D.C. Criminal Code Reform Commission

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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety

From: Richard Schmechel,
Executive Director, D.C. Criminal Code Reform Commission (CCRC)

Date: November 1, 2019

Re: Testimony for the October 23, 2019 Hearing on Bill 23-0409, "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019" and Bill 23-0435, "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019"

I. Introduction

Thank you for the opportunity to provide written testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019" and "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019" (hereafter "bills"), held on October 23, 2019. I am presenting written testimony on behalf of the Criminal Code Reform Commission (CCRC).

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC's mission is to prepare comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing comprehensive recommendations to reform the District's "substantive" criminal statutes—i.e. laws that define crimes and punishments.

To date, the CCRC has not submitted final recommendations to the Mayor or Council regarding defenses applicable to a broad range of crimes. The agency has yet to fully research or develop recommendations for general defenses relating to the justifiable use of force, mental incapacity, or "heat of passion." However, the agency has completed research and draft recommendations regarding the availability of a mitigation defense to murder and two general defenses: a special responsibility for care, discipline, or safety defense (applicable to parents, guardians, caretakers, and emergency medical personnel) and an effective consent defense to a range of offenses against persons.[1]

The CCRC takes no position at present on the substantive merits of whether to codify a categorical exception or multiple exceptions to defenses based on the defendant's knowledge or

[1] *See* "Compilation of Draft RCC Statutes to Date (October 3, 2019)" available at https://ccrc.dc.gov/page/draft-recommendations.

discovery of the victim's actual or purported gender identity, sexual orientation, or other specified attribute. Instead, this testimony analyzes potential ambiguities and questions related to the bills' proposed language and offers some possible solutions.

II. Background Considerations

The present bills seek to codify exceptions to defenses that may be presented and considered at trial and specific jury instructions. However, in assessing whether and how to codify an *exception* to certain defenses, or an articulation of an exception to be presented to juries, the scope and operation of the underlying defenses themselves is relevant. Unfortunately, establishing the precise scope of these defenses in the District is problematic because they do not exist in the D.C. Code.

The District is among a minority of jurisdictions nationally that have no codified general defenses. For example, only thirteen states have failed to codify a defense of persons defense.[2] The District's lack of statutory law regarding general defenses is not surprising given that the D.C. Code's criminal statutes have never undergone a comprehensive review and reform since being passed by Congress in 1901. In the 19th century (and the first half of the 20th century), state jurisdictions rarely codified general defenses or even the elements of common crimes, instead relying on the "common law"—the sprawling, evolving set of court decisions made in individual cases—to describe exceptions to criminal liability. In the second half of the 20th century, however, most of the United States modernized their criminal codes and codified general defenses relating to: duress or necessity, the use of force in self-defense or defense of others, the use of force by police or government officials, the special rights of parents and others with duties of care, mental disability, and other defenses. This codification of general defenses in the second half of the 20th century was sparked in large part by the American Law Institute (ALI) Model Penal Code (1962). There was a recognition that the often unclear, inconsistent, and incomplete articulation of defenses in the common law were a barrier to justice. Moreover, exclusive reliance on the common law to decide what constitutes an exception to criminal liability effectively put the courts in control of what should be a legislative function—the articulation of what behavior constitutes a criminal offense and the permitted penalties.

In the absence of legislation codifying general defenses, a judicial "common law" regarding the scope and meaning general defenses has continued to evolve in the District and those other jurisdictions that have not modernized their criminal codes. District judges continue to apply prior court rulings, and issue new appellate rulings, concerning the meaning and applicability of general defenses in the District as they arise in particular cases. However, the nature of court decisions—being limited to the facts of the case before them and bound by older precedent—mean that the court decisions establishing the District's law regarding defenses are

[2] *See* Paul H. Robinson, Matthew G. Kussmaul, Camber M. Stoddard, Ilya Rudyak & Andreas Kuersten, *The Am. Criminal Code: Gen. Defs.*, 7 J. Legal Analysis 37, 50, 127-140 (2015) (Self-defense and defense of third persons are common law defenses which, in 16 jurisdictions, are found only in case law). Note, however, that one of the cited jurisdictions is the federal criminal code, and two others codify self-defense separately: N.C. Gen. Stat. Ann. § 14-51.3 and Wyo. Stat. Ann. § 6-2-602.

necessarily incomplete, may include outdated language, and may not reflect current District norms or the will of its elected representatives.[3]

Legal practitioners seeking a common, fixed articulation of District general defenses routinely turn to pattern jury instructions. Practically, these pattern jury instructions fill the gap in statutory law, but they have no legal authority of their own. The District's Criminal Jury Instructions for the District of Columbia (commonly referred to as the "Redbook" due to its red cover) are issued by a private company, LexisNexis, which consults with local experts when creating the instructions. The Redbook's instructions include a short commentary explaining relevant case law and often provide alternative formulations of an instruction. However, as the Redbook itself recognizes,[4] the instructions—updated only periodically—are imperfect and incomplete. Courts and legal practitioners routinely craft the pattern jury instructions to fit the facts at hand in a particular case.[5] In fact, jury instructions *must* be tailored by the court to ensure that the manner and mode of the presentation of law and evidence do not infringe on the due process rights of the litigants.[6] But, this is possible only because the D.C. Code does not in any other place codify the specific language of a jury instruction, nor do the Superior Court Rules of Criminal Procedure.

III. Specific Considerations Regarding Bill Language

First, it is unclear which District defenses are curtailed by the proposed exceptions. The present bills aim to limit defenses concerning justifiable use of force, mental incapacity, and heat of passion.[7] However, the bills' language gives rise to several questions. Does the reference to "a *defense* premised on heat of passion" mean to preclude raising a *partial defense* such as a mitigating circumstance in a of murder case (lowering liability to manslaughter)?[8] Or, put

[3] The fact that a District court has recognized a defense does not preclude other defenses, previously unrecognized by District courts, from being recognized in the future. Courts are bound by a judicial doctrine of *stare decisis* to uphold decisions in prior cases in future cases with substantially similar facts. In this way, court rulings are essentially backward-looking and cannot prospectively create entirely new law (absent legislative authority to issue advisory opinions on particular matters). Only legislation can establish a complete articulation of criminal defenses, and only when such defenses are within constitutional bounds.

[4] *See* Criminal Jury Instructions for the District of Columbia Preface for the Fifth Edition (2019) ("No matter how careful we have been, I expect that there may still be some instructions or comments that can be improved.").

[5] *See* District of Columbia Rule of Criminal Procedure 30.

[6] *See, e.g.*, *Holloway v. United States*, 25 A.3d 898, 903 (D.C. 2011) ("A trial court generally has broad discretion in fashioning jury instructions, as long as the charge, 'considered as a whole, fairly and accurately states the applicable law.'"); *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123, 140 (1938) ("The question whether due process in the court's procedure was accorded thus comes to the mode of trial; that is, (1) the propriety of a trial by jury, and (2) the manner in which the issues were submitted to the jury.").

[7] Bill 23-435 refers to "a defense predicated on 'heat of passion'" whereas Bill 23-435 refers to "heat of passion," "reduced mental capacity," a defense that a person was "justified in using force against another."

[8] Although current District murder statutes make no mention of mitigating circumstances, the District of Columbia Court of Appeals ("DCCA") has held that a person commits voluntary manslaughter when he or she causes the death of another with a mental state that would constitute murder, except for the presence of mitigating circumstances. *Comber v. United States*, 584 A.2d 26, 41 (D.C. 1990) ("The mitigation principle is predicated on the legal system's recognition of the 'weaknesses' or 'infirmity' of human nature, as well as a belief that those who kill under 'extreme mental or emotional disturbance for which there is reasonable explanation or excuse' are less 'morally blameworth[y]' than those who kill in the absence of such influences.") (Internal citations omitted.). If

differently, does the reference to "a defense premised on heat of passion" mean to preclude raising such conduct as a defense to any crime of violence, or *only* to murder? Similarly, does the reference to "reduced mental capacity" mean to preclude an insanity defense to any crime of violence, or does a "reduced mental capacity" defense here have a broader meaning?[9]

Two possible solutions to these ambiguities are to: 1) eliminate the bills' references to exceptions for heat of passion and reduced mental capacity defenses; or 2) statutorily specify the meaning and scope of heat of passion and reduced mental capacity defenses as to all crimes of violence.

Second, the causal relationship between the protected attribute and the provocation of violence is unclear. Each bill prohibits a heat of passion defense where defendant's actions are

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evidence of mitigating circumstances is presented at trial, the government must prove beyond a reasonable doubt that mitigating circumstances were not present. *Harris v. United States*, 373 A.2d 590, 592-93 (D.C. 1977).

The DCCA has not clearly defined what constitutes a "mitigating circumstance," but has held that mitigating circumstances include an accused "act[ing] in the heat of passion caused by adequate provocation." *See, e.g., High v. United States*, 972 A.2d 829, 833 (D.C. 2009). Under common law, cases interpreting what constituted adequate provocation came to recognize "fixed categories of conduct" that "the law recognized as sufficiently provocative to mitigate" murder to the lesser offense of manslaughter. *Brown v. United States*, 584 A.2d 537, 540 (D.C. 1990); *see also* Commentary to Model Penal Code § 210.3 at 57 ("Traditionally, the courts have also limited the circumstances of adequate provocation by casting generalizations about reasonable human behavior into rules of law that structured and confined the operation of the doctrine."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 Wm. & Mary L. Rev. 1027, 1036 (2011) ("The law came to recognize four distinct-and exhaustive-categories of provocative conduct considered "sufficiently grave to warrant the reduction from murder to manslaughter of a hot-blooded intentional killing." The categories were: (1) a grossly insultive assault; (2) witnessing an attack upon a friend or relative; (3) seeing an Englishman unlawfully deprived of his liberty; and (4) witnessing one's wife in the act of adultery."); Lafave, Wayne, 2 Subst. Crim. L. § 15.2 (3d ed.). In contrast, the modern approach "does not provide specific categories of acceptable or unacceptable provocatory conduct" and more generally inquires whether the "provocation is that which would cause…a reasonable man…to become so aroused as to kill another" such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen." *Brown v. United States*, 584 A.2d 537, 542 (D.C. 1990); Commentary to Model Penal Code § 210.3 at 63.

Under both approaches, the accused must have acted with an emotional state that would cause a person to become so "aroused as to kill another" or that would "naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection." *High*, 972 A.2d 829, 833-34 (D.C. 2009); *Brown*, 584 A.2d at 543 n. 17. And, under both approaches, the reasonableness of the accused's reaction to the provoking circumstance is determined from the accused's view of the facts. *See, e.g.*, *High*, 972 A.2d at 833. While the DCCA has long used the traditional "adequate provocation" formulation, the court has also noted that while under the common law, "there grew up a process of pigeon-holing provocative conduct…[o]ur own law of provocation in the District of Columbia began with a general formulation similar to the modern view[.]". *Brown v. United States*, 584 A.2d at 542 Instead of being bound by common law precedent defining specific fact patterns that constitute adequate provocation, the District may already embrace the more flexible modern approach that "does not provide specific categories of acceptable or unacceptable provocatory conduct." *Id.* Ultimately the DCCA has not fully reconciled its "recognition (or non-recognition) of the Model Penal Code" approach to provocation. *Simpson v. United States*, 632 A.2d 374, 377 (D.C. 1993). For example, the DCCA has explicitly declined to decide whether the decedent must have provided the provoking circumstance.

[9] Either proposition is problematic. While the Supreme Court has not resolved the issue, many state supreme courts have held that an insanity defense is grounded in constitutional case law and statutory limitations may be subject to constitutional challenge. See, e.g., *Finger v. State*, 117 Nev. 548, 575, 27 P.3d 66, 84 (2001). On the other hand, to the extent that "reduced mental capacity" is meant to refer to something other than an insanity defense, District courts and practice have historically rejected such a defense as existing apart from an insanity defense. *Bethea v. United States*, 365 A.2d 64, 83 (D.C. 1976).

"related to" the victim's[10] protected characteristics or the victim's "association with"[11] a member of the protected class. However, it is unclear exactly how the actions and the identity must be related and how to assess evidence of multifaceted provocation.[12] The phrase "related to" is notably different than the phrase "based *solely* on" in the subsections of Bill 23-409 pertaining to diminished capacity and self-defense. It is also notably different than the phrase "based *on*" in the definition of "bias-related crime" in D.C. Code § 22-3701(1)[13] and the phrase "because of" in 18 U.S.C. § 249, the federal hate crime statute.[14]

Two possible solutions to these ambiguities are to: 1) adopt a "based on" causation standard for all exceptions, consistent with the current bias enhancement; or 2) adopt a "based solely on" causation standard for the exception to a heat of passion defense, consistent with the other exceptions.

Third, it is unclear how the jury instruction requirement will operate in practice. The present bills require:

> In any criminal trial or proceeding, upon the request [of either the prosecutor or the defendant] [[sic.] a party], the court shall instruct the jury substantially as follows: 'Do not let bias, sympathy, prejudice, or public opinion influence your decision. ['']Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity or expression, or sexual orientation.['].

First, it is unclear how this jury instruction is intended to relate to the exception to defense(s) articulated earlier in the bills. The proposed bias jury instruction appears to be a

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[10] Curiously, the statutes do not address defenses based on the potential disclosure of the *defendant's* identity or expression.

[11] For example, Person A (straight) doesn't like Person B (gay) simply because B is an Astros fan. Person C (straight) is B's friend. If A starts a bar fight with B, and C joins in on B's side, should A be precluded from claiming a heat of passion defense as to C but not B? This does not appear to be the intent of the bills, but the possibility arises from the drafting of the statute and the ambiguity of "associated with" language. In this hypothetical, A's fight was not "related to" B's identity in the sense of being causally linked (strongly or loosely), but if A knew B was gay and that C appears to be "associated with" A, then the plain language of the statute seems to exclude a defense as to harms to C but not B.

[12] For example, it is unclear whether a person in a heterosexual marriage who discovers their spouse engaged in a homosexual affair could nevertheless argue a heat of passion defense, premised on the discovery of the infidelity.

[13] D.C. Code § 22-3701(1) "'Bias-related crime' means a designated act that demonstrates an accused's prejudice based on the actual or 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 of a victim of the subject designated act.").

[14] The DCCA has not yet interpreted the phrase "based on," however, in at least one case, it has been relied upon to prosecute a gay person for assaulting another gay person. *See* U.S. Attorney's Office for the District of Columbia, Twins Found Guilty of Attacking Man In Bias-Related Crime in Northwest Washington (May 8, 2015) (available at https://www.justice.gov/usao-dc/pr/twins-found-guilty-attacking-man-bias-related-crime-northwest-washington); Mark Joseph Stern, *Judge Lessens Jail Time for Hate Crime Assailants, Claims Gay Victim Was Just "Jumped,"* SLATE (July 27, 2015). Federal courts disagree about the meaning of "because of." *Compare United States v. Miller*, 767 F.3d 585, 591 (6th Cir. 2014) (requiring "but-for" causality) *with United States v. Jenkins*, 120 F. Supp. 3d 650, 652 (E.D. Ky. 2013) (requiring a "substantial reason"); *United States v. Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. 2012) (requiring only "motivation").

wholly separate provision that does not appear to confer a new right or remedy[15] but may risk creating a conflict of law in some cases. Under current District case law and practice, a trial court has broad discretion in fashioning appropriate jury instructions, and its refusal to grant a request for a particular instruction is not a ground for reversal if the court's charge, considered as a whole, fairly and accurately states the applicable law.[16] The presentation of evidence and the jury instructions must protect the due process rights of the accused in each individual case.[17] The present bills propose to codify instruction language which may comport with due process in some cases but present a conflict between constitutional law and statutory law in others.[18]

Second, if the bills' specific jury instruction is not intended as a general, stand-alone instruction that is not necessarily related to the exception to defense(s) articulated earlier in the bills, then there remains an important procedural question of how the exception is to be implemented. Under current District case law and practice, where it is appropriately requested by either party,[19] a trial court should carefully amend each affirmative defense instruction to clarify the limitations of its reach in that particular case.[20] However, each affirmative defense raising a question of fact should then be presented to the factfinder—in contrast, defenses that raise matters of law are decided by the judge only.[21] The current bills' exceptions to defenses appear to raise mixed questions of fact and law (e.g., causation), requiring submission to the factfinder. However, the bills' specification of an anti-bias jury instruction without any instruction as to the bills' exceptions to defenses makes the expected operation of any such instruction on exceptions to defenses unclear.

Two possible solutions to these ambiguities are to: 1) eliminate the bills' references to a jury instruction, referring the matter to the drafters of the Redbook; or 2) make the codified jury instruction permissive, subject to judicial approval, by replacing "the court shall" with "the court may."

Fourth, the rationale for limiting application of the defense exception to any "crime of violence" is unclear. D.C. Code § 23-1331(4) defines the term "crime of violence" to

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[15] The proposed instruction is notably similar, though perhaps not "substantially" similar to current Redbook instruction 2.102, which is routinely given in criminal jury trials: "You should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone's race, ethnic origin, or gender. Decide the case solely from a fair consideration of the evidence."

[16] *George Wash. Univ. v. Waas*, 648 A.2d 178, 183 (D.C. 1994) (citing *Psychiatric Institute of Washington v. Allen*, 509 A.2d 619, 625 (D.C. 1986); *Mark Keshishian & Sons, Inc. v. Washington Square Inc.*, 414 A.2d 834, 841 (D.C. 1980).

[17] *See, e.g., Russell v. United States*, 698 A.2d 1007, 1016 (D.C. 1997) (reversing a conviction because the jury instructions created a risk of confusing the jury about the affirmative defense presented).

[18] For example, the evidence in a particular case may require an anti-bias instruction that is substantially more specific or more robust than the pattern instruction proposed in the present bills.

[19] A party is entitled to a jury instruction upon the theory of the case if there is sufficient evidence to support it. *George Wash. Univ. v. Waas*, 648 A.2d 178, 183 (D.C. 1994) (citing *Wingfield v. Peoples Drug Store Inc.*, 379 A.2d 685, 688 (D.C. 1978); *Weil v. Seltzer*, 873 F.2d 1453, 1457 (1989); *Montgomery v. Virginia Stage Lines, Inc.*, 191 F.2d 770, 772 (1951)).

[20] *See Pannu v. Jacobson*, 909 A.2d 178, 198 (D.C. 2006) (explaining the court bears the burden of tailoring a requested instruction and the opposition thereto to meet the demands of an accurate and fair statement of the law).

[21] *See Cal. Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 617 (1885); *Sparf v. United States*, 156 U.S. 51, 80 (1895) (citing *Commonwealth v. Anthes*, 5 Gray, 185, 208, 218).

encompass a list of relatively serious District offenses.[22] The list does not coincide with the availability of the relevant defenses such as self-defense or adequate provocation. For example, self-defense and adequate provocation are not available to a defendant in a child sexual abuse case,[23] but are available to a defendant charged with simple assault,[24] possession of a prohibited weapon,[25] or malicious destruction of property.[26] While distinguishing crimes of violence from other crimes may be particularly salient for purposes of determining punishment, it is not clear that determinations of criminal liability should follow such a distinction. Notably, the District's bias-related crime penalty enhancement[27] applies to a range of crimes (not all) that includes property crimes such as unlawful entry and low-level assaults that are not included in the definition of "crime of violence."

Two possible solutions to these ambiguities are to: 1) eliminate the limitation on the heat of passion exception so that it would apply to any offense to which a heat of passion defense could be raised; or 2) limit the exception for a heat of passion defense to murder.

Fifth, the meaning of "force" and "non-forcible romantic or sexual advance" is unclear, affecting whether and how the bills may limit self-defense. While some types of assaultive conduct would presumably be included in any definition of force,[28] it is unclear whether the definition of force would include non-painful or sexual contact or whether such behavior would constitute a non-forcible romantic or sexual advance. Such non-painful or sexual contact currently is an element of various crimes of violence.[29] While there is a definition of "force" codified in the D.C. Code, that definition is applicable only to sex offenses[30] and appears to

[22] The list does not include any cross-references to District statutes, nor does it consistently refer to the offenses by their provision titles in the D.C. Code. These offenses are: aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

[23] *See* D.C. Code § 22-3002 et seq.

[24] D.C. Code § 22-404; *see also Parker v. United States*, 155 A.3d 835, 839 (D.C. 2017) ("whether the government has disproved a claim of self-defense turns on two questions: (1) whether a defendant reasonably believed that she was in imminent danger of bodily harm (an inquiry that may be informed, among other things, by motive evidence presented by the government); and (2) if so, whether the force used was excessive.")

[25] D.C. Code § 22-4514(b); *Potter v. United States*, 534 A.2d 943 (D.C. 1987).

[26] D.C. Code § 22-303; *Brown v. United States*, 584 A.2d 537 (D.C. 1990).

[27] D.C. Code § 22-3701(2) ("'Designated act' means a criminal act, including arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry, and attempting, aiding, abetting, advising, inciting, conniving, or conspiring to commit arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry.").

[28] For example, significant bodily injury or serious bodily injury.

[29] For example: assault with intent to commit second degree sexual abuse or commit child sexual abuse; assault with intent to commit any other offense; sexual abuse in the first, second, or third degrees.

[30] D.C. Code § 22-3001 (5) ("'Force' means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

differ from the requirements of physical contact sufficient for assault liability.[31] Clear definition of "force" and "non-forcible romantic or sexual advance," however, is critical to any analysis of whether and how the bills constrain self-defense. Current District case law recognizes self-defense only where there is a reasonable belief that one is in imminent danger of suffering "bodily harm" and the use of "force" is not excessive.[32] Whether an unwanted non-painful or sexual touch constitutes "bodily harm" or "force" under existing District case law on self-defense has not been resolved by District courts, so it is unclear what effect the bills' terminology may have.

Two possible solutions to these ambiguities are to: 1) eliminate the bills' references to an exception to a use of force defense; or 2) define the terms force and "force" and "non-forcible romantic or sexual advance," including whether the terms do or do not include: coercive threats, the display of weapons (alone), and non-painful physical contact.

IV. Closing

The CCRC takes no position at present on the substantive merits of whether to codify one or more categorical exceptions to defenses based on the defendant's knowledge or discovery of the victim's actual or purported gender identity, sexual orientation, or other specified attribute. Instead, the CCRC has raised for Council consideration a variety of potential ambiguities and questions related to the bills' current proposed language, as well as some possible solutions that would resolve these issues.

However, these ambiguities and questions arise, in chief, because the bills seek to codify exceptions to defenses that themselves are not codified. The District is one of a minority of jurisdictions nationally that relies solely on judicial "common law" rulings to establish general defenses such as justifiable use of force. Insofar as the scope or meaning of the underlying defenses is unclear, it also is unclear how the bills' proposed exceptions operate. Other ambiguities and questions arise from the lack of definitions of terminology used in the bills, or the specification of other matters such as culpable mental states or procedures for applying the bills' exception.

Assuming the Council wishes to move forward on the substantive merits of the bills, one way to provide greater specificity and avoid possible litigation would be to first define the underlying defenses (to which the bill seeks to provide an exception). Under its statutory mandate, the CCRC is currently developing recommendations for codifying several general defenses that may help resolve questions raised by the bills' text.

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[31] *See Ray v. United States*, 575 A.2d 1196 (D.C. 1990) (assault includes offensive physical contact such as spitting on another person).

[32] *Parker v. United States*, 155 A.3d 835 (D.C. 2017) ("Under the District's long-standing common law test for self-defense, captured in our standard jury instructions, whether the government has disproved a claim of self-defense turns on two questions: (1) whether a defendant reasonably believed that she was in imminent danger of bodily harm (an inquiry that may be informed, among other things, by motive evidence presented by the government); and (2) if so, whether the force used was excessive. Motive is not separately and additionally considered as a basis for disproving a claim of self-defense."); *see also People v. Goetz*, 68 N.Y.2d 96 (1986).

Thank you for your consideration of this testimony. For questions about the testimony or the CCRC's work more generally, please do not hesitate to contact our office or visit the agency website at www.ccrc.dc.gov.

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D.C. Criminal Code Reform Commission