statutorily require a mental state of "intentionally,"[2483] and two states use knowledge.[2484] Last, two jurisdictions' obstruction of public ways statutes require proof that the defendant "intend to" engage in some other disruptive conduct or created a risk of harm.[2485]

Second, with respect to the places protected, states vary and often combine various terms in their obstruction statutes. Thirteen states include "highway" in their list of protected places.[2486] The generic phrases "public passage," "public thoroughfare," or "public way" are used by fourteen states.[2487] Only two states statutorily extend liability for obstruction to private property.[2488]

Third, regarding the bar on multiple convictions for the revised COPW offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised COPW offense and other overlapping property offenses. For example, where the offense most like revised COPW is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2489] statute or

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[2480] Two states do not apply a mental state at all in their obstruction statute, though default culpable mental states may apply. Ark. Code Ann. § 5-71-214; 720 Ill. Comp. Stat. Ann. 5/47-5.

[2481] Ariz. Rev. Stat. Ann. § 13-2906; Colo. Rev. Stat. Ann. § 18-9-107; Conn. Gen. Stat. Ann. § 53a-182; Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; N.J. Stat. Ann. § 2C:33-7; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Or. Rev. Stat. Ann. § 166.025; N.Y. Penal Law § 240.20; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03; Utah Code Ann. § 76-9-102.

[2482] Model Penal Code § 250.7 ("A person, who, having no legal privilege to do so, purposely or recklessly obstructs any highway or other public passage, whether alone or with others, commits a violation, or, in case he persists after warning by a law officer, a petty misdemeanor.")

[2483] Ky. Rev. Stat. Ann. § 525.140 ("intentionally or wantonly"); Minn. Stat. Ann. § 609.74; Wash. Rev. Code Ann. § 9A.84.030.

[2484] Alaska Stat. Ann. § 11.61.150; Mont. Code Ann. § 45-8-101.

[2485] Ala. Code § 13A-11-7; Ind. Code Ann. § 35-44.1-2-13.

[2486] Alaska Stat. Ann. § 11.61.150; Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Colo. Rev. Stat. Ann. § 18-9-107; Haw. Rev. Stat. Ann. § 711-1105; 720 Ill. Comp. Stat. Ann. 5/47-5; Ky. Rev. Stat. Ann. § 525.140; Minn. Stat. Ann. § 609.74; N.J. Stat. Ann. § 2C:33-7; Ohio Rev. Code Ann. § 2917.11; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03.

[2487] Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Colo. Rev. Stat. Ann. § 18-9-107 ("any other place used for the passage of persons, vehicles, or conveyances"); Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; Ky. Rev. Stat. Ann. § 525.140; Me. Rev. Stat. tit. 17-A, § 505; Minn. Stat. Ann. § 609.74 ("public right-of-way"); N.J. Stat. Ann. § 2C:33-7; Ohio Rev. Code Ann. § 2917.11 ("right-of-way"); Or. Rev. Stat. Ann. § 166.025; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307 ("any other place used for the passage of persons, vehicles, or conveyances"); Tex. Penal Code Ann. § 42.03 ("any other place used for the passage of persons, vehicles, or conveyances"); Utah Code Ann. § 76-9-102 ("vehicular or pedestrian traffic in a public place").

[2488] 720 Ill. Comp. Stat. Ann. 5/47-5; Ohio Rev. Code Ann. § 2917.11.

[2489] D.C. Code § 22-3203.

the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2490] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2491]

Last, it is notable that eleven states either define this element of their obstruction statute (often using the word "obstruct") to mean "render impassable without unreasonable inconvenience or hazard," or simply codify that phrase as the element itself.[2492] This definition of "obstruct" was proposed by the Model Penal Code.[2493]

RCC § 22E-2604. UNLAWFUL DEMONSTRATION.
[Now RCC § 22E-4204. Unlawful Demonstration.]

Relation to National Legal Trends. The current unlawful demonstration offense has no equivalent in other jurisdictions, and no other jurisdiction divides prosecutorial authority in the way it is divided in the District. Therefore, no comparable statutes exist from which one can draw meaningful comparisons for the change in law proposed.

RCC § 22E-2605. UNLAWFUL OBSTRUCTION OF A BRIDGE TO THE COMMONWEALTH OF VIRGINIA.
[Now RCC § 22E-4203. Blocking a Public Way.]

Relation to National Legal Trends. There are no comparable statutes in other jurisdictions. Some states that have obstructing bridges within their more general "obstructing highways" offenses, similar to the District's criminal obstruction of a public way offense, RCC § 22E-2603.

Chapter 27. Burglary Offenses

RCC § 22E-2701. BURGLARY.

Relation to National Legal Trends. *The above-mentioned substantive changes to current District burglary law are broadly supported by national legal trends.*

First, regarding the revised burglary offense's requirement that the defendant's presence in the location is "without effective consent" or trespassory, nearly all jurisdictions require some kind of trespass or otherwise limit the sort of entry to one that is unlawful or somehow illicit by statute. Within the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code

[2490] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[2491] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[2492] Ala. Code § 13A-11-7; Alaska Stat. Ann. § 11.61.150; Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; Ky. Rev. Stat. Ann. § 525.140; N.J. Stat. Ann. § 2C:33-7; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03.
[2493] MPC § 250.7 (""Obstructs" means renders impassable without unreasonable inconvenience or hazard.").

(MPC) and have a general part (hereafter "reformed code jurisdictions"),[2494] the most common means of imposing this requirement is through the use of the word "unlawfully."[2495] Some states' statutes say that the entry must be "without authority,"[2496] "unauthorized,"[2497] or (following the MPC[2498]) that the defendant is not "licensed or privileged" to enter.[2499] The remaining approaches vary. One state codifies a requirement that the place burgled be "of another,"[2500] and another requires that the defendant "break" into the building.[2501] Only one reformed jurisdiction seems to omit a trespassory element from the statutory offense definition entirely.[2502] That state, however, also codifies a defense that applies when the defendant is "licensed or privileged to enter."[2503] Finally, two states use the phrase "without effective consent" as proposed in the revised burglary offenses for the RCC, and two other states use the phrase "without consent.[2504] Tennessee and Texas both use this phrase in their burglary offenses.[2505] Finally, one state codifies this element by stating that "[n]o person, by force, stealth, or deception, shall . . . trespass in an occupied structure[.]"[2506]

Among jurisdictions that have not undergone comprehensive reform of their codes based on the MPC, five states' statutes require no proof of that the entry was trespassory.[2507] It may be that, like the District, courts of these five states require proof

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[2494] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[2495] Ala. Code § 13A-7-5; Alaska Stat. Ann. § 11.46.300; Ariz. Rev. Stat. Ann. § 13-1508; Ark. Code Ann. § 5-39-201; Colo. Rev. Stat. Ann. § 18-4-202; Conn. Gen. Stat. Ann. § 53a-101; Del. Code Ann. tit. 11, § 826; Haw. Rev. Stat. Ann. § 708-810; Ky. Rev. Stat. Ann. § 511.020; Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.Y. Penal Law § 140.30; Or. Rev. Stat. Ann. § 164.225; Utah Code Ann. § 76-6-203; Wash. Rev. Code Ann. § 9A.52.020.

[2496] Kan. Stat. Ann. § 21-5807; 720 Ill. Comp. Stat. Ann. 5/19-1; Wyo. Stat. Ann. § 6-3-301.

[2497] N.M. Stat. Ann. § 30-16-4.

[2498] Model Penal Code § 221.1.

[2499] Me. Rev. Stat. tit. 17-A, § 401; N.J. Stat. Ann. § 2C:18-2; N.D. Cent. Code Ann. § 12.1-22-02; S.D. Codified Laws § 22-32-1.

[2500] Ind. Code Ann. § 35-43-2-1.

[2501] Neb. Rev. Stat. Ann. § 28-507.

[2502] 18 Pa. Stat. and Cons. Stat. Ann. § 3502.

[2503] *Id*.

[2504] Two states use effective consent. Tenn. Code Ann. § 39-14-402; Tex. Penal Code Ann. § 30.02. Two states use consent. Minn. Stat. Ann. § 609.582; Wis. Stat. Ann. § 943.10.

[2505] *Id*.

[2506] Ohio Rev. Code Ann. § 2911.12.

[2507] Cal. Penal Code § 459 ("Every person who enters any house . . .with intent to commit grand or petit larceny or any felony is guilty of burglary."); Idaho Code Ann. § 18-1401 ("Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary."); Nev. Rev. Stat. Ann. § 205.060 ("Except as otherwise provided in subsection 5, a person who, by day or night, enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary."); W. Va. Code Ann. § 61-3-11 ("If any person shall, in the daytime, enter without breaking a dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be

that the building be "of another" or otherwise that the entry be something similar to a trespass; nothing, however, is required by the statutory language in these jurisdictions. Five other states retain the use of the common law requirement, "breaks."[2508] Additionally, twelve unreformed jurisdictions use some trespass-like element in their burglary statutes. Four states use the phrase, "without authority,"[2509] four use the phrase, "without consent,"[2510] and four follow the MPC and use the phrase, "without license or privilege."[2511] Although these terms all lack the precision of the Revised Criminal Code's "effective consent," one scholar has concluded that in those jurisdictions that use the term "breaks," most of these jurisdictions "permit 'constructive breaking,' meaning entry gained by artifice, trick, fraud or threat."[2512] In some instances, state case law has

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deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years.").

[2508] Md. Code Ann., Crim. Law § 6-202 ("A person may not break and enter the dwelling of another with the intent to commit theft."); Mich. Comp. Laws Ann. § 750.110 ("A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car is guilty of a felony punishable by imprisonment for not more than 10 years."); Neb. Rev. Stat. Ann. § 28-507 ("A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value."); Okla. Stat. Ann. tit. 21, § 1431 ("Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either . . . ."); Va. Code Ann. § 18.2-90 ("If any person in the nighttime enters without breaking or in the daytime breaks and enters or enters and conceals himself in a dwelling house or an adjoining, occupied outhouse or in the nighttime enters without breaking or at any time breaks and enters or enters and conceals himself in any building permanently affixed to realty, or any ship, vessel or river craft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation, with intent to commit murder, rape, robbery or arson in violation of §§ 18.2-77, 18.2-79 or § 18.2-80, he shall be deemed guilty of statutory burglary, which offense shall be a Class 3 felony.").

[2509] Ga. Code Ann. § 16-7-1 ("A person commits the offense of burglary in the first degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant dwelling house of another or any building, vehicle, railroad car, watercraft, aircraft, or other such structure designed for use as the dwelling of another."); La. Stat. Ann. § 14:62 ("Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60."); Wyo. Stat. Ann. § 6-3-301 ("A person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit theft or a felony therein.").

[2510] S.C. Code Ann. § 16-11-311 ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either . . . .")

[2511] Fla. Stat. Ann. § 810.02 (burglary is "[e]ntering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter . . . ."); Iowa Code Ann. § 713.1 ("Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary."); Vt. Stat. Ann. tit. 13, § 1201 ("A person is guilty of burglary if he or she enters any building or structure knowing that he or she is not licensed or privileged to do so, with the intent to commit a felony, petit larceny, simple assault, or unlawful mischief.").

[2512] Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629, 644 (2012).

highlighted the absurdities that can happen without requiring burglary to be trespassory.[2513]

Second, the inclusion of an alternative element of "remaining" is also present among other nearly all the reform jurisdictions.[2514] However, these states generally codify "remaining" alone, without that the requirement that the remaining be surreptitious. Five states do codify "surreptitious remaining" or similar language.[2515] And finally, four states only use "enters" and do not permit convictions based on remaining at all.[2516]

Third, jurisdictions vary in the types of places that are protected by burglary. Burglary historically protected dwellings,[2517] and that history has carried forward: nearly all reformed jurisdictions make use of dwelling (or its functional equivalent) in their definitions of burglary.[2518] Protecting "buildings" or some functional equivalent (e.g., "structure" or "non-residential structure") is also nearly universal.[2519] Less common is something akin to the Revised Criminal Code's "business yard."[2520] However, two

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[2513] *See, e.g.*, *In re T.J.E.*, 426 N.W.2d 23, 25 (S.D. 1988). The South Dakota Supreme Court reversed a conviction where an eleven-year-old girl was charged with burglary after she entered a store with her aunt, took a piece of Easter candy off the shelf, and ate it without paying for it. *Id*. at 23. The court read in a requirement that there be an "unlawful remaining," largely on the basis of avoiding a perceived "absurdity." *Id*. One concurring justice described the result as "a type of horror/nonsensical situation" that arises from not requiring the remaining be somehow trespassory. *Id*. at 26. Subsequent to the case, South Dakota amended its statute to say directly that a person is not guilty of burglary if the person is licensed or privileged to remain. *See State v. Miranda*, 776 N.W.2d 77, 82 (S.D. 2009).

[2514] Ala. Code § 13A-7-5; Alaska Stat. Ann. § 11.46.300; Ariz. Rev. Stat. Ann. § 13-1508; Ark. Code Ann. § 5-39-201; Colo. Rev. Stat. Ann. § 18-4-202; Conn. Gen. Stat. Ann. § 53a-101; Del. Code Ann. tit. 11, § 826; Haw. Rev. Stat. Ann. § 708-810; 720 Ill. Comp. Stat. Ann. 5/19-1; Kan. Stat. Ann. § 21-5807; Ky. Rev. Stat. Ann. § 511.020; Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.Y. Penal Law § 140.30; Ohio Rev. Code Ann. § 2911.12 (Ohio uses the element "trespasses," which includes entry and remaining); Or. Rev. Stat. Ann. § 164.225; S.D. Codified Laws § 22-32-1; Utah Code Ann. § 76-6-203; Wash. Rev. Code Ann. § 9A.52.020.

[2515] Me. Rev. Stat. tit. 17-A, § 401; N.J. Stat. Ann. § 2C:18-2; N.D. Cent. Code Ann. § 12.1-22-02; Tenn. Code Ann. § 39-14-404; Tex. Penal Code Ann. § 30.02.

[2516] Ind. Code Ann. § 35-43-2-1; Minn. Stat. Ann. § 609.582; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Wis. Stat. Ann. § 943.10.

[2517] Sir Edward Coke, The Third Part of the Institutes of the Laws of England 63 (London, W. Clarke & Sons 1809) (1644).

[2518] Ala. Code § 13A-7-5; Alaska Stat. Ann. § 11.46.300; Ariz. Rev. Stat. Ann. § 13-1508; Colo. Rev. Stat. Ann. § 18-4-203; Conn. Gen. Stat. Ann. § 53a-102; Del. Code Ann. tit. 11, § 825; 720 Ill. Comp. Stat. Ann. 5/19-3; Ind. Code Ann. § 35-43-2-1.5; Ky. Rev. Stat. Ann. § 511.030; Mo. Ann. Stat. § 569.170; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.M. Stat. Ann. § 30-16-3; N.Y. Penal Law § 140.30; N.D. Cent. Code Ann. § 12.1-22-02; Ohio Rev. Code Ann. § 2911.12; Or. Rev. Stat. Ann. § 164.225; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Tenn. Code Ann. § 39-14-403; Tex. Penal Code Ann. § 30.02; Utah Code Ann. § 76-6-202; Wash. Rev. Code Ann. § 9A.52.025.

[2519] Ala. Code § 13A-7-7; Alaska Stat. Ann. § 11.46.310; Ariz. Rev. Stat. Ann. § 13-1506; Colo. Rev. Stat. Ann. § 18-4-203; Conn. Gen. Stat. Ann. § 53a-103; Del. Code Ann. tit. 11, § 824; Haw. Rev. Stat. Ann. § 708-811; 720 Ill. Comp. Stat. Ann. 5/19-1; Ind. Code Ann. § 35-43-2-1; Ky. Rev. Stat. Ann. § 511.040; Me. Rev. Stat. tit. 17-A, § 401; Mo. Ann. Stat. § 569.170; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.M. Stat. Ann. § 30-16-3; N.Y. Penal Law § 140.20; N.D. Cent. Code Ann. § 12.1-22-02; Ohio Rev. Code Ann. § 2911.12; Or. Rev. Stat. Ann. § 164.215; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Tenn. Code Ann. § 39-14-402; Utah Code Ann. § 76-6-202; Wash. Rev. Code Ann. § 9A.52.030; Wyo. Stat. Ann. § 6-3-301.

[2520] Ariz. Rev. Stat. Ann. § 13-1506.

jurisdictions incorporate places like business yards in their definitions of "building."[2521] Although some jurisdictions include "watercraft" in their definition of "building," they generally do so only if the "vehicle, aircraft, or watercraft [is] used for the lodging of persons or carrying on business therein."[2522] Eleven states include railcars by statute, which the revised burglary omits.[2523] Of course, such places, if they are used for lodging, would be covered under the Revised Criminal Code's definition of dwelling.

Fourth, the factors used to grade burglary vary widely across reform jurisdictions, but generally these states tend to penalize the invasion of a dwelling more severely than invasion of a non-dwelling. The use of the presence of another person is also a grading distinction adopted in six other reformed jurisdictions.[2524] Eleven jurisdictions have two grades of burglary, while fifteen have three or more grades of burglary.[2525]

Fifth, regarding the bar on multiple convictions for the revised burglary offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. However it does appear to be the case that, in other jurisdictions, trespass is commonly considered a lesser-included offense (LIO) of burglary. Generally, a determination of the LIO relationship is matter of case law, and most states appear to determine the LIO relationship on the basis of examining statutory elements.[2526]

[2521] Ala. Code § 13A-7-1; Wash. Rev. Code Ann. § 9A.04.110.

[2522] Ala. Code § 13A-7-1; Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-39-101; Haw. Rev. Stat. Ann. § 708-800; Ky. Rev. Stat. Ann. § 511.010; Minn. Stat. Ann. § 609.556.

[2523] Ala. Code § 13A-7-1; Ariz. Rev. Stat. Ann. § 13-1501; Conn. Gen. Stat. Ann. § 53a-100; Haw. Rev. Stat. Ann. § 708-800; 720 Ill. Comp. Stat. Ann. 5/19-1; Kan. Stat. Ann. § 21-5807 (West 2017; Miss. Code. Ann. § 97-17-33; S.D. Codified Laws § 22-1-2; Tenn. Code Ann. § 39-14-402; Wash. Rev. Code Ann. § 9A.04.110; Wis. Stat. Ann. § 943.10.

[2524] Colo. Rev. Stat. Ann. § 18-4-203; Conn. Gen. Stat. Ann. § 53a-102; Mo. Ann. Stat. § 569.160; N.H. Rev. Stat. Ann. § 635:1; Ohio Rev. Code Ann. § 2911.11; 18 Pa. Stat. and Cons. Stat. Ann. § 3502.

[2525] One jurisdiction has one grade of burglary. Neb. Rev. Stat. Ann. § 28-507. Eleven jurisdictions have two grades of burglary. Alaska Stat. Ann. § 11.46.300-10; 720 Ill. Comp. Stat. Ann. 5/19-3; Mo. Ann. Stat. § 569.160-70; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.D. Cent. Code Ann. § 12.1-22-02; Or. Rev. Stat. Ann. § 164.215-25; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Wash. Rev. Code Ann. § 9A.52.020-30; Wyo. Stat. Ann. § 6-3-301. Seven jurisdictions have three grades of burglary. Ala. Code § 13A-7-5-7; Ariz. Rev. Stat. Ann. § 13-1506-08; Conn. Gen. Stat. Ann. § 53a-101-03; Ky. Rev. Stat. Ann. § 511.020-030; Haw. Rev. Stat. Ann. § 708-810-11; N.M. Stat. Ann. § 30-16-3-4; N.Y. Penal Law § 140.20-30. Six jurisdictions have four grades of burglary. Colo. Rev. Stat. Ann. § 18-4-202-04; Del. Code Ann. tit. 11, § 824-26; Me. Rev. Stat. tit. 17-A, § 401; Tenn. Code Ann. § 39-14-402-04; Tex. Penal Code Ann. § 30.02; Utah Code Ann. § 76-6-202-03. Two jurisdictions have five grades of burglary. Ind. Code Ann. § 35-43-2-1; Ohio Rev. Code Ann. § 2911.11-13.

[2526] *E.g.*, *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) ("Criminal trespass can be a lesser included offense of burglary of a building."); State v. Terry, 118 S.W.3d 355, 359 (Tenn. 2003) ("we conclude that aggravated criminal trespass is a lesser-included offense of aggravated burglary. Thus, we also conclude that attempted aggravated criminal trespass is a lesser-included offense of attempted aggravated burglary."); People v. Devonish, 843 N.E.2d 1120, 1120 (2005) ("It was error to refuse defendant's request that the jury be charged with the lesser included offense of criminal trespass in the second degree."); *State v. Singleton*, 675 A.2d 1143, 1146 (N.J. App. Div. 1996) (trespass is a lesser-included offense of burglary, and therefore, judge erred when failing to instruct jury on trespass in burglary case); *State v. Williams*, 708 P.2d 834, 835 (Haw. 1985) ("Criminal trespass in the first degree is a lesser included offense of burglary in the first degree."); *State v. Harvey*, 713 P.2d 517, 520 (Mont. 1986) ("A reading of the criminal trespass and burglary statutes clearly shows that criminal trespass is a lesser included offense of burglary."); *State v. Smith*, No. SC 95461, 2017 WL 2952325, at *3 (Mo. July 11, 2017).

Although it appears to be more common than not that trespass is an LIO of burglary, some reformed code jurisdiction takes the opposite view.[2527] Aside from these cases, research has not identified any equivalent statutory provision to either the current Consecutive sentences[2528] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[2529] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2530]

Sixth, reform jurisdictions vary in the required semi-inchoate intent that distinguishes burglary from trespass. At common law, intent to commit a felony was required, but that standard has loosened. Seventeen states have at least one grade of burglary that requires proof the defendant intended to commit any offense (felony or misdemeanor).[2531] Thirteen states do require that the defendant intend to commit a felony, but they almost always permit proof of intent to commit theft (felony or misdemeanor) and sometimes an assault (felony or misdemeanor).[2532] But since it appears most burglaries are based on the defendant's intent to steal, the inclusion of an intent to commit any theft would seemingly broaden the scope of burglary in these jurisdictions to substantially match the others.[2533]

Lastly, it is notable that a recent study funded by the Department of Justice also provides a sensible basis for the RCC's grading scheme.[2534] This study suggest two

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[2527] E,g., *Commonwealth v. Quintua*, 56 A.3d 399, 402 (Penn. Super. Ct. 2012) (trespass is not a lesser-included offense of burglary, because trespass requires proof the defendant knew he or she was not permitted to enter, while burglary does not). *People v. Satre*, 950 P.2d 667, 668 (Colo. App. 1997) ("we conclude that first degree criminal trespass is not a lesser included offense of first degree burglary."); *State v. Malloy*, 639 P.2d 315, 320–21 (Ariz. 1981) ("Since in [burglary] the phrase "entering or remaining unlawfully" is not modified by the term "knowingly", in order to convict a defendant of burglary in the third degree, the prosecution need not prove that the defendant was aware of the unlawfulness of his entry. There need only be shown that the entry was knowingly or voluntarily made. Criminal trespass is not necessarily a lesser included offense of burglary.").

[2528] D.C. Code § 22-3203.

[2529] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[2530] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[2531] Ala. Code § 13A-7-7; Alaska Stat. Ann. § 11.46.300; Colo. Rev. Stat. Ann. § 18-4-204; Conn. Gen. Stat. Ann. § 53a-103; Del. Code Ann. tit. 11, § 824; Ky. Rev. Stat. Ann. § 511.040; Me. Rev. Stat. tit. 17-A, § 401; Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.Y. Penal Law § 140.30 (McKinney); N.D. Cent. Code Ann. § 12.1-22-02; Ohio Rev. Code Ann. § 2911.11; Or. Rev. Stat. Ann. § 164.225; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Wash. Rev. Code Ann. § 9A.52.030.

[2532] Ala. Code § 13A-7-6; Ariz. Rev. Stat. Ann. § 13-1508; Colo. Rev. Stat. Ann. § 18-4-202; Haw. Rev. Stat. Ann. § 708-810; 720 Ill. Comp. Stat. Ann. 5/19-1; Ind. Code Ann. § 35-43-2-1; Neb. Rev. Stat. Ann. § 28-507; N.M. Stat. Ann. § 30-16-4; Ohio Rev. Code Ann. § 2911.13; Tenn. Code Ann. § 39-14-404; Tex. Penal Code Ann. § 30.02; Utah Code Ann. § 76-6-203; Wyo. Stat. Ann. § 6-3-301.

[2533] Additionally, a few states mix both sorts of intents, and use the intended offense as a basis for grading the offense. *E.g.*, compare Ala. Code § 13A-7-7 (second-degree burglary requiring proof of intent to commit a theft or felony) with Ala. Code § 13A-7-6 (third-degree burglary requiring proof of intent to commit any crime).

[2534] RICHARD F. CULP ET AL., IS BURGLARY A CRIME OF VIOLENCE? AN ANALYSIS OF NATIONAL DATA 1998-2007 ii (2015), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf (last visited Aug. 4, 2017).

important empirical facts: first, burglaries as a whole are typically not violent: only 2.7% of burglaries involved actual physical injury, only 2.4% involved a defendant who was armed with a weapon, and only 4.9% involved a defendant who threatened violence or placed victims in fear.[2535] When burglaries were of a dwelling, the authors state that a person other than the defendant was present 26% of the time.[2536] Additionally, of the burglaries that are violent, 91% occur within a dwelling.[2537] However, violent burglaries are still rare: only a small fraction of dwelling burglaries involve violence.[2538] Nevertheless, distinguishing between occupied dwellings and other buildings sensibly reflects the greater risk of harm in burglaries of dwellings.

RCC § 22E-2702. POSSESSION OF BURGLARY AND THEFT TOOLS.
[Now RCC § 22E-2702. Possession of Tools to Commit Property Crime.]

Relation to National Legal Trends. *The revised possession of burglary and theft tools offense's above-mentioned substantive changes to current District law are not well supported by national legal trends because the District is an outlier in criminalizing possession of implements of crime*.

Most jurisdictions do not have analogous statutes, though some states have similar statutes that are limited to possession of burglary tools.[2539] However, some states have broader statutes that criminalize possession of any tool with intent to use it criminally[2540], or any tool that is specifically adapted for criminal use.[2541]

Regarding the bar on multiple convictions for the revised possession of burglary and theft tools offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised possession of burglary and theft tools offense and other overlapping property offenses. For example, where the offense most like the revised possession of burglary and theft tools offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[2542] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of

[2535] *Id*. at 29-30. The report's authors also noted that the incidence of violence differed based on the database used. However, the authors stated that, "Expressed as a range, an average of between .9% and 7.6% of burglaries between 1998 and 2007 resulted in actual physical violence, or threats of violence." *Id*. at 34.
[2536] *Id*. at 38.
[2537] *Id*. at 40.
[2538] *Id*. at 39. The authors state that 30,133 burglaries over the relevant time period (1998 -2007) involved violence. Of these, 27,293 were residential burglaries. However, 3,401,559 burglaries were non-violent. Of these non-violent burglaries, 2,277,069 were residential burglaries.
[2539] Cal. Penal Code § 466; Idaho Code Ann. § 18-1406; N.M. Stat. Ann. § 30-16-5; Wis. Stat. Ann. § 943.12.
[2540] Ohio Rev. Code Ann. § 2923.24.
[2541] 18 Pa. Stat. Ann. § 907.
[2542] D.C. Code § 22-3203.

the same act or course of conduct for most or all (not just property) crimes,[2543] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[2544]

[2543] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[2544] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

Subtitle IV. Offenses Against Government Operation.

Chapter 34. Government Custody Offenses.

RCC § 22E-3401. ESCAPE FROM INSTITUTION OR OFFICER.

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

Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[2545] All 29 reform jurisdictions have one or more criminal escape statutes.[2546]

First, most reform jurisdictions and the Model Penal Code[2547] have multiple sentencing gradations for escape. Nineteen reform jurisdictions grade offenses based on use of force, threat of force, or possession of a weapon.[2548] Fifteen reform jurisdictions consider the seriousness of the charge underlying the detention (felony or misdemeanor).[2549] Although few reform jurisdictions explicitly distinguish between

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[2545] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2546] Ala. Code §§ 13A-10-30, 13A-10-31, 13A-10-32, 13A-10-33, and14-8-42; Alaska Stat. Ann. §§ 11.56.300, 11.56.310, 11.56.320, 11.56.330, and 11.56.370; Ariz. Rev. Stat. Ann. § 13-2501, 13-2502, 13-2503, and 13-2504; Ark. Code Ann. §§ 5-54-101, 5-54-110, 5-54-111, 5-54-112, and 5-54-131; Colo. Rev. Stat. Ann. §§ 18-8-208 and 18-8-208.1; Conn. Gen. Stat. Ann. §§ 53a-168, 53a-169, 53a-170, and 53a-171; Del. Code Ann. tit. 11, §§ 1251, 1252, 1253, and 1258; Haw. Rev. Stat. Ann. §§ 710-1020 and 710-1021; 720 Ill. Comp. Stat. Ann. 5/31-6 and 720 Ill. Comp. Stat. Ann. 5/31-7; Ind. Code Ann. § 35-44.1-3-4; Kan. Stat. Ann. § 21-5911; Ky. Rev. Stat. Ann. §§ 520.010, 520.015, 520.020, 520.030, and 520.040; Me. Rev. Stat. tit. 17-A, § 755; Minn. Stat. Ann. § 609.485; Mo. Ann. Stat. §§ 575.195, 575.200, 575.210, and 575.220; Mont. Code Ann. § 45-7-306; N.H. Rev. Stat. Ann. § 642:6; N.J. Stat. Ann. § 2C:29-5; N.Y. Penal Law §§ 205.00, 205.10, 205.15, 205.16, 205.17, 205.18, and 205.19; N.D. Cent. Code Ann. § 12.1-08-06; Ohio Rev. Code Ann. § 2921.34; Or. Rev. Stat. Ann. §§ 162.145, 162.155, 162.165, and 162.175; 18 Pa. Stat. and Cons. Stat. Ann. § 5121; S.D. Codified Laws §§ 22-11A-1, 22-11A-2, and 22-11A-2.1; Tenn. Code Ann. § 39-16-605; Tex. Penal Code Ann. § 38.06; Utah Code Ann. § 76-8-309; Wash. Rev. Code Ann. §§ 9A.76.110, 9A.76.115, 9A.76.120, and 9A.76.1130; Wis. Stat. Ann. § 946.42.

[2547] Model Penal Code § 242.6(4).

[2548] Ala. Code §§ 13A-10-31(a)(1) and 13A-10-32(a)(1); Alaska Stat. Ann. §§ 11.56.300(a) and 11.56.310(a)(1)(C); Ariz. Rev. Stat. Ann. § 13-2504; Ark. Code Ann. §§ 5-54-110, 5-54-111; Del. Code Ann. tit. 11, § 1253; Haw. Rev. Stat. Ann. § 710-1020; Ind. Code Ann. § 35-44.1-3-4(Sec. 4(a)); Kan. Stat. Ann. § 21-5911(b)(1)(G); Ky. Rev. Stat. Ann. § 520.020; Me. Rev. Stat. tit. 17-A, § 755; N.H. Rev. Stat. Ann. § 642:6; N.J. Stat. Ann. § 2C:29-5; N.D. Cent. Code Ann. § 12.1-08-06(2); Or. Rev. Stat. Ann. §§ 162.145, 162.155, 162.165, and 162.175; 18 Pa. Stat. and Cons. Stat. Ann. § 5121(d); S.D. Codified Laws § 22-11A-2(1); Tex. Penal Code Ann. § 38.06; Utah Code Ann. § 76-8-309(2)(a); and Wis. Stat. Ann. § 946.42; *see also* Model Penal Code § 242.6(4)(b).

[2549] Ala. Code §§ 13A-10-31(a)(2), 13A-10-32(a)(2), and 13A-10-33; Alaska Stat. Ann. §§ 11.56.320(a)(1), 11.56.330(a)(1); Ariz. Rev. Stat. Ann. §§ 13-2502(A), 13-2503(A)(2); Colo. Rev. Stat. Ann. § 18-8-208; Conn. Gen. Stat. Ann. § 53a-171(b); 720 Ill. Comp. Stat. Ann. 5/31-6; Kan. Stat. Ann. § 21-5911(b)(1)(A); Ky. Rev. Stat. Ann. § 520.030; Minn. Stat. Ann. § 609.485 (Subd. 4); N.Y. Penal Law §§ 205.10, 205.15, and 205.16; N.D. Cent. Code Ann. § 12.1-08-06(2)(b); Ohio Rev. Code Ann. § 2921.34(C)(2); 18 Pa. Stat.

fleeing from custody and failing to timely return,[2550] several others punish prison breaks more harshly than other unlawful absences.[2551]

Second, the removal of attempted escapes from the offense definition is broadly supported by national trends. Only four reform jurisdictions punish attempted escapes as harshly as the completed offense.[2552]

Third, the revised statute's omission of an accomplice liability provision specific to escape is supported by national trends. Sixteen reform states punish permitting or facilitating an escape.[2553] However, most of these provisions apply only to public servants who violate their official duties, in contrast to D.C. Code § 10-509.01a, which states, "No person shall aid or abet any person to violate this section."[2554] Notably, there is variance among states with respect to how the act of harboring a fugitive is punished. Some, like the District, punish it as accessory-after-the-fact to escape, whereas others punish it as obstruction of justice or hindering prosecution.[2555]

Fourth, support for the revised statute's restriction to flight from the lawful custody of a "law enforcement officer" as defined throughout the RCC is difficult to assess. States use a range of terminology to describe the person whose custody is escaped and the nature of the custody[2556] and staff did not research statutory or case law definitions for that terminology.

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and Cons. Stat. Ann. § 5121(d); Tenn. Code Ann. § 39-16-605(c)(1); and Wash. Rev. Code Ann. §§ 9A.76.110, 9A.76.120, and 9A.76.130; *see also* Model Penal Code § 242.6(4)(a).

[2550] 720 Ill. Comp. Stat. Ann. 5/31-6; Ind. Code Ann. § 35-44.1-3-4; Mo. Ann. Stat. § 575.220; N.Y. Penal Law §§ 205.17 and 205.18 ("absconding"); S.D. Codified Laws §§ 22-11A-2 and 22-11A-2.1; Wash. Rev. Code Ann. § 9A.76.120(c); *see also* Wis. Stat. Ann. § 946.425 (Failure to report to jail).

[2551] Some states grade escapes from the custody of an officer lower than escapes from an institution. Others grade escapes from a non-secure location (such as a halfway house or house arrest) lower than escapes from a secured facility. Others do not include failures to return in their escape statutes at all. *See e.g.,* Alaska Stat. Ann. §§ 11.56.335 and 11.56.340 ("unlawful evasion"); Ark. Code Ann. § 5-54-131 ("absconding" from house arrest); Conn. Gen. Stat. Ann. § 53a-170; Del. Code Ann. tit. 11, § 1251-1253; Me. Rev. Stat. tit. 17-A, § 755; Mo. Ann. Stat. § 575.200; Tex. Penal Code Ann. § 38.06.

[2552] Ala. Code §§ 13A-10-31(a)(2), § 13A-10-32(a)(2), and 13A-10-33(a); Ariz. Rev. Stat. Ann. §§ 13-2502, 13-2503, and 13-2504; N.D. Cent. Code Ann. § 12.1-08-06(1); and Ohio Rev. Code Ann. § 2921.34.

[2553] Ala. Code §§ 13A-10-35 and 36; Alaska Stat. Ann. § 11.56.370; Ark. Code Ann. §§ 5-54-113, 115, and 116; Colo. Rev. Stat. Ann. §§ 18-8-201, 201.1, and 205; 720 Ill. Comp. Stat. Ann. 5/31-7; Kan. Stat. Ann. § 21-5912; Me. Rev. Stat. tit. 17-A, § 756; Minn. Stat. Ann. § 609.485 (Subd. 2)(3); Mo. Ann. Stat. §§ 575.230 and 575.240; N.J. Stat. Ann. § 2C:29-5(c); N.D. Cent. Code Ann. § 12.1-08-07; Ohio Rev. Code Ann. § 2921.35; 18 Pa. Stat. and Cons. Stat. Ann. § 5121(b); Tenn. Code Ann. § 39-16-607; Tex. Penal Code Ann. § 38.07; Wis. Stat. Ann. § 946.44; *see also* Conn. Gen. Stat. Ann. § 53a-171a (concerning escapes from a hospital or sanitorium). States vary with respect to whether the act of harboring a fugitive is punished as accessory to escape, obstruction of justice, or hindering prosecution.

[2554] [Public corruption offenses will be addressed in another section of the revised code.]

[2555] *See, e.g.,* Haw. Rev. Stat. Ann. § 710-1028(1); 720 Ill. Comp. Stat. Ann. 5/31-5; Ky. Rev. Stat. Ann. § 520.120; Me. Rev. Stat. tit. 17-A, § 753; Minn. Stat. Ann. § 609.495; Mo. Ann. Stat. §§ 575.030, 575.159, Mont. Code Ann. § 45-7-303; N.H. Rev. Stat. Ann. § 642:3; N.Y. Penal Law §§ 205.50, 205.55, 205.60, and 205.65; S.D. Codified Laws § 22-11A-5; Tex. Penal Code Ann. § 38.05; Wash. Rev. Code Ann. §§ 9A.76.050, 9A.76.060, 9A.76.070, 9A.76.080, and 9A.76.090; Wis. Stat. Ann. § 946.47.

[2556] For example, the Model Penal code uses terms that may be congruent with "the lawful custody of a law enforcement officer," such as "official detention," "arrest," and "public servant." Model Penal Code § 242.6.

Fifth, the reform jurisdictions do not include a merger provision for convictions of contempt based on the same course of conduct. Research was not conducted to determine whether the offenses would merge under a general merger provision or under the elements test in other states.

RCC § 22E-3402. TAMPERING WITH A DETECTION DEVICE.

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

Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[2557]

Twelve reform jurisdictions specifically criminalize tampering with a detection device as a form of escape or as a stand-alone offense.[2558]

Seven reform jurisdictions' statutes specifically require knowing or intentional conduct.[2559] The other statutes are silent as to the applicable culpable mental state.

No reform jurisdictions include attempts to interfere with the operation of the device as a completed offense.[2560]

RCC § 22E-3403. CORRECTIONAL FACILITY CONTRABAND.

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

Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[2561] Twenty-six

[2557] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2558] Alaska Stat. Ann. § 11.56.330; Ariz. Rev. Stat. Ann. § 13-3725; Ark. Code Ann. § 12-12-923 (applies only to people labeled "sexually dangerous persons"); Colo. Rev. Stat. Ann. § 17-27.5-104; Ind. Code Ann. § 35-44.1-3-4; Ky. Rev. Stat. Ann. § 519.070; Minn. Stat. Ann. § 609.485; Mo. Ann. Stat. § 575.205; 18 Pa. Stat. and Cons. Stat. Ann. § 5121 (as interpreted in *Com. v. Wegley*, 829 A.2d 1148, 574 Pa. 190, Sup.2003); Tenn. Code Ann. § 40-39-304; Wash. Rev. Code Ann. § 9A.76.130; Wash. Rev. Code Ann. § 9A.76.115 (applies only to people labeled "sexually violent predators"); Wis. Stat. Ann. § 946.465; *see also* Conn. Gen. Stat. Ann. § 53a-115 (requiring damage to the device).

[2559] Ark. Code Ann. § 12-12-923; Colo. Rev. Stat. Ann. § 17-27.5-104; Ind. Code Ann. § 35-44.1-3-4; Mo. Ann. Stat. § 575.205; Tenn. Code Ann. § 40-39-304; Wash. Rev. Code Ann. § 9A.76.130; Wis. Stat. Ann. § 946.465.

[2560] *But see* Wash. Rev. Code Ann. § 9A.76.130 (prohibiting knowingly violating the terms of an electronic monitoring program, which may include attempts to tamper).

[2561] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

reform states criminalize trafficking contraband to a correctional facility.[2562] Twenty-five reform states criminalize possession of contraband by a person who is incarcerated.[2563]

First, the revised statute prohibits contraband in halfway houses, in addition to secure detention facilities. This change is broadly supported by national trends. Eighteen reform states explicitly define terms such as "detention facility," "correctional facility," "penal institution" and "official custody" to include any place used for the confinement of accused or convicted persons.[2564]

Second, the revised statute requires that an incarcerated person know that she possesses the prohibited item and know she does not have the effective consent of the facility to possess it. No reform state punishes an incarcerated person for possession of contraband "regardless of the intent with which he or she possesses it," as the District's current law does.[2565] Nineteen reform states statutorily require knowledge or intent.[2566]

[2562] Ala. Code § 13A-10-36; Ala. Code § 13A-10-37; Ala. Code § 13A-10-38; Alaska Stat. Ann. § 11.56.375; Alaska Stat. Ann. § 11.56.380; Ariz. Rev. Stat. Ann. § 13-2505; Ark. Code Ann. § 5-54-119; Ark. Code Ann. § 5-54-117; Colo. Rev. Stat. Ann. § 18-8-203; Colo. Rev. Stat. Ann. § 18-8-204; Conn. Gen. Stat. Ann. § 53a-174; Del. Code Ann. tit. 11, § 1256; Haw. Rev. Stat. Ann. § 710-1023; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; 720 Ill. Comp. Stat. Ann. 5/31A-1.2; Ind. Code Ann. § 35-44.1-3-5; Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.050; Ky. Rev. Stat. Ann. § 520.060; Me. Rev. Stat. tit. 17-A, § 757; Me. Rev. Stat. tit. 17-A, § 757-A; Me. Rev. Stat. tit. 17-A, § 757-B; Mo. Ann. Stat. § 221.111; Mont. Code Ann. § 45-7-307; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; N.D. Cent. Code Ann. § 12.1-08-09; Ohio Rev. Code Ann. § 2921.36; Or. Rev. Stat. Ann. § 162.185; 18 Pa. Stat. and Cons. Stat. Ann. § 5122; Tenn. Code Ann. § 39-16-201; Tex. Penal Code Ann. § 38.114; Tex. Penal Code Ann. § 38.09; Utah Code Ann. § 76-8-311.3; Utah Code Ann. § 76-8-311.1; Wash. Rev. Code Ann. § 9A.76.140; Wash. Rev. Code Ann. § 9A.76.150; Wash. Rev. Code Ann. § 9A.76.160.

[2563] Ala. Code § 13A-10-36; Ala. Code § 13A-10-37; Ala. Code § 13A-10-38; Alaska Stat. Ann. § 11.56.375; Alaska Stat. Ann. § 11.56.380; Ariz. Rev. Stat. Ann. § 13-2505; Ark. Code Ann. § 5-54-119; Ark. Code Ann. § 5-54-117; Colo. Rev. Stat. Ann. § 18-8-204.1; Colo. Rev. Stat. Ann. § 18-8-204.2; Conn. Gen. Stat. Ann. § 53a-174a; Conn. Gen. Stat. Ann. § 53a-174b; Del. Code Ann. tit. 11, § 1256; Haw. Rev. Stat. Ann. § 710-1023; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; 720 Ill. Comp. Stat. Ann. 5/31A-1.2; Ind. Code Ann. § 35-44.1-3-7; Ind. Code Ann. § 35-44.1-3-8; Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.050; Ky. Rev. Stat. Ann. § 520.060; Me. Rev. Stat. tit. 17-A, § 757; Me. Rev. Stat. tit. 17-A, § 757-A; Me. Rev. Stat. tit. 17-A, § 757-B; Mo. Ann. Stat. § 221.111; Mont. Code Ann. § 45-8-318; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; N.D. Cent. Code Ann. § 12.1-08-09; Ohio Rev. Code Ann. § 2921.36; Or. Rev. Stat. Ann. § 162.185; 18 Pa. Stat. and Cons. Stat. Ann. § 5122; Tenn. Code Ann. § 39-16-201; Tex. Penal Code Ann. § 38.114; Utah Code Ann. § 76-8-311.3; Utah Code Ann. § 76-8-311.1.

[2564] Ala. Code § 13A-10-30; Ariz. Rev. Stat. Ann. § 13-2501; Ark. Code Ann. § 5-54-101(2)(A); Colo. Rev. Stat. Ann. § 18-8-204; Conn. Gen. Stat. Ann. § 1-1(w); Del. Code Ann. tit. 11, § 1258(3); 720 Ill. Comp. Stat. Ann. 5/31A-0.1; Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.010; Me. Rev. Stat. tit. 17-A, § 755(3); Mo. Ann. Stat. § 217.010; N.H. Rev. Stat. Ann. § 642:6(II); N.Y. Penal Law § 205.00 (1); N.D. Cent. Code Ann. § 12.1-08-06(3)(b); Or. Rev. Stat. Ann. § 162.135(2); Tex. Penal Code Ann. § 1.07 (14); Utah Code Ann. § 76-8-311.3(1)(c); Wash. Rev. Code Ann. § 9A.76.010(3)(e). Staff did not research case law for jurisdictions that do not define these terms or that define them using unclear language such as "any prison or any building appurtenant thereto."

[2565] D.C. Code § 22-2603.02(b).

[2566] Alaska Stat. Ann. § 11.56.380; Ariz. Rev. Stat. Ann. § 13-2505; Ark. Code Ann. § 5-54-119; Colo. Rev. Stat. Ann. § 18-8-204.1; Colo. Rev. Stat. Ann. § 18-8-204.2; Conn. Gen. Stat. Ann. § 53a-174a; Del. Code Ann. tit. 11, § 1256; Haw. Rev. Stat. Ann. § 710-1022; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; Ind. Code Ann. § 35-44.1-3-7; Ind. Code Ann. § 35-44.1-3-8; Ky. Rev. Stat. Ann. § 520.050; Ky. Rev. Stat. Ann. § 520.060; Me. Rev. Stat. tit. 17-A, § 757; Me. Rev. Stat. tit. 17-A, § 757-A; Me. Rev. Stat. tit. 17-A,

Third, the revised statute follows the gradation approach in the Model Penal Code, by distinguishing between items that may be useful for an escape and other contraband.[2567] Seven reform states have a gradation structure similar to the revised statute and the model penal code.[2568]

Fourth, the revised statute decriminalizes possession of civilian clothing and "anything prohibited by rule." No reform states expressly punish possession of civilian clothing.[2569] A minority of reform states (ten) define contraband to include any unauthorized item.[2570] However, at least one of these statutes was held to violate due process as applied.[2571]

Fifth, the revised code punishes "causing another to bring contraband" in its general accomplice liability provision instead of in the offense definition. Only four reform states specifically punish "causing another" to bring contraband in the contraband offense definition.[2572]

Sixth, the revise offense does not criminalize an employee's failure to report the presence of contraband. No reform states punish a failure to report.[2573]

Seventh, the revised statute leaves concurrent versus consecutive sentencing decisions to the discretion of the trial court. Only one reform state requires consecutive sentencing for promoting contraband.[2574]

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§ 757-B; Mo. Ann. Stat. § 221.111; Mont. Code Ann. § 45-8-318; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; Or. Rev. Stat. Ann. § 162.185; Tenn. Code Ann. § 39-16-201; Utah Code Ann. § 76-8-311.3.

[2567] Model Penal Code § 242.7.

[2568] Ala. Code § 13A-10-36; Ala. Code § 13A-10-37; Ala. Code § 13A-10-38; Alaska Stat. Ann. § 11.56.375; Alaska Stat. Ann. § 11.56.380; Ark. Code Ann. § 5-54-119; Ark. Code Ann. § 5-54-117; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; N.D. Cent. Code Ann. § 12.1-08-09.

[2569] Staff did not perform case law research to determine phrases such as "any item or article that could be used to facilitate an escape" have been interpreted by any state court to include all civilian clothing.

[2570] Ala. Code § 13A-10-30(b)(4); Alaska Stat. Ann. § 11.56.390; Ark. Code Ann. § 5-54-119; Ind. Code Ann. § 35-44.1-3-5 (for trafficking, but not for possession); Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.010; Mo. Ann. Stat. § 221.111(4) (infraction only); N.H. Rev. Stat. Ann. § 642:7; ("anything contrary to law or regulation"); N.Y. Penal Law § 205.00 (3); Or. Rev. Stat. Ann. § 162.135(1)(a)(D); *see also* Mont. Code Ann. § 45-7-307 (barring "illegal articles"); N.J. Stat. Ann. § 2C:29-6 (barring "unlawful" articles).

[2571] *See State v. Taylor*, 54 Kan. App. 2d 394 (2017) (holding a contraband statute violated due process as applied to a defendant was not provided individualized notice by correctional institution administrators of what items were prohibited).

[2572] Conn. Gen. Stat. Ann. § 53a-174; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; Ind. Code Ann. § 35-44.1-3-5; Utah Code Ann. § 76-8-311.3.

[2573] *But see* Ariz. Rev. Stat. Ann. §§ 13-2505(B) and 13-2514(B) (requiring reporting without punishing a failure to report). Staff did not perform research to determine whether this conduct would violate other public corruption statutes in each state.

[2574] Colo. Rev. Stat. Ann. § 18-8-209.

Subtitle V. Public Order and Safety Offenses.

Chapter 40. Disorderly Conduct and Public Nuisance. [Now Chapter 42. Breaches of Peace.]

RCC § 22E-4001. DISORDERLY CONDUCT. [Now RCC § 22E-4201. Disorderly Conduct.]

[No National Legal Trends Section.]

RCC § 22E-4002. PUBLIC NUISANCE. [Now RCC § 22E-4202. Public Nuisance.]

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

First, the RCC's reorganization of the existing disorderly conduct statute to distinguish a public nuisance from other disorderly conduct has little precedent. Twenty-nine states (hereafter "reform jurisdictions") have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC).[2575] While there is significant variance in how states organize breach of peace offenses, all twenty-nine have a provision criminalizing disorderly conduct as a low-level violation.[2576] Unreasonably loud noise falls explicitly within the ambit of disorderly conduct in every reform jurisdiction.[2577] Disruption of a public gathering or funeral qualifies as disorderly

[2575] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2576] Ala. Code § 13A-11-7; Alaska Stat. Ann. § 11.61.110; Ariz. Rev. Stat. Ann. § 13-2904; Ark. Code Ann. § 5-71-207; Colo. Rev. Stat. Ann. § 18-9-106; Conn. Gen. Stat. Ann. § 53a-182; Del. Code Ann. tit. 11, § 1301; Haw. Rev. Stat. Ann. § 711-1101; 720 Ill. Comp. Stat. Ann. 5/26-1; Ind. Code Ann. § 35-45-1-3; Kan. Stat. Ann. § 21-6203; Ky. Rev. Stat. Ann. § 525.060; Me. Rev. Stat. tit. 17-A, § 501-A; Minn. Stat. Ann. § 609.72; Mo. Ann. Stat. § 574.010 ("peace disturbance"); Mont. Code Ann. § 45-8-101; N.H. Rev. Stat. Ann. § 644:2; N.J. Stat. Ann. § 2C:33-2; N.Y. Penal Law § 240.20; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Or. Rev. Stat. Ann. § 166.025; 18 Pa. Stat. and Cons. Stat. Ann. § 5503; S.D. Codified Laws § 22-18-35; Tenn. Code Ann. § 39-17-305; Tex. Penal Code Ann. § 42.01; Utah Code Ann. § 76-9-102; Wash. Rev. Code Ann. § 9A.84.030; Wis. Stat. Ann. § 947.01.

[2577] Ala. Code § 13A-11-7(a)(2); Alaska Stat. Ann. § 11.61.110(a); Ariz. Rev. Stat. Ann. § 13-2904(A)(2); Ark. Code Ann. § 5-71-207(a)(2); Colo. Rev. Stat. Ann. § 18-9-106(1)(c); Conn. Gen. Stat. Ann. § 53a-182(a)(3); Del. Code Ann. tit. 11, § 1301(1)(b); Haw. Rev. Stat. Ann. § 711-1101(1)(b); 720 Ill. Comp. Stat. Ann. 5/26-1("any act" that causes public alarm, presumably, including noise); Ind. Code Ann. § 35-45-1-3(a)(2); Kan. Stat. Ann. § 21-6203(a)(3); Ky. Rev. Stat. Ann. § 525.060(1)(b); Me. Rev. Stat. tit. 17-A, § 501-A(1)(A)(1); Mo. Ann. Stat. § 574.010(1)(1)(a); Mont. Code Ann. § 45-8-101(1)(b); N.H. Rev. Stat. Ann. § 644:2(III)(a); N.J. Stat. Ann. § 2C:33-2 (noise must be both unreasonably loud and offensively coarse); N.Y. Penal Law § 240.20(2); N.D. Cent. Code Ann. § 12.1-31-01(1)(b); Ohio Rev. Code Ann. § 2917.11(A)(2); Or. Rev. Stat. Ann. § 166.025(1)(b); 18 Pa. Stat. and Cons. Stat. Ann. § 5503(2); S.D. Codified Laws § 22-18-35(2); Tenn. Code Ann. § 39-17-305(b); Tex. Penal Code Ann. § 42.01(a)(5); Utah

conduct in sixteen reform jurisdictions.[2578] Twenty-three reform jurisdictions treat disruption of a public gathering or funeral as a separate offense.[2579] Two reform jurisdictions do not specifically criminalize disrupting a meeting.[2580]

The revised public nuisance statute only proscribes conduct that occurs in a location that is open to the general public or the communal area of multi-unit housing. Many reform jurisdiction statutes are silent as to the location in which the conduct occurs. However, because the various types of conduct prohibited by the revised public nuisance statute often appear as multiple public order offenses in the reform jurisdictions, it is not possible to generalize whether the definition of "public" in each state is coextensive with the locations in the RCC.[2581]

Lastly, eliminating urinating and defecating in a public place is broadly supported by criminal codes in reform jurisdictions. Only two reform jurisdictions punish public urination as disorderly conduct.[2582] Both states punish public urination only "under circumstances which the person should know will likely cause affront or alarm to another."[2583] The revised statute largely captures similar conduct in RCC § 22E-4001.

Chapter 41. Rioting and Failure to Disperse.

RCC § 22E-4101. RIOTING.
[Now RCC § 22E-4301. Rioting.]

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

First, defining rioting as a form of group disorderly conduct is consistent with criminal codes in a minority of reform jurisdictions. Of the twenty-nine states (hereafter "reform jurisdictions") that have comprehensively reformed their criminal codes

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Code Ann. § 76-9-102(1)(ii); Wash. Rev. Code Ann. § 9A.84.030 (noise must occur within 500 feet of a funeral); Wis. Stat. Ann. § 947.01(1).

[2578] Ala. Code § 13A-11-7(a)(4); Ariz. Rev. Stat. Ann. § 13-2904(A)(4); Ark. Code Ann. § 5-71-207(a)(4); Conn. Gen. Stat. Ann. § 53a-182(a)(4); Del. Code Ann. tit. 11, § 1301(1)(c); Ind. Code Ann. § 35-45-1-3(a)(3); Kan. Stat. Ann. § 21-6203(a)(2); Me. Rev. Stat. tit. 17-A, § 501-A(1)(D); Mont. Code Ann. § 45-8-101(1)(f); N.H. Rev. Stat. Ann. § 644:2(III)(b)-(c); N.J. Stat. Ann. § 2C:33-8; N.Y. Penal Law § 240.20(A)(4); Or. Rev. Stat. Ann. § 166.025(1)(c); S.D. Codified Laws § 22-18-35(3); Tenn. Code Ann. § 39-17-305("lawful activities", presumably, includes gatherings or meetings); Wash. Rev. Code Ann. § 9A.84.030(1)(d).

[2579] Ala. Code § 13A-11-17; Ariz. Rev. Stat. Ann. § 13-2930; Ark. Code Ann. § 5-71-230; Colo. Rev. Stat. Ann. § 18-9-125; Conn. Gen. Stat. Ann. § 53a-183c; Del. Code Ann. tit. 11, § 1303; 720 Ill. Comp. Stat. Ann. 5/26-6(a); Kan. Stat. Ann. § 21-6106; Ky. Rev. Stat. Ann. § 525.155; Minn. Stat. Ann. § 609.501; Mo. Ann. Stat. § 574.160; Mont. Code Ann. § 45-8-116; N.H. Rev. Stat. Ann. § 644:2-bI.; N.J. Stat. Ann. § 2C:33-8.1; N.Y. Penal Law § 240.21; N.D. Cent. Code Ann. § 12.1-31-01.1; Ohio Rev. Code Ann. § 2917.12; 18 Pa. Stat. and Cons. Stat. Ann. § 7517; S.D. Codified Laws § 22-13-17; Tenn. Code Ann. § 39-17-317; Tex. Penal Code Ann. § 42.055; Utah Code Ann. § 76-9-108; Wis. Stat. Ann. § 947.011

[2580] Alaska and Hawaii.

[2581] Research did not include a review of case law interpreting what locations qualify as public or private in each state.

[2582] New Hampshire and Utah. N.H. Rev. Stat. Ann. § 645:1-a; Utah Code Ann. § 76-9-702.3.

[2583] N.H. Rev. Stat. Ann. § 645:1-a(b); Utah Code Ann. § 76-9-702.3.

influenced by the Model Penal Code (MPC) and have a general part,[2584] all but two have a rioting statute.[2585] Six of these twenty-seven reform jurisdictions with a rioting statute explicitly define rioting as disorderly conduct in a group similar to the RCC.[2586] Similarly, the MPC defines rioting as disorderly conduct in a group.[2587] The remaining twenty-one rioting statutes do not reference "disorderly conduct",[2588] but instead refer to "tumultuous or violent conduct" or a "disturbance of public peace" or similar language without specifying how such conduct relates to disorderly conduct.[2589]

Second, eliminating incitement as a distinct basis for rioting liability is broadly supported by criminal codes in reform jurisdictions. Only eleven reform jurisdictions distinctly criminalize incitement to riot at all.[2590] Nine of those eleven states punish incitement as a misdemeanor or lower-level felony as compared to the 10-year penalty in the District.[2591] Only the Dakotas have a maximum penalty for incitement that is as high

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[2584] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2585] All reform jurisdictions except Washington and Wisconsin criminalize engaging in a public riot. Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Me. Rev. Stat. tit. 17-A, § 503; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.J. Stat. 2C:33-1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Ohio Rev. Code Ann. § 2917.03; Or. Rev. Stat. Ann. § 166.015; 18 Pa. Cons. Stat. Ann. § 5501; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104. Washington has a related offense called Criminal Mischief. Wash. Rev. Code Ann. § 9A.84.010.

[2586] Delaware, Hawaii, Maine, New Jersey, Ohio, and Pennsylvania. Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; Me. Rev. Stat. tit. 17-A, § 503; N.J. Stat. § 2C:33-1; Ohio Rev. Code Ann. § 2917.03; 18 Pa. Cons. Stat. Ann. § 5501.

[2587] Model Penal Code § 250.1. Riot; Failure to Disperse.

[2588] Case law research was not performed to determine how many states have held that disorderly conduct is a lesser-included offense of rioting.

[2589] Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Or. Rev. Stat. Ann. § 166.015; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104.

[2590] Alabama, Arkansas, Colorado, Connecticut, Kansas, Kentucky, Montana, New York, North Dakota, South Dakota, and Tennessee. Ala. Code § 13A-11-4; Ark. Code § 5-71-203; Colo. Rev. Stat. Ann. § 18-9-102; Conn. Gen. Stat. Ann. § 53a-178; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. Ann. § 525.040; Mont. Code Ann. § 45-8-104; N.Y. Penal Law § 240.08; N.D. Cent. Code Ann. § 12.1-25-01; S.D. Codified Laws §§ 22-10-6, 22-10-6.1; Tenn. Code Ann. § 39-17-304.

[2591] Alabama punishes incitement as a misdemeanor. Ala. Code § 13A-11-4. Arkansas punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Ark. Code § 5-71-203. Colorado punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Colo. Rev. Stat. Ann. § 18-9-102. Connecticut punishes incitement as a misdemeanor. Conn. Gen. Stat. Ann. § 53a-178. Kansas punishes incitement as a low-level felony. Kan. Stat. Ann. § 21-6201. Kentucky punishes incitement as a misdemeanor. Ky. Rev. Stat. Ann.

as the District of Columbia's current law.[2592] The MPC rioting statute does not include an incitement provision.[2593]

Third, the revised rioting statute's single gradation structure is consistent with approximately half of the criminal codes in reformed jurisdictions and the MPC.[2594] Fifteen reform jurisdictions have multiple gradations of rioting in a public place.[2595] Most of these jurisdictions grade more severely either on the presence or use of a dangerous weapon during the rioting,[2596] or on the infliction of physical injury or substantial property damage.[2597]

Finally, there is strong support in revised statutes for requiring at least recklessness as to the predicate conduct. A majority of the 27 reform jurisdictions that outlaw rioting require at least recklessness as to whether the actor's conduct causes public alarm.[2598]

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§ 525.040. Montana punishes incitement outside a correctional institution as a misdemeanor. Mont. Code Ann. § 45-8-104. New York punishes incitement as a misdemeanor. N.Y. Penal Law § 240.08. Tennessee punishes incitement as a misdemeanor. Tenn. Code Ann. § 39-17-304.

[2592] The rioting statutes in the Dakotas each include an additional limitation. North Dakota punishes incitement as a Class B felony only if: (1) the person incites five or more people or (2) the riot involves 100 or more people. N.D. Cent. Code Ann. § 12.1-25-01. South Dakota punishes incitement as a Class 2 felony only if the person also engages in rioting himself. S.D. Codified Laws §§ 22-10-6, 22-10-6.1.

[2593] Model Penal Code § 250.1. Riot; Failure to Disperse.

[2594] *Id*.

[2595] Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Dakota, Tennessee, and Utah. Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b); Ind. Code Ann. § 35-45-1-2(Sec. 2); Ky. Rev. Stat. § 525.020; Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); N.Y. Penal Law § 240.06; N.D. Cent. Code Ann. § 12.1-25-01(4); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3). Some states recognize that a penal institution is not a public place or punish prison rioting as a distinct offense. *See* N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-301(3); Wash. Rev. Code Ann. § 9.94.010.

[2596] Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Ind. Code Ann. § 35-45-1-2(Sec. 2); Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Utah Code Ann. § 76-9-101(3).

[2597] Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b)(3); Ky. Rev. Stat. § 525.020; N.H. Rev. Stat. § 644:1(IV); N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3).

[2598] Ala. Code § 13A-11-3 ("intentionally or recklessly"); Ariz. Rev. Stat. Ann. § 13-2903 ("recklessly"); Ark. Code Ann. § 5-71-201 ("knowingly"); Conn. Gen. Stat. Ann. § 53a-176 ("intentionally or recklessly"); Del. Code Ann. tit. 11 § 1302 ("with intent to…"); Haw. Rev. Stat. Ann. § 711-1103 ("with intent to…" or with a weapon); 720 Ill. Comp. Stat. Ann. 5/25-1 ("knowing or reckless"); Ind. Code Ann. § 35-45-1-2 ("recklessly, knowingly, or intentionally"); Ky. Rev. Stat. § 525.030 ("knowingly"); Me. Rev. Stat. tit. 17-A, § 503 ("with intent to…" or with a weapon); Minn. Stat. Ann. § 609.71 ("by an intentional act"); Mo. Ann. Stat. § 574.050 ("knowingly"); Mont. Code Ann. § 45-8-103 ("purposely and knowingly"); N.H. Rev. Stat. § 644:1 ("purposely or recklessly"); N.J. Stat. 2C:33-1("with purpose to…"); N.Y. Penal Law § 240.05 ("intentionally or recklessly"); Ohio Rev. Code Ann. § 2917.03 ("with purpose to…"); Or. Rev. Stat. Ann. § 166.015 ("intentionally or recklessly"); 18 Pa. Cons. Stat. Ann. § 5501 ("with intent to…" or with a weapon); Tenn. Code Ann. § 39-17-302 ("knowingly"); Tex. Penal Code Ann. § 42.02 ("knowingly"); Utah Code Ann. § 76-9-104 ("knowingly or recklessly"). Case law research was not performed to determined the culpable mental states where statutes were silent in Alaska, Colorado, Kansas, North Dakota, and South Dakota.

RCC § 22E-4102. FAILURE TO DISPERSE.
[Now RCC § 22E-4302. Failure to Disperse.]

Relation to National Legal Trends. *The revised failure to disperse statute is broadly supported by national legal trends.*

Of the twenty-nine states (hereafter "reform jurisdictions") that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[2599] 27 criminalize failure to disperse as a separate low-level misdemeanor offense or as a type of disorderly conduct, unlawful assembly, or rioting.[2600]

[2599] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2600] Ala.Code 1975 § 13A-11-6; Ala.Code 1975 § 13A-11-7(a)(6); Alaska Stat. Ann. § 11.61.110; Ariz. Rev. Stat. § 13-2902(A)(2); Ariz. Rev. Stat. § 13-2904(A)(5); Ark. Code Ann. § 5-71-206; Ark. Code Ann. § 5-71-207(a)(6); Del. Code Ann. tit. 11, § 1301(1)(e) and (2); Haw. Rev. Stat. Ann. § 711-1102; Haw. Rev. Stat. Ann. § 711-1101(b); 720 Ill. Comp. Stat. Ann. 5/25-1(b)(4); Kan. Stat. Ann. § 21-6202(c)(2); Ky. Rev. Stat. Ann. § 525.060 (1)(c); Me. Rev. Stat. tit. 17-A, § 502; Minn. Stat. Ann. § 609.715; Mo. Ann. Stat. § 574.060; Mont. Code Ann. § 45-8-102; N.H. Rev. Stat. § 644:1(II); N.H. Rev. Stat. § 644:2(IV)(c); N.J. Stat. Ann. § 2C:33-1(b); N.Y. Penal Law § 240.20(6); N.D. Cent. Code Ann. § 12.1-25-04; Ohio Rev. Code Ann. § 2917.04; Ohio Rev. Code Ann. § 2917.11(3)(a); 18 Pa.C.S.A. § 5502; S.D. Codified Laws § 22-10-11; Tenn. Code Ann. § 39-17-305(a)(2); Utah Code Ann. § 76-9-104; Utah Code Ann. § 76-9-102(1)(a); Wash. Rev. Code Ann. § 9A.84.020; Wis. Stat. Ann. § 947.06(3)-(4).

Offenses Recommended for Repeal.

Repealed. FAILURE TO ARREST.

Relation to National Legal Trends. No other state has a similar criminal provision concerning a failure to make an arrest. Nevada and Oklahoma criminalize willfully refusing to arrest a person after being "lawfully commanded" to do so.[2601] New Jersey punishes a public servant's refraining from performing a duty when it is done "with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit."[2602] Twenty-five states explicitly allow law enforcement officers to issue a citation instead of arrest for some or all offenses, by statute or in the rules of criminal procedure.[2603] Eleven additional states appear to allow officers to issue a citation instead of arrest (that is, the code has a citation procedure and does not explicitly require an arrest).[2604] Ten states enforce a presumption that officers will issue a citation instead of arrest for certain offenses.[2605]

[2601] Nev. Rev. Stat. Ann. § 199.270; Okla. Stat. Ann. tit. 21, § 537.
[2602] N.J. Stat. Ann. § 2C:30-2.
[2603] Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.
[2604] Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Montana, North Carolina, Oregon, Texas, and Wyoming. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.
[2605] Alaska, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, Ohio, Pennsylvania, Rhode Island, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

RCC § 22E-1401. AGGRAVATED KIDANPPING
RCC § 22E-1402. KIDNAPPING.
[Now RCC § 22E-1401. Kidnapping.]

Relation to National Legal Trends. *The changes to the kidnapping offense are broadly sup ported by national legal trends. However, codifying an aggravated kidnapping offense based on the status of the complainant, or whether the defendant used a dangerous or imitation weapon is not supported by national legal trends.*

First, requiring that the defendant acted with one of the enumerated motives is consistent with the kidnapping statutes adopted by the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1] (hereinafter "reformed code jurisdictions"). None of the 29 states' kidnapping statutes include a catchall provision similar to the District's statute criminalizing restraints "for ransom or reward or otherwise."[2] A large majority of reformed code jurisdictions' kidnapping statutes include intent to hold another for random or reward[3]; to use the complainant as a shield or hostage[4]; to facilitate the commission of any felony or flight thereafter[5]; or to inflict bodily injury upon the complainant, or to commit a sexual offense.[6] Although no reformed code jurisdictions'

[1] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[2] D.C. Code § 22-2001.
[3] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; 720 Ill. Comp. Stat. Ann. 5/10-2; Ind. Code Ann. § 35-42-3-2; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.
[4] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; Ind. Code Ann. § 35-42-3-2; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.
[5] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.
[6] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; 720 Ill. Comp. Stat. Ann. 5/10-2; Ind. Code Ann. § 35-42-3-2; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110;

kidnapping statutes include intent to cause any person to believe that the complainant will not be released without suffering significant bodily injury, a majority do include a comparable "intent to terrorize the complainant or another" as an element of kidnapping.[7] However, including intent to permanently deprive a parent or court appointed guardian of custody is not strongly supported by national criminal codes. Only a minority of reformed jurisdictions' kidnapping statutes include intent to intent to permanently deprive a parent of legal custody.[8]

Second, including an exception to liability when the complainant is a relative of the complainant has mixed support from other reformed criminal codes. A minority of reformed code jurisdiction includes a relative defense to kidnapping or kidnapping-related offenses.[9] The RCC's definition of "relative" differs from most reformed jurisdictions that statutorily recognize a relative defense. A slight majority of these jurisdictions define "relative" to include any "ancestor."[10]

Third, barring sentences for both kidnapping and another offense if the interference with the other person's freedom of movement was incidental to the commission the other offense is consistent with reformed criminal codes. A majority of reformed code jurisdictions either by statute[11] or case law[12] bar sentences for both kidnapping and a separate offense if the kidnapping was incidental to another offense.

Fourth, it is unclear if barring multiple penalty enhancements from applying to a single kidnapping conviction is consistent with most criminal codes. CCRC staff has not

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Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

[7] Ala. Code § 13A-6-43; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

[8] Colo. Rev. Stat. Ann. § 18-3-302; Del. Code Ann. tit. 11, § 783A; 720 Ill. Comp. Stat. Ann. 5/10-2; Ind. Code Ann. § 35-42-3-2; Ky. Rev. Stat. Ann. § 509.040; Mo. Ann. Stat. § 565.110; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; Tenn. Code Ann. § 39-13-304; Utah Code Ann. § 76-5-302.

[9] Alaska Stat. Ann. § 11.41.300; Ala. Code § 13A-6-44; Ariz. Rev. Stat. Ann. § 13-1303; N.Y. Penal Law § 135.15; Or. Rev. Stat. Ann. § 163.225; 18 Pa. Stat. Ann. § 2902; Tex. Penal Code Ann. § 20.02; Wash. Rev. Code Ann. § 9A.40.030.

[10] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ariz. Rev. Stat. Ann. § 13-1301; Or. Rev. Stat. Ann. § 163.215; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

[11] Ky. Rev. Stat. Ann. § 509.050

[12] *Hurd v. State*, 22 P.3d 12, 18 (Alaska Ct. App. 2001); *Summerlin v. State*, 756 S.W.2d 908, 910 (Ark. 1988); *Apodaca v. People*, 712 P.2d 467, 475 (Colo. 1985); *Weber v. State*, 547 A.2d 948, 958 (Del. 1988); *State v. Deguair*, 384 P.3d 893, 895 (Haw. 2016); *People v. Smith*, 414 N.E.2d 1117, 1121 (Ill. App. Ct. 1980); *State v. Buggs*, 547 P.2d 720, 730–31 (Kan. 1976); *State v. Taylor*, 661 A.2d 665, 667–68 (Me. 1995); *State v. Welch*, 675 N.W.2d 615, 620 (Minn. 2004); *State v. Williams*, 860 S.W.2d 364, 366 (Mo. Ct. App. 1993); *State v. Casanova*, 63 A.3d 169, 172 (N.H. 2013); *State v. Masino*, 466 A.2d 955, 960 (N.J. 1983); *People v. Miles*, 245 N.E.2d 688, 695 (N.Y. 1969); *State v. Logan*, 397 N.E.2d 1345, 1351–52 (Ohio 1979); *State v. Garcia*, 605 P.2d 671, 676–77 (Or. 1980); *Com. v. Hook*, 512 A.2d 718, 720 (Pa. 1986); *State v. Lykken*, 484 N.W.2d 869, 876 (S.D. 1992); *State v. White*, 362 S.W.3d 559, 581 (Tenn. 2012).

researched whether other jurisdictions allow more than one penalty enhancement to apply to a single kidnapping conviction.

Fifth, including penalty enhancements based on the status of the complainant as elements of aggravated kidnapping is not consistent with most criminal codes. Of the twenty-nine states reformed code jurisdictions, none include heightened penalty gradations based on whether the complainant was a law enforcement officer, public safety employee, government official, or transportation worker. Five reformed code jurisdictions include as an element of an aggravated form of kidnapping that the complainant was a child,[13] and one includes as an element that the complainant had a "profound intellectual disability."[14]

Sixth, including as an element of aggravated kidnapping that the defendant acted with the purpose of harming the complainant due to the complainant's status as a law enforcement officer, public safety employee, or public official is not consistent with most criminal codes. As discussed above, none of the reformed code jurisdictions include as an element of aggravated kidnapping that the complainant was a law enforcement officer, public safety employee, District official. However, CCRC staff has not researched whether other jurisdictions' separate penalty enhancement statutes that may authorize heightened penalties for kidnapping based on the status of the complainant.

Seventh, including as an element of aggravated kidnapping that the defendant displayed or used a dangerous weapon or imitation dangerous weapon to commit the offense is not consistent with most criminal codes. Of the 29 reformed code jurisdictions, four include as an element of an aggravated form of kidnapping that the defendant was armed with a dangerous weapon.[15] However, CCRC staff has not researched whether other jurisdictions' criminal codes include separate while-armed enhancement provisions that may authorize heightened penalties for kidnappings committed while armed.

RCC § 22E-1403. AGGRAVATED CRIMINAL RESTRAINT.
RCC § 22E-1404. CRIMINAL RESTRAINT
[Now RCC § 22E-1402. Criminal Restraint.]

Relation to National Legal Trends. *Changing current District law by including a criminal restraint is supported by national criminal codes.*

First, including a separate criminal restraint offense is consistent with the approach across the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[16] (hereinafter

[13] Ariz. Rev. Stat. Ann. § 13-1304 (under 15 years of age); 720 Ill. Comp. Stat. Ann. 5/10-2 (under 13 years of age); Ind. Code Ann. § 35-42-3-2 (under 14 years of age); N.J. Stat. Ann. § 2C:13-1 (under 16 years of age); Ohio Rev. Code Ann. § 2905.01 (under 13 years of age, and defendant had a sexual motivation).
[14] 720 Ill. Comp. Stat. Ann. 5/10-2.
[15] Ind. Code Ann. § 35-42-3-2; 720 Ill. Comp. Stat. Ann. 5/10-2 (dangerous weapon other than a firearm); Utah Code Ann. § 76-5-302; Tenn. Code Ann. § 39-13-305 ("accomplished with a deadly weapon or by displaying of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon").
[16] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa,

"reformed code jurisdictions"). The Model Penal Code, as well as twenty-seven of the twenty-nine reformed code jurisdictions include a separate criminal restraint offense that is subject to less severe penalties that kidnapping.[17]

Requiring that the restraint be without effective consent of the complainant has limited support amongst other states' criminal codes. A minority of reformed jurisdictions' analogous criminal restraint offenses explicitly require lack of consent, use of force, threats, or any means if the complainant is under the age of 16.[18] However, CCRC has staff has not comprehensively researched case law in other jurisdictions to determine whether courts have interpreted analogous criminal restraint offenses to require lack of consent, use coercive threats, deception, or any other means when the complainant is a minor.

Second, requiring that interference must be "to a substantial degree" is supported by other criminal codes. A majority of reformed code jurisdictions' analogous criminal restraint offenses require that the defendant interfere with another person's freedom of movement to a substantial degree.[19]

Third, providing an exception to liability for criminal restraint if person restrained is under the age of 18 or incapacitated and the accused is a person with authority over the complainant is not supported by other jurisdictions' criminal codes. A minority of reformed code jurisdictions include a defense to kidnapping or criminal restraint-type offenses when the accused is a relative of the complainant.[20]—[No reformed code

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Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[17] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ariz. Rev. Stat. Ann. § 13-1303; Ark. Code Ann. § 5-11-104, Ark. Code Ann. § 5-11-103; Colo. Rev. Stat. Ann. § 18-3-303; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; 720 Ill. Comp. Stat. Ann. 5/10-3, 720 Ill. Comp. Stat. Ann. 5/10-3.1; Ind. Code Ann. § 35-42-3-3; Kan. Stat. Ann. § 21-5411; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; Me. Rev. Stat. tit. 17-A, § 302; Minn. Stat. Ann. § 609.255; Mo. Ann. Stat. § 565.130 (though labeled third degree kidnapping); Mont. Code Ann. § 45-5-301; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law § 135.05, N.Y. Penal Law § 135.10; N.D. Cent. Code Ann. § 12.1-18-02, N.D. Cent. Code Ann. § 12.1-18-03; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; S.D. Codified Laws § 22-19-17; Tenn. Code Ann. § 39-13-302; Tex. Penal Code Ann. § 20.02; Wash. Rev. Code Ann. § 9A.40.040; Wis. Stat. Ann. § 940.30.

[18] Ala. Code § 13A-6-40; Ark. Code Ann. § 5-11-101; Ariz. Rev. Stat. Ann. § 13-1301; Conn. Gen. Stat. Ann. § 53a-91; Del. Code Ann. tit. 11, § 786; 720 Ill. Comp. Stat. Ann. 5/10-1 (Illinois' kidnapping offense is analogous to the RCC's criminal restraint offense); Ky. Rev. Stat. Ann. § 509.010; N.D. Cent. Code Ann. § 12.1-18-04; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

[19] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ark. Code Ann. § 5-11-101; Ariz. Rev. Stat. Ann. § 13-1301; Conn. Gen. Stat. Ann. § 53a-91; Del. Code Ann. tit. 11, § 786; Haw. Rev. Stat. Ann. § 707-700; Ind. Code Ann. § 35-42-3-1; Kan. Stat. Ann. § 21-5411; Ky. Rev. Stat. Ann. § 509.010; Me. Rev. Stat. tit. 17-A, § 301; Mo. Ann. Stat. § 565.110, Mo. Ann. Stat. § 565.120, Mo. Ann. Stat. § 565.130; Mont. Code Ann. § 45-5-301; N.D. Cent. Code Ann. § 12.1-18-04; N.J. Stat. Ann. § 2C:13-3; Or. Rev. Stat. Ann. § 163.225; S.D. Codified Laws § 22-19-1, S.D. Codified Laws § 22-19-17; Tenn. Code Ann. § 39-13-302; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

[20] Alaska Stat. Ann. § 11.41.300; Ala. Code § 13A-6-44; Ariz. Rev. Stat. Ann. § 13-1303; N.Y. Penal Law § 135.15; Or. Rev. Stat. Ann. § 163.225; 18 Pa. Stat. Ann. § 2902; Tex. Penal Code Ann. § 20.02; Wash. Rev. Code Ann. § 9A.40.030.

jurisdictions provide an exception to liability for parents, legal guardians with authority to take physical custody of the person, persons acting in the place of a parent per civil law, or persons acting at the request of such a parent, legal guardian, or person acting in the place of a parent per civil law. Need to re-check other jurisdictions' statutes to make sure this is correct.]

Fourth, barring sentences for criminal restraint if the interference with the other person's freedom of movement was incidental to the commission of another criminal offense is consistent with reformed criminal codes. A majority of reformed code jurisdictions either by statute[21] or case law[22] bar sentences for both kidnapping and a separate offense if the kidnapping was incidental to another offense. However, CCRC staff has not researched whether the same rule specifically applies to sentencing for the lesser criminal restraint-type offenses that are incidental to other offenses.

Fifth, codifying a more serious gradation of criminal restraint is the majority approach across the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereinafter "reformed code jurisdictions"). Nearly all reformed code jurisdictions codify a separate criminal restraint type offense[23], and a slight majority of these recognize more than one grade of the criminal restraint offense.[24] The MPC also codifies more than one grade of criminal restraint. However, of the states that recognize more than one penalty grade, most have followed the MPC's lead and grade their analogous criminal restraint offenses based on whether the defendant placed the complainant at "risk of serious bodily injury."[25] Only one reformed code jurisdictions grade their criminal restraint offenses

[21] Ky. Rev. Stat. Ann. § 509.050

[22] *Hurd v. State*, 22 P.3d 12, 18 (Alaska Ct. App. 2001); *Summerlin v. State*, 756 S.W.2d 908, 910 (Ark. 1988); *Apodaca v. People*, 712 P.2d 467, 475 (Colo. 1985); *Weber v. State*, 547 A.2d 948, 958 (Del. 1988); *State v. Deguair*, 384 P.3d 893, 895 (Haw. 2016); *People v. Smith*, 414 N.E.2d 1117, 1121 (Ill. App. Ct. 1980); *State v. Buggs*, 547 P.2d 720, 730–31 (Kan. 1976); *State v. Taylor*, 661 A.2d 665, 667–68 (Me. 1995); *State v. Welch*, 675 N.W.2d 615, 620 (Minn. 2004); *State v. Williams*, 860 S.W.2d 364, 366 (Mo. Ct. App. 1993); *State v. Casanova*, 63 A.3d 169, 172 (N.H. 2013); *State v. Masino*, 466 A.2d 955, 960 (N.J. 1983); *People v. Miles*, 245 N.E.2d 688, 695 (N.Y. 1969); *State v. Logan*, 397 N.E.2d 1345, 1351–52 (Ohio 1979); *State v. Garcia*, 605 P.2d 671, 676–77 (Or. 1980); *Com. v. Hook*, 512 A.2d 718, 720 (Pa. 1986); *State v. Lykken*, 484 N.W.2d 869, 876 (S.D. 1992); *State v. White*, 362 S.W.3d 559, 581 (Tenn. 2012).

[23] In other jurisdictions, the analogous offenses are often labeled as felonious restraint, unlawful restraint, false imprisonment, or unlawful imprisonment.

[24] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ark. Code Ann. § 5-11-103, Ark. Code Ann. § 5-11-104; Colo. Rev. Stat. Ann. § 18-3-303; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; 720 Ill. Comp. Stat. Ann. 5/10-3, 720 Ill. Comp. Stat. Ann. 5/10-3.1; Ind. Code Ann. § 35-42-3-3; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; Me. Rev. Stat. tit. 17-A, § 302; N.D. Cent. Code Ann. § 12.1-18-02, N.D. Cent. Code Ann. § 12.1-18-03; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law § 135.05; N.Y. Penal Law § 135.10; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; Tex. Penal Code Ann. § 20.02.

[25] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ark. Code Ann. § 5-11-103, Ark. Code Ann. § 5-11-104; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; N.D. Cent. Code Ann. § 12.1-18-03; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law §

based on the status of the complainant[26], and no reformed code jurisdictions grade criminal restraint based on whether the defendant was armed with a dangerous weapon. However, some state courts have held that using or being armed with a dangerous weapon can create a risk of serious bodily injury[27], which is a widely recognized grading factor.

Codifying an aggravated criminal restraint offense is well supported by national criminal codes, however the use of complainant-specific and weapon-based aggravators is not well supported by national criminal codes.

Codifying a more serious gradation of criminal restraint is the majority approach across the twenty-nine reformed code jurisdictions. Nearly all reformed code jurisdictions codify a separate criminal restraint type offense[28], and a slight majority of these recognize more than one grade of the criminal restraint offense.[29] The MPC also codifies more than one grade of criminal restraint. However, of the states that recognize more than one penalty grade, most have followed the MPC's lead and grade their analogous criminal restraint offenses based on whether the defendant placed the complainant at "risk of serious bodily injury."[30] Only one reformed code jurisdictions grade their criminal restraint offenses based on the status of the complainant[31], and no reformed code jurisdictions grade criminal restraint based on whether the defendant was armed with a dangerous weapon. However, some state courts have held that using or

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135.05; N.Y. Penal Law § 135.10; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; Tex. Penal Code Ann. § 20.02.

[26] Tex. Penal Code Ann. § 20.02.

[27] *E.g.*, *State v. Zubhuza*, 90 A.3d 614, 618 (N.H. 2014) ("In determining whether such a risk exists, the defendant's use or brandishing of a deadly weapon is a highly relevant consideration."); *Linville v. Com.*, No. 2011-SC-000109-MR, 2012 WL 2362489, at *6 (Ky. June 21, 2012) (holding that at least certain uses of dangerous weapons create risk of serious physical injury); *State v. Ciullo*, 59 A.3d 293, 301 (2013), *aff'd*, 314 Conn. 28, 100 A.3d 779 (Ct. App. 2014) (holding that pointing guns at complainants created a risk of substantial injury).

[28] In other jurisdictions, the analogous offenses are often labeled as felonious restraint, unlawful restraint, false imprisonment, or unlawful imprisonment.

[29] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ark. Code Ann. § 5-11-103, Ark. Code Ann. § 5-11-104; Colo. Rev. Stat. Ann. § 18-3-303; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; 720 Ill. Comp. Stat. Ann. 5/10-3, 720 Ill. Comp. Stat. Ann. 5/10-3.1; Ind. Code Ann. § 35-42-3-3; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; Me. Rev. Stat. tit. 17-A, § 302; N.D. Cent. Code Ann. § 12.1-18-02, N.D. Cent. Code Ann. § 12.1-18-03; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law § 135.05; N.Y. Penal Law § 135.10; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; Tex. Penal Code Ann. § 20.02.

[30] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ark. Code Ann. § 5-11-103, Ark. Code Ann. § 5-11-104; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; N.D. Cent. Code Ann. § 12.1-18-03; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law § 135.05; N.Y. Penal Law § 135.10; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; Tex. Penal Code Ann. § 20.02.

[31] Tex. Penal Code Ann. § 20.02.

being armed with a dangerous weapon can create a risk of serious bodily injury[32], which is a widely recognized grading factor.

[32] *E.g.*, *State v. Zubhuza*, 90 A.3d 614, 618 (N.H. 2014) ("In determining whether such a risk exists, the defendant's use or brandishing of a deadly weapon is a highly relevant consideration."); *Linville v. Com.*, No. 2011-SC-000109-MR, 2012 WL 2362489, at *6 (Ky. June 21, 2012) (holding that at least certain uses of dangerous weapons create risk of serious physical injury); *State v. Ciullo*, 59 A.3d 293, 301 (2013), *aff'd*, 314 Conn. 28, 100 A.3d 779 (Ct. App. 2014) (holding that pointing guns at complainants created a risk of substantial injury).